March 10, 2021

Via First-Class Mail and Email (**kmartinek@town.northborough.ma.us**)
Ms. Kerri A. Martinek, Chair
Town of Northborough Planning Board
Town Hall
63 Main Street
Northborough, MA 01532

Re: Definitive Subdivision Plan - 0 Bartlett Street, Northborough, MA

Dear Chairperson Martinek and Members of the Board:

As you know, this office represents The Gutierrez Company ("Company") with respect to its application for approval of its Definitive Subdivision Plan ("Application") for 0 Bartlett Street, Northborough, Massachusetts ("Locus"). We are in receipt of correspondence dated February 25, 2021 from counsel for Mr. and Mrs. Wixted ("February 25th Letter" or "Abutters' Letter"), abutters who reside at 2 Stirrup Brook Lane ("Abutters").

The February 25th Letter cites to three cases in support of the Abutters' erroneous contention that the Board should reject the Application because the Commonwealth of Massachusetts, as the owner of the fee interest in the right-of-way owned by the Company over the aqueduct ("Aqueduct Right of Way"), did not sign the Application. The cases cited, however, are entirely inapplicable to the Company's Application. Additionally, the Abutters' reliance on Conway v. Westford Planning Bd., 2018 WL 4685977 (Mass. Land Ct. Sept. 27, 2018) ("Conway") is particularly misplaced because the subsequent appellate history of that case, in fact, demonstrates the necessity of approval of the Application.

In support of their position, the Abutters cite to Batchelder v. Planning Bd. of Yarmouth, 31 Mass. App. Ct. 104 (1991) and Kuklinska v. Planning Bd. Wakefield, 357 Mass. 123 (1970), copies of which are enclosed herewith. In both cases, the court denied subdivision approval because there existed, between private parties, *disputes as to ownership of the applicable parcels*, and the respective applications did not include all signatures of parties asserting title. In Batchelder, the applicant sought subdivision approval during the pendency of its separate complaint to register title to the locus based on adverse possession. The Court denied approval because there was no basis upon which the applicant could establish that it was the record owner of the locus at the time it submitted its application. Similarly, in Kuklinska, the locus incorporated a portion of land the ownership of which was in dispute. The court's decision

denying subdivision approval was, again, based the lack of an owner signature *where ownership was contested*.

In the Application, however, it is entirely undisputed that the Company owns the Locus, the MWRA owns the fee interest in the Aqueduct Right of Way, and the Company holds an express easement to traverse over and otherwise use the same for access to the Locus ("Easement"). Indeed, Easement has been in existence since approximately 1856. Moreover, the Section 8(m) permit granted by the MWRA, relative to the preceding site plan rejected by the Planning Board, further grants the Company the express authority to take all necessary action to implement a driveway which is in every reasonable manner exactly the same as the subdivision plan. Thus, the holdings in Batchelder and Kuklinska are entirely irrelevant to our Application.

The Abutters' reliance on Conway is similarly flawed as evidenced by its subsequent appellate history. The facts in Conway, and ultimately the holding on appeal, are directly on point with our situation. In Conway, the applicable regulations required all owners of the locus to sign the application. A portion of the locus was owned by the plaintiff-abutters, over which the applicant held an easement for access and passage. The abutters opposed the application because they refused to sign the application and thus the "all-owner signature" requirement could not be met. There was no dispute in Conway as to the chain of title of ownership. The Court remanded the case to the planning board to determine whether it would waive the foregoing requirement. On remand, the planning board waived the requirement which the abutters appealed in Conway v. Westford Planning Bd., 2019 WL 3059765 (Mass. Land Ct. July 11, 2019) ("Conway II").

Citing Batchelder, the Court in Conway II reiterated that the primary concern underlying the Subdivision Control Law is to ensure the provision of "adequate drainage, sewerage, and water facilities, without harmful effect to adjoining land and to the lots in the subdivision." Conway II at *4-7. One of the means for achieving that objective would be to obtain a covenant from the record owner that the foregoing provisions will be met. If, however, the record-owners are not fully identified, the Batchelder provisions will not be adequately protected because the covenant would, essentially, be unenforceable. Id. Stated another way, the purpose of the all-owners' signature requirement is to ensure that those seeking definitive subdivision approval "have the authority to undertake the improvements shown" on the plan. Conway II at *6-7.

Ultimately, the Court in Conway II held that requiring the abutters' signatures on the application was **not** required to satisfy the Batchelder provisions; it was undisputed that the abutters owned the right of way, that the applicant held an easement over the right of way for access and the provision of utilities at the locus, and that, as a result, the applicant had the full authority to make any improvements required by the planning board as a condition for approving the subdivision. The Conway II decision was upheld in Conway v. Westford Planning Bd., 2019 WL 3070415 (Mass. Land Ct. July 19, 2019 at*4-6 ("Conway III") and Conway v. Westford Planning Bd., 98

Mass.App.Ct. 1110 (Sept. 2, 2020) ("Conway IV"). Enclosed herewith for the Board's reference are copies of Conway, Conway I, Conway II and Conway III.

As in Conway II and its progeny, there are no ownership or title disputes applicable to the Locus in our Application. To the contrary, the Applicant is the undisputed record owner of the Locus, the Commonwealth of Massachusetts is the owner of the fee interest to the Aqueduct Right of Way, the Company holds easement rights over the Aqueduct Right of Way and the MWRA pursuant to the authority granted to the MWRA over certain land of the Commonwealth as set forth in the enabling statute of the MWRA (Chapter 372 of the Acts of 1984) has consented to the Company's use of the same to carry out the objectives of the subdivision plan. Consequently, the Company will have the full authority to make any and all improvements to the Locus which may be imposed as a condition of subdivision approval by the Board. See Conway II at *7. Accordingly, there is absolutely no basis to deny or reject the Application because the MWRA has not co-signed the same.

Furthermore, requiring the Company to obtain the signature of the Commonwealth would thwart the statutory framework which creates as a basic tenet that a property owner has the right to subdivide its property into separate legal parcels if in compliance with the Rules and Regulations of the applicable community. The unique circumstances here mandate that the Board not require the ministerial act of obtaining a signature from the Commonwealth. Pursuant to Section 4(C) of Chapter 372 of the Acts of 1984, ownership of the real property utilized by the Commonwealth in either transmission of water or collection of sewage was not transferred to the MWRA; rather, the MWRA was put in the care, custody and control at such property. It is patently unreasonable to require the Company to obtain the signature of an entirely different state agency (the Division of Capital Asset and Management and Maintenance which administers all lands owned or controlled by the Commonwealth) for an Application so as to permit a minor crossing of the aqueduct in a location of a long established right of way, established particularly for the purposes of access to other land of the owner. An interpretation of the law which would require the Commonwealth's administrative signature authorizing the filing of the Application is simply unjustified under the circumstances.

I look forward to the opportunity to discuss this in more detail at the next meeting.

Very truly yours,

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Enclosures

2018 WL 4685977
Only the Westlaw citation is currently available.
Massachusetts Land Court,
DEPARTMENT OF THE TRIAL COURT.
MIDDLESEX COUNTY.

John CONWAY and Regina Conway, Plaintiffs,
v.
TOWN OF WESTFORD PLANNING BOARD; Dennis J. Galvin, Matthew Lewin, Michael Green, Kate Hollister and Darrin Wiszt, in their capacities as members of the Town of Westford Planning Board; David A. Guthrie; and Christopher Finneral, Defendants.

16 MISC 000570 (MDV)
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Dated: September 27, 2018

ORDER ON MOTIONS FOR SUMMARY JUDGMENT AND REMANDING CASE TO WESTFORD PLANNING BOARD

By the Court (Vhay, J.)

*1 Plaintiffs Regina and John Conway reside on a roughly rectangular 1.79-acre parcel at 66 Main Street in Westford, Massachusetts. Defendants David Guthrie and Christopher Finneral own an abutting 6.8-acre property at 64 Main Street. 64 and 66 Main were once in a single tract. The Westford Planning Board approved a division of that tract in 1969, leaving 66 Main abutting the northwest side of Main Street and placing the 64 Main property behind 66 Main (if one were standing on Main Street).

Since 1969, in order to reach 64 Main from Main Street, one must travel a 30-foot right of way that runs over the southwest edge of 66 Main. This decision will call that right-of-way the "Conway Right of Way." The parties to this dispute agree that by deed, the owners of 64 Main enjoy an easement over the Conway Right of Way. They're allowed to use it "for all purposes for which streets and ways are commonly used in the Town of Westford...."

Sometime after 1969, a single-family residence was built on 64 Main. The owners of that home (later demolished, relocated and rebuilt) used the Conway Right of Way for access to Main Street. Messrs. Guthrie and Finneral bought 64 Main in 2015. In 2016, they applied to the Westford Planning Board for approval of a definitive two-lot, two-residence subdivision of 64 Main. They contemplate dubbing the Conway Right of Way "Kinloch Drive." They plan on extending Kinloch Drive within a new 50-foot right of way that will be entirely within 64 Main's boundaries. That extension will proceed northwest from the end of the Conway Right of Way, jag to the north and northwest, and end in what's laid out as a cul-de-sac (although as will be seen later, Guthrie and Finneral have no duty as of yet to build a cul-de-sac). The two building sites will be north of where Kinloch Drive first jags to the north.

The Conways did not join in or otherwise consent to Guthrie and Finneral's subdivision application. The Planning Board nevertheless approved it, and the Conways timely appealed the Board's decision to this Court under G.L. c. 41, § 81BB.

The Conways have moved for summary judgment. They attack the Board's decision on four grounds. They first argue that the Board shouldn't have acted on Guthrie and Finneral's subdivision application because (a) the Board's subdivision regulations

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(the "Regulations," found in Chapter 218 of the Code of the Town of Westford) require all "owners ... of all land" included in a request for approval of a subdivision to join in the subdivision application; (b) Guthrie and Finneral's subdivision includes the Conway Right of Way; (c) the Conways didn't sign Guthrie and Finneral's subdivision application; and thus (d) the application is incomplete. (This decision calls that argument the "Application Claim.") Second, the Conways contend that the two approved subdivision lots lack adequate frontage on a road or way. Third, the Conways submit that the Board improperly waived its requirement (with respect to the Conway Right of Way only) that all subdivision access ways be at least 50 feet wide. (This decision calls that waiver the "Width Waiver.") Last, the Conways assert that the Board improperly waived a requirement that a dead-end street like proposed Kinloch Drive terminate with a built cul-de-sac having a 70-foot outside curb radius. (This decision calls that waiver the "Cud-de-sac Waiver.")

***2** Guthrie and Finneral have cross-moved for summary judgment on all four issues that the Conways raise. Guthrie and Finneral also dispute the Conways' standing under § 81BB to challenge the Board's approval. As this Court's jurisdiction to entertain the Conways' appeal depends on their standing, the Court addresses that issue first.

> Pursuant to G.L. c. 41, § 81BB, only persons who are aggrieved by a planning board's decision concerning a definitive subdivision plan may appeal to the ... Land Court. A person aggrieved within the meaning of G.L. c. 41, § 81BB, must assert 'a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest.' The asserted basis for the claim also must be one that the statute intends to protect.

Krafchuk v. Planning Board of Ipswich, 453 Mass. 517, 522 (2009), quoting *Standerwick v. Zoning Bd. of Appeals of Andover*, 445 Mass. 20, 27 (2006). As abutters to 64 Main, the Conways enjoy a rebuttal presumption that they are "persons aggrieved." *See Krafchuk*, 453 Mass. at 522. But as *Krafchuk* notes, there are two ways that an abutter's opponent may overcome that presumption. One is to show that the abutter's interests are not among those that the Subdivision Control Law, G.L. c. 41, §§ 81K et seq., or the municipality's subdivision rules and regulations protect. The second way to overcome an abutter's presumed standing is to challenge, with evidence, the abutter's claims of injury. *See Krafchuk*, 453 Mass. at 522-523.

Guthrie and Finneral attack the Conways' standing using both methods. Guthrie and Finneral first claim that the Conways' interest in remedying Guthrie and Finneral's "defective application" isn't one that the Subdivision Control Law or Westford's Regulations protect. But it's undisputed that §§ 218-3 and 218-11(A)(1)(b) of the Regulations require the "applicant" for approval of a definitive subdivision to be the "owner (or owners) ... of all land included in the subject request for action before the Planning Board," and the "original signatures of the owner(s)" must be on the applicant's definitive-subdivision application. *Kuklinska v. Planning Bd. of Wakefield*, 357 Mass. 123, 129 (1970), and *Batchelder v. Planning Bd. of Yarmouth*, 31 Mass. App. Ct. 104, 106-107 (1991), hold that the Subdivision Control Law allows municipalities to adopt such regulations, and *Batchelder* lists (at pages 108-109 of the decision) several statutory interests that such "owner" application requirements advance. The Conways' Application Claim thus is within the ambit of the interests protected by the Subdivision Control Law and the Regulations. (Even if it weren't, the Conways point to another interest – that in having traffic cross their property safely – that the Law explicitly defends. *See* c. 41, § 81M (requiring local boards exercising authority under the Law to do so "with due regard ... for reducing danger to life and limb in the operation of motor vehicles"). Guthrie and Finneral's "beyond the scope" attack on the Conways' standing thus fails either way.)

"Beyond the scope" arguments lend themselves to decisions on summary judgment, as they usually don't involve evidentiary issues. *See Swartz v. Lipkind*, 26 LCR 235, 238 (2018) (addressing similar standing issues under G.L. c. 40A, § 17). The second method of disputing an abutter's standing – challenging his or her claims of injury – is an uphill battle on summary judgment, owing both to the abutter's statutory presumption of standing and rules that require a court to draw against any party who moves for summary judgment all reasonable inferences from the moving party's evidence. *See Parent v. Stone & Webster Engineering Corp.*, 408 Mass. 108, 111 (1990).

***3** Guthrie and Finneral succumb to that uphill battle here. The Conways contend that the proposed subdivision will result in (1) construction noise; (2) construction-related dust; (3) speeding construction traffic; (4) increased risks associated with the added traffic on the Conway Right of Way, once a second residence is built; (5) loss of privacy; and (6) loss of peace and quiet. An analysis of the first three harms (all related to construction) shows that there's enough evidence for the Conways to survive

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Guthrie and Finneral's motion for summary judgment on the issue of standing. *See 81 Spooner Road, LLC v. Zoning Board of Appeals of Brookline*, 461 Mass. 692, 704 n. 16 (2012) (plaintiff may maintain zoning appeal with only one valid standing claim). Since the Conways are presumed to have standing, it's incumbent on Guthrie and Finneral to offer admissible evidence that disputes the Conways' specific claims of harm. *See Krafchuk*, 453 Mass. at 522-523; *Swartz*, 26 LCR at 238. Guthrie and Finneral did that, submitting evidence that any construction-related harms will be short-lived. The Conways provided competing testimony, however, that construction still will affect them substantially, owing in large part to use of the Conway Right of Way.

The state of the evidence is such that the Conways survive Guthrie and Finneral's standing challenge, at this stage of this case. *See 81 Spooner Road*, 461 Mass. at 704-705 (appeal of summary-judgment ruling in a c. 40A, § 17 appeal of zoning board decision); *Gale v. Zoning Board of Appeals of Gloucester*, 80 Mass. App. Ct. 331, 335 (2011) (appeal under c. 40A, § 17 of a special permit and zoning variance; owner of servient estate that is subject to an access easement, who fears impacts of construction on the dominant estate, has standing to challenge dominant estate's construction permits). The Court thus DENIES Guthrie and Finneral's motion for summary judgment on the issue of standing. But Guthrie and Finneral's triable challenge to the Conways' standing has an immediate effect upon the Conways' motion for summary judgment: the Court must deny it, as the Court can't enter judgment in their favor on any of their claims until they have established standing at trial. The most that the Court can do with respect to the Conways' substantive claims is rule against them, if the summary-judgment record warrants that. *See Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991) (court may enter summary judgment against a party that bears the burden of proof at trial, if that party has no reasonable expectation of proving their claim at trial).

Guthrie and Finneral argue that the Conways won't be able to prove any of their claims at trial. The Court starts with the Conways' challenge to the frontage of the proposed subdivision's lots. It's undisputed that § 218-4.2 of the Regulations requires lots within a proposed subdivision to have frontage that complies with Westford's Zoning Bylaw. 64 Main is in a Residence A district under the Bylaw. Lots in that district must have a minimum "lot frontage" of 200 feet. The Bylaw defines "lot frontage" as "[t]he horizontal distance measured along the front lot line between the points of intersection of the side lot lines with the front lot line and to a minimum depth of the minimum front setback for the building in that zoning district." The Bylaw defines "Lot Line, Front" as "[t]he property line dividing a lot from a street or right-of-way over which line there is vehicular access to the building(s) on the lot...." The Bylaw defines "Lot Line, Side" as "[a]ny lot line not a front or rear lot line." ("Lot Line, Rear" means "[t]he lot line ... opposite the front lot line.") The minimum front-yard setback in the Residence A district is 50 feet.

The Conways claim generally that the subdivided lots won't have more than 200 feet of "lot frontage." The only evidence they cite for that contention is the approved subdivision plan and the Bylaws. The former shows, however, that both approved lots will have at least 200 feet of "lot frontage," all of it along Guthrie and Finneral's newly laid-out right of way, Kinloch Drive, and the Conways dispute that fact. Instead, the Conways spend considerable effort arguing that 64 Main lacked adequate frontage when the Board approved the creation of 64 Main in 1969. They contend that Guthrie and Finneral need to correct that earlier mistake (if there was one) before they're entitled to subdivide 64 Main.

*4 The Conways point to nothing in the Subdivision Control Law or the Regulations that obligates Guthrie and Finneral to correct what the Conways perceive as flaws in the 1969 subdivision approval. The lack of a written "correction" requirement is fatal to the Conways' "mistaken 1969 approval" argument. In approving definitive-subdivision applications, municipal boards may apply only their written rules. They don't enjoy wide-ranging discretion to impose conditions. *See Beale v. Planning Bd. of Rockland*, 423 Mass. 690, 695-697 (1996); *Wall Street Development Corporation v. Planning Board of Westwood*, 72 Mass. App. Ct. 844, 854 (2008). Since the Conways haven't identified a Regulation that requires Guthrie and Finneral to correct the alleged 1969 error, and as the Conways don't dispute the facts that show that the approved lots have at least 200 feet of frontage on Kinloch Drive, the Court GRANTS Guthrie and Finneral's cross-motion for summary judgment on the issue of the adequacy of the proposed lots' frontage.

The Court next turns to the Board's waivers. The parties agree that planning boards may waive strict compliance with their own subdivision rules and regulations "where such action is in the public interest and not inconsistent with the intent and purpose of the subdivision control law." G.L. c. 41, § 81R. *Krafchuk* holds that a board's decision to grant or deny a waiver "will be

upheld unless premised upon 'a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary,' " *Krafchuk*, 453 Mass. at 529, quoting *Musto v. Planning Bd. of Medfield*, 54 Mass. App. Ct. 831, 837 (2002). *Krafchuk* goes on to hold that proving that a board has committed reversible error is a considerable task:

> The board's determination whether a particular waiver is in "the public interest" involves a large measure of discretion, and if "reasonable minds might in good faith differ, without doubting the reasonableness of the opposing view, the conclusion reached by the planning board should be sustained on judicial review. For it is the board, not the court, to whom the statute delegates the discretion, and the role of the court is merely to ascertain whether the board exceeded its authority."

Krafchuk, 453 Mass. at 429 (citations omitted), quoting *Arrigo v. Planning Bd. of Franklin*, 12 Mass. App. Ct. 802, 809 (1981). *Krafchuk* suggests that in considering the other requirement for a valid waiver, that the waiver is "not inconsistent" with the intent and purpose of the Subdivision Control Law, a reviewing court needn't show any deference to the board. *See Krafchuk*, 453 Mass. at 429 (emphasis added; "*the court* determines whether there is a substantial derogation from the intent and purpose of the subdivision control law").

With *Krafchuk* in mind, the Court examines the Board's two waivers.

The Width Waiver. Guthrie and Finneral argue that the undisputed facts show that the Board properly concluded that the Width Waiver is in the public interest. The pertinent undisputed facts are these:

- Guthrie and Finneral asked for the Width Waiver, as well as waivers of requirements that they build sidewalks on both sides of the Conway Right of Way and Kinloch Drive.

- In exchange for both waivers, Guthrie and Finneral volunteered to either (a) pay $12,838.50 to a Town "Sidewalk Gift Account" or (b) construct or reconstruct 1,131 linear feet of sidewalk at a location to be determined by the Town.

- Section 218-19(C) of the Regulations provides:

  > For subdivisions in which a requirement to construct sidewalks is waived, the Board may, as a condition of approval[,] (1) require the applicant to construct an off-site sidewalk of at least equal value to the sidewalk that was waived in a location within proximity to the subject project; or (2) require the applicant to contribute funds for the purposes of studying, designing, acquiring easement(s) and/or constructing sidewalks, pathways, walkways, bicycle paths, and/or other pedestrian access and safety measures.

*5 • Section 218-19(D) of the Regulations provides: "Where the Town accepts contribution of funds in lieu of sidewalk construction, the amount of such funds shall be at least equal to the costs of the sidewalk(s) that would have been required in the absence of a waiver...."

- The Board accepted Guthrie and Finneral's proposal and required, as a condition of the Board's approval of their subdivision, to do what they promised prior to the issuance of a certificate of occupancy for the second (unbuilt) lot in the subdivision.

- In granting a waiver of the "sidewalk" Regulations, the Board stated:

  > In exercising their discretion to grant the waiver, the Board found that by granting the waiver (and other related waivers), the public interest would be served by either providing or planning for pedestrian access and safety measures that would benefit the public, as opposed to non-public improvements for the benefit [of] a single additional residential lot."

- In granting the Width Waiver, the Board stated:

  > The Board found that by granting this waiver (and related waivers), that the public interest criterion would be satisfied by either providing or planning for offsite pedestrian access and safety measures that would benefit the public, as opposed to non-public improvements for the benefit [of] a single additional residential lot, and that without said waivers, no such public benefit would be realized."

The Conways ask the Court to overlook the Board's stated reasons for finding that the Width Waiver is in the public interest, and instead embrace (or at least allow the Conways to proceed to trial on) alternative, not-so-publicly-beneficial grounds for the Waiver. The Conways assert, for example, that "the only reason for waiving the width requirement was to allow the Applicants to realize a significant economic benefit." They also contend that the Board granted the Waiver because Guthrie and Finneral had agreed to donate part of the 64 Main property to the Town of Westford. The Conways' Statement of Material Facts provides no support for these assertions. The Statement doesn't identify anything that describes anyone's reasons for seeking or granting the Waiver. The Statement points to no evidence of Guthrie and Finneral's "economic benefit" from the waiver. The Statement also provides no evidence of a land-for-Waiver exchange. Since the Conways offer no facts that put the reasonableness of the Board's public-interest conclusion in dispute, the Court GRANTS Guthrie and Finneral's motion for summary judgment on the issue of whether the Board acted within its discretion in concluding that the Width Waiver is in the public interest.

Guthrie and Finneral say they're also entitled to summary judgment on the question of whether the Board properly held that the Width Waiver is "not inconsistent" with the intent and purpose of the Subdivision Control Law. A dispute of fact prevents the Court from siding with Guthrie and Finneral on that issue. Section 218-13 of the Regulations states that design standards such as the 50-foot width requirement "may be waived or modified by the Board if a *determination* is made that the general guidelines enumerated in the previous section [that is, § 218-12, "General guidelines"] can be *better implemented* by a waiver or modification of a specific design requirement." (Emphases added.)

***6** The Board's decision contains no express determination that granting the Width Waiver "better implements" any of § 218-12's general guidelines. The decision contains twelve general "findings," plus five "notes" that are specific to the Width Waiver. None of the findings or notes mentions § 218-12's general guidelines expressly. Moreover, none of the findings or notes states, in so many words, that the Width Waiver "better implements" anything.

For purposes of summary judgment, the Court must construe the decision's lack of an express finding under § 218-13 as evidence that the Board failed to make a § 218-13 determination. While it's true that the law doesn't require a planning board to make written determinations supporting the grant of a waiver, *see Krafchuk*, 453 Mass. at 529, the *absence* of a written finding nevertheless is admissible evidence that the board neglected the issue. The Court thus DENIES Guthrie and Finneral's motion for summary judgment on the issue of whether the Board properly held that the Width Waiver is "not inconsistent" with the Subdivision Control Law.

The Cul-de-sac Waiver. The Court's discussion of the Width Waiver makes it easier to dispose of Guthrie and Finneral's motion for summary judgment concerning the Cul-de-sac Waiver. The Conways correctly point out that the Board's decision contains no discussion of how the Waiver is in the public interest, and no indication that the Board made the required determination under § 218-13 of the Regulations that the Waiver "better implements" § 218-12's general guidelines. Guthrie and Finneral counter that the Cul-de-sac Waiver isn't "substantial" enough of a derogation from the Subdivision Control Law to warrant overturning the Board's decision. *See Krafchuk*, 453 Mass. at 529; *Arrigo*, 12 Mass. App. Ct. at 809.

Guthrie and Finneral's argument founders, on summary judgment, because of disputes of fact. Their evidence that the Cul-de-sac Waiver "insubstantially" derogates from the Subdivision Control Law is found in (a) the Engineering and Fire Department's alleged approvals of the Waiver, (b) the Board's explanation that the cul-de-sac requirement was intended for roads likely to be accepted as public ways, and (c) Condition 2 of the Board's approval, which declares that the subdivision's "roadway" is to be a "private way" and, in the event it is ever accepted as a public street, that the owners of the subdivision's lots must bring the roadway up to the Board's then-applicable standards. But the Conways have offered evidence that the Engineering Department merely deferred to the Fire Department's analysis of Kinloch Drive, and that the Fire Department's conclusions don't jive with the Drive shown on the plan that the Board approved. That creates enough of a dispute of fact for the Court to DENY Guthrie and Finneral's motion for summary judgment as to the Cul-de-sac Waiver. A trial is needed on whether (a) the Board determined that the Waiver is in the public interest; and (b) the Board's approval of the Waiver "substantially derogates" from the purposes of the cul-de-sac requirement or the Subdivision Control Law more generally.

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Guthrie and Finneral also cross-moved for summary judgment on the Conways' Application Claim. As noted earlier, the Regulations require the "owners" of "all land" included in a request for subdivision approval to sign the approval application, and the Conways didn't do that. The Board nevertheless accepted Guthrie and Finneral's application as complete, reasoning:

> *7 In exercising their discretion to interpret their own Regulations, and with benefit of advice from Town Counsel, the Board found that a waiver from Section 218-3 of the Regulations from the definition of the term "Applicant" was not required for [Guthrie and Finneral's subdivision] proposal. The Board found that while [Guthrie and Finneral do] not possess fee simple ownership of the [Conway Right of Way, Guthrie and Finneral do] possess a 30-foot easement, reserved by the original grantor, for all purposes for which streets and ways are commonly used in the Town of Westford. The Board found that while the definition of "frontage" [in § 218-3 of the Regulations] makes reference to fee simple ownership, the definition of "Applicant" does not....

The trouble with the Board's conclusion is that it runs contrary to the holdings of *Kuklinska*, *Batchelder*, and *Silva v. Planning Bd. of Somerset*, 34 Mass. App. Ct. 339 (1993), all of which sustained challenges from persons similarly situated to the Conways, persons who live in municipalities that require the "owners" of land leading to or part of a proposed definitive subdivision to sign on to or otherwise consent to the subdivision application. While it's true that § 218-3's definition of "frontage" refers to "fee-simple ownership" of property, and its definition of "applicant" uses the unmodified word "owner," it doesn't stand to reason that one can therefore interpret "owner" as including someone who holds only an easement in affected land. If that were the case, the subdivision applicants in *Silva* – who owned the fee to the centerline of a proposed subdivision's access way, but only an easement over the other half of the way – would have won and not lost their case. The plain meaning of "owner" also doesn't support the Board's conclusion. *See* Black's Law Dictionary (7th ed. 1999) (defining "owner" as "One who has the right to possess, use and convey something; a proprietor.").

Citing *Pelullo v. Croft*, 86 Mass. App. Ct. 908 (2014), Guthrie and Finneral contend that where the interpretation of the local board's regulation is at issue, a court owes the board's interpretation deference. *Pelullo* holds, and this Court doesn't dispute, that a court must defer to a municipal board's reasonable interpretation of a *zoning bylaw* that the same board is charged with administering. One justification for that deference is the view that a local board is more familiar than a reviewing court with local conditions and the " 'history and purpose of [the] town's zoning by-law.' " *Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 381 (2009), quoting *Duteau v. Zoning Bd. Of Appeals of Webster*, 47 Mass. App. Ct. 664, 669 (1999). Another justification stems from one of the purposes of the Zoning Act – "to achieve 'greater implementation of the powers granted to municipalities,' including 'restricting, prohibiting, permitting or regulating' the uses of land." *Wendy's*, 454 Mass. at 381, quoting St.1975, c. 808, § 2A. Deferring to a local board's reasonable interpretation of its local laws fosters the Zoning Act's interest in furthering local autonomy. *See North Landers Corp. v. Planning Bd. of Falmouth*, 382 Mass. 432, 443 (1981).

The reasons developed under the Zoning Act for deferring to the reasonable interpretations of local zoning bylaws by local zoning boards don't carry over to the subdivision context. While the Legislature enacted the Subdivision Control Law "for the purpose of protecting the safety, convenience and welfare of the inhabitants of the cities and towns in which it is, or may hereafter be, put in effect," the Law achieves those purposes through a discrete set of tools: "by regulating the laying out and construction of ways in subdivisions providing access to the several lots therein, but which have not become public ways, and ensuring sanitary conditions in subdivisions and in proper cases parks and open areas." G.L. c. 41, § 81M. The Law constrains the process of "regulating the laying out and construction of ways" by requiring municipalities that adopt the Law to enact subdivision regulations that are "comprehensive, reasonably definite, and carefully drafted, so that owners may know in advance what is or may be required of them and what standards and procedures will be applied to them" – in other words, rules that shouldn't require too much interpretation. *Castle Estates, Inc. v. Park & Planning Bd. of Medfield*, 344 Mass. 329, 334 (1962). And if a definitive subdivision plan complies with those rules (and conforms to the board of health's recommendations), the planning board must approve the subdivision. The board enjoys no discretion to reject the plan. *See* c. 41, § 81M; *Pieper v. Planning Bd. of Southborough*, 340 Mass. 157, 163 (1959) (the Law's legislative history "gives no indication that planning boards were

to have freedom to disapprove plans which comply with applicable standards merely because the board feels general public considerations make such action desirable").

*8 Because the purposes of the Zoning Act differ from those of the Subdivision Control Law, and because zoning bylaws function differently from subdivision regulations, the Court rejects the argument that a court, when reviewing under c. 41, § 81BB of a planning board's decision either to grant or refuse approval of a definitive subdivision plan, must defer to the board's interpretation of its local subdivision regulations.

Does that mean that the Conways will prevail on their Application Claim? Not necessarily. They haven't yet proved standing: no standing means no victory. But there's something else that gives the Court pause. Silva, 34 Mass. App. Ct. at 342, muses that where the owner of a servient estate that's subject to an access easement can't legally block efforts by the owner of the dominant estate to improve the easement for purposes of lawfully subdividing the dominant estate, a planning board might be able to waive a local requirement that "all owners" sign a subdivision application.

Silva declined to decide the application-waiver issue because there was nothing in the *Silva* record that suggested that the planning board entertained a waiver in that case. Not so here: the Board's decision shows that it mulled waiving the "all owners" requirement, but concluded that a waiver wasn't necessary, owing solely to the Board's perceived ability to define the "ownership" issue away. The Board nevertheless identified the very circumstance described in *Silva* that could make a waiver appropriate: the Conways likely can't object, as a matter of private easement law, to reasonable improvements in and increased use of the Conway Right of Way for purposes of Guthrie and Finneral's proposed subdivision. (The Conways conceded at oral argument on the parties' motions for summary judgment that it's unlikely they could claim that the proposed improvements to the Conway Right of Way, or the use of the Way for two residential lots, would overburden the Guthrie and Finneral's easement in the Way.)

In light of the Board's comments on the "applicant" issue, before putting the parties to trial on standing and the other issues left open by this decision, the Court will remand this case to the Board for its prompt consideration of whether it wishes to waive its "applicant" requirement. Should the Board's decision on remand disappoint a party, that party may bring its appeal to this Court, without having to file a new action.

Accordingly, the Court REMANDS this case to the Westford Planning Board to decide whether to waive the requirement under § 218-3 of the Town's Subdivision Regulations concerning the "applicant" for the proposed Guthrie and Finneral Subdivision. The Court further ORDERS:

1. The Planning Board shall commence a duly noticed public hearing on the waiver issue within 45 days of this Order. The Board's hearing shall incorporate all materials previously submitted to the Board during the Board's previous public hearings on Guthrie and Finneral's subdivision application. Guthrie and Finneral shall be obligated to pay any notice and publication costs normally charged by the Board to subdivision applicants.

2. The Board shall close its public hearing within 30 days of opening the hearing, unless Guthrie and Finneral agree in writing to extend the deadline for closing the hearing. Within twenty days of closing the hearing, the Board shall issue a written decision concerning the waiver issue, file a copy of that decision with the Town Clerk, and file a copy of that decision with this Court.

*9 3. This Court retains jurisdiction over this case, including but limited to any appeal that the Conways, Guthrie or Finneral may take from the Board's decision after remand. Any party to this case who is aggrieved by the Board's decision after remand shall, within twenty days of the filing of the decision with the Town Clerk, (a) move in this Court for leave to submit an appropriate pleading for judicial review of the decision, and (b) file with the Town Clerk, with a copy to counsel of record in this proceeding, written notice of having filed the motion for leave, accompanied by a true copy of the motion for leave.

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4. Nothing in this order shall affect the rights of persons other than the parties to this action to appeal the Board's decision after remand.

5. Nothing in this Order shall prevent the parties from meeting to discuss settlement or settling this matter.

The Court otherwise DENIES the Conways' motion for summary judgment. The Court GRANTS Guthrie and Finneral's cross-motion for summary judgment in part and DENIES the motion in part.

SO ORDERED.

All Citations

Not Reported in N.E. Rptr., 2018 WL 4685977

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CONWAY II

2019 WL 3059765
Only the Westlaw citation is currently available.
Massachusetts Land Court,
Department of the Trial Court.
Middlesex County.

John CONWAY and Regina Conway, Plaintiffs,
v.
TOWN OF WESTFORD PLANNING BOARD; Dennis J. Galvin, Matthew Lewin, Michael Green, Kate Hollister, and Darrin Wiszt, in their capacities as members of the Town of Westford Planning Board; David A. Guthrie; and Christopher H. Finneral, Defendants.

16 MISC 000570 (MDV)
|
Dated: July 11, 2019

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Rule 52, Mass. R. Civ. P.)

Michael D. Vhay, Associate Justice

*1 In 2015, defendants David Guthrie and Christopher Finneral purchased a property at 64 Main Street in Westford. In 2016, they applied to the defendant Westford Planning Board for approval of a definitive two-lot, two-residence subdivision of 64 Main Street. Plaintiffs Regina and John Conway, who live at 66 Main Street, appealed the subdivision approval. The Conways own the fee in a 30-foot right of way that runs over the southwest edge of 66 Main Street. That right of way provides access to 64 Main Street. Guthrie and Finneral propose to extend that right of way (which they've dubbed "Kinloch Drive") with a new 50-foot right of way that will be entirely within 64 Main's boundaries. That extension will proceed northwest from the end of the existing right of way, jag to the north and northwest, and end in what's laid out as a cul-de-sac (although as will be seen later, Guthrie and Finneral have no duty as of yet to build a cul-de-sac).

The Court first addressed the issues in this case on summary judgment. *See Conway v. Town of Westford Planning Bd.*, 26 LCR 477 (2018). At that time, the Conways appealed the Board's decision on multiple grounds, two of which are relevant to this decision. First, they disputed the Board's waiver of a requirement in Westford's Subdivision Regulations (the "Regulations") that dead-end streets terminate in a cul-de-sac having a 70-foot outside curb radius (the "Cul-de-Sac Waiver"). The Conways contended that the Board hadn't made the requisite determinations that the Cul-de-Sac Waiver is in the public interest or that the Waiver "better implements" the general guidelines enumerated in § 218-12 of the Regulations. The Conways further argued the Board improperly approved Finneral and Guthrie's subdivision plans without requiring them to obtain the Conways' signature on the subdivision application, contrary to §§ 218-3 and 218-11(A)(1)(b) of the Regulations (requiring all "owners ... of all land" included in a request for approval of a subdivision to join in the subdivision application) and didn't waive that requirement either.

The Court denied summary judgment for the Conways because there were disputed facts concerning the Conways' standing to appeal Guthrie and Finneral's subdivision approval. But the Court also denied summary judgment to Guthrie and Finneral on the Cul-de-Sac Waiver and the "Applicant" issues. In order to save everyone's resources, the Court remanded the matter to the

Board to determine whether it could make the requisite findings supporting the Cul-de-Sac Waiver and to decide whether to waive the "all-owners signature" requirement.

The Board issued its remand decision in December 2018. In that decision, the Board made findings in support of the Cul-de-Sac Waiver and waived the requirement that the Conways sign Guthrie and Finneral's subdivision application (the "Applicant Waiver"). The Conways appealed again to this Court, challenging both Waivers. Finneral and Guthrie resumed their attack on the Conways' standing to challenge the Board's decision.

*2 The parties appeared for trial on April 16, 2019. The Court began the trial with a view of the right of way, the Finneral property (by the time of trial, Guthrie had conveyed his interest in the property), and the Conway property. Based on the testimony and exhibits received at trial, the parties' stipulations of fact, and the arguments of counsel, the Court finds the facts recited above plus these:

1. John and Regina Conway own a single-family residential property at 66 Main Street in Westford, Massachusetts (the "Conway Property"). The Conway Property abuts the north side of Main Street and is roughly rectangular.

2. At the time of the Conways' appeal, David A. Guthrie and Christopher H. Finneral owned the 6.8-acre property at 64 Main Street in Westford (the "Locus"). On January 23, 2019, Guthrie and Finneral conveyed the Locus to Finneral and his wife, Meghan Mahoney. The Locus abuts the north side of the Conway Property.

3. Prior to 1969, the Conway Property and the Locus were part of a single tract of land owned by Mary D. Agnew (the "Agnew Property").

4. In 1969, Ms. Agnew submitted a plan (the "Agnew Plan") to the Westford Planning Board showing a division of the Agnew Property into two parcels, Parcel A (now the Conway Property) and Parcel B (now the Locus).

5. In April 1969, the Planning Board endorsed the Agnew Plan with the words, "Westford Planning Board Approval, Subject to the condition that not more than one dwelling be erected on Parcel 'B' without further approval of the Westford Planning Board."

6. In May 1969, Ms. Agnew conveyed Parcel A on the Agnew Plan to L. Grey and Nancy S. Perry, reserving for herself access rights to Parcel B across Parcel A along a 30-foot right of way (the "ROW") crossing the western edge of Parcel A. Agnew's deed to the Perrys provides in relevant part:

> The grantor hereby reserves for herself, her heirs and assigns, the right to use, in common with the grantees, their heirs and assigns, the thirty (30) foot right of way shown on said plan extending from Main Street northerly to other land of the grantor shown as Parcel B on said plan, for all purposes for which streets and ways are commonly used in the Town of Westford, including the right to pave or otherwise improve and maintain all or any part of said right of way and to install or permit to be installed in, upon or over said right of way water, gas, drainage or sewerage pipes and any and all other utility services.

7. At all times pertinent to this Decision, the only lawful access to the Locus from a public way is over the ROW.

8. Following the Planning Board's endorsement of the Agnew Plan, Ms. Agnew built a single-family residence on the Locus (the "Agnew Residence").

9. The Conways bought the Conway Property in 1994. Ms. Agnew was alive at the time and living in the Agnew Residence. The Conways thought that the Locus was restricted to a single residence, but they started hearing a different view from Ms. Agnew's son Trey shortly after her death in 2001.

10. Ms. Agnew's estate sold the Locus in 2014 to Messrs. Finneral and Guthrie. After they purchased the Locus, Finneral and Guthrie moved in two ways to develop the property.

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11. One aspect of Finneral and Guthrie's vision was to demolish the modest Agnew Residence and replace it with a far-grander, multi-story residence (called the "Finneral Residence" at trial) with large open yards. Demolition of the Agnew Residence and construction of the Finneral Residence started in June 2015 and lasted well into 2016. Every vehicle associated with the Finneral project, every cubic yard of the considerable fill brought to the Finneral site, every piece of equipment and machinery used on the project, and every load of construction materials reached the Finneral site via the ROW. These uses of the ROW were dramatically different from what the Conways had experienced during the Agnew years. Increased traffic and the considerable construction activity on the Finneral site increased noise on the Conway Property while construction was underway. Construction-related noise and traffic ended once the Finneral Residence was built.

*3 12. The other aspect of Finneral and Guthrie's development efforts was to subdivide the Locus. Finneral and Guthrie first applied to the Planning Board in 2015 for approval of a three-lot subdivision on the Locus, comprised of the Finneral Residence and two other building sites. After several hearings about that plan, Finneral and Guthrie withdrew it.

13. In June 2016, Finneral and Guthrie submitted to the Planning Board an application for approval of a two-lot definitive subdivision plan (the "Second Subdivision Plan"). The Second Subdivision Plan proposed access to its two lots (Lots 1 and 2, respectively) from Main Street via the ROW. Lot 1 was proposed to be the location of the completed Finneral Residence; Lot 2 was to be the site of as-yet unbuilt residence.

14. Finneral and Guthrie revised the Second Subdivision Plan via a plan set dated July 27, 2016.

15. During the application and approval process for the Second Subdivision Plan, Finneral and Guthrie asked the Planning Board to waive several provisions of the Regulations.

16. By a decision dated September 6, 2016 (the "Original Decision"), the Planning Board approved, with conditions, the Second Subdivision Plan as revised.

17. The Conways timely appealed the Original Decision to this Court pursuant to G.L. c. 41, § 81BB.

18. In September 2018, after the parties had filed cross-motions for summary judgment, this Court issued an Order on Motions for Summary Judgment and Remanding Case to Westford Planning Board. This Decision will quote from that Order later, but as evident from the Order's title, this Court remanded the case to the Planning Board for further work.

19. On December 17, 2018, the Planning Board issued a Record of Decision Upon Remand from the Massachusetts Land Court (the "Remand Decision"; together with the Original Decision, the "Decisions"). The Remand Decision is notable for two things.

20. First, the Board granted Finneral and Guthrie a waiver from §§ 218-3 and 218-11(A)(1)(b) of the Regulations (the "Applicant Waiver").

21. Section 218-3 of the Regulations defines certain terms used in the Regulations. Among the defined terms is "Applicant." Section 218-3 defines "Applicant" as (emphasis added):

> A person who applies for approval of a plan of a subdivision or who applies for a determination that approval [of a plan under the Subdivision Control Law] is not required. The *"applicant" (or "applicants") shall be the owner (or owners) or the duly authorized agent or representative of the owner(s), or his or their assigns, of all land included in the subject request for action before the Planning Board.* If a plan for a subdivision of land is to be submitted by one representing to be the agent or assign of an owner, a notarized certificate shall be submitted, signed by the owner, authorizing the person filing the plan to act as agent or assign.

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Section 218-11(A)(1)(b) of the Regulations provides (emphasis added): "Any person who submits a definitive plan of a subdivision to the Board for approval shall file ... [a] properly executed application Form C.... The *applicant must be the owner(s) of the land and the Form C shall bear original signatures of the owner(s)....* "

22. The sole purpose of §§ 218-3 and 218-11(A)(1)(b) of the Regulations is to ensure that those applying for definitive subdivision approvals by the Planning Board have the authority to undertake the improvements shown on the applicant's definitive subdivision plan.

*4 23. Neither of Finneral and Guthrie's subdivision applications bore the signatures of the owners of the fee in the ROW, the Conways.

24. As successors in interest to Ms. Agnew in their ownership of the Locus, Finneral and Guthrie (at the time they submitted the Second Subdivision Plan) enjoyed the easement rights set forth in ¶ 6 of this Decision.

25. Between their ownership of the Locus and their easement rights, Finneral and Guthrie had the authority at the time of filing of the Second Subdivision Plan to undertake all of the improvements shown on the revised Second Subdivision Plan. Mr. Finneral still possesses those rights.

26. The second noteworthy aspect of the Remand Decision is that it reaffirmed the Original Decision's waiver of § 218-13(A)(3)(f) of the Regulations (the "Cul-de-sac Waiver").

27. Section 218-13(A)(3)(f) of the Regulations provides in part: "Dead-end streets shall be provided with a circular turnaround at the end having an outside curb radius of not less than seventy (70) feet."

28. The sole purpose of § 218-13(A)(3)(f)'s 70-foot radius requirement is to afford emergency vehicles suitable access to properties within a proposed subdivision.

29. The Decisions show the layout of a right of way serving Lots 1 and 2, "Kinloch Drive," terminating at Lot 2 in a cul-de-sac having a 65-foot radius. The Decisions do not require Finneral to build the cul-de-sac; instead, the Decisions allow Finneral to build, starting within the layout of Kinloch Drive, a sixteen-foot driveway that leads to a circular driveway having a 50-foot radius that would be located partly within the layout of Kinloch Drive and partly within Lot 2.

30. The Westford Fire Department reviewed the revised July 27, 2016 plan set for the Second Subdivision Plan. In a memorandum that the Fire Department sent to the Town Engineer on August 16, 2016 (copy received by the Planning Board on August 19, 2016), the Fire Department noted it had reviewed the "submitted plans for a proposed subdivision at 64 Main Street (rev 7-27-16)" and reported them to be "satisfactory to the Westford Fire Department." Westford's Town Engineer concurred with the Fire Department's conclusions. The Conways provided no evidence that contradicted either of these determinations.

31. The Conways introduced no evidence at trial that the Planning Board's granting of the Cul-de-sac Waiver will have any effect upon the Conways. The proposed dead-end will be approximately 750 feet from the Conways' northern property line. Emergency vehicles already have sufficient access to the Conway Property from Main Street, and have no need to use those portions of Kinloch Drive that are outside of the ROW (including the dead-end) in order to provide services to the Conway Property.

32. The new home on Lot 2 will be approximately 760 feet from the Conways' northern property line, and nearly 1000 feet from the Conways' house. Once built, a home on Lot 2 will have no effect upon the Conways' privacy. There are at least four residences that currently are closer to the Conway Property than Lot 2: the Finneral Residence, two along Wheeler Lane (which lies immediately west of the ROW), and one west of the Conway Property on Main Street. The Conways introduced no evidence of invasions of their privacy stemming from the use of these existing residences, or proof that the use of a residence on Lot

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2 will differ from that of the existing residences. Main Street itself is a major thoroughfare. Plaintiff John Conway admitted at trial that Main Street is a "cut-through from New Hampshire" to locations in northern Massachusetts. Traffic on the street averages between 11,000 and 12,000 vehicles per day, with approximately 1000 vehicles per hour during the morning peak hours and 1300 vehicles per hour during the evening peak hours.

*5 33. Once built, a home on Lot 2 will have an insubstantial effect upon traffic and noise around the Conway Property. A home on Lot 2 is estimated to generate approximately ten vehicle trips per day (five entries and five exits) along the ROW. The post-construction geometry and width of the ROW as it meets Main Street will be adequate to serve both houses on the ROW. The Conways do not use the ROW as their principal driveway. Their principal driveway is approximately 100 feet east of the ROW on Main Street. Lot 2's ten-trip addition to Main Street's traffic (see ¶ 32 above) and to traffic-related noise will be trivial.

34. The Conways will hear temporary (that is, not constant) construction-related noise and will encounter construction-related dust on their property during construction on Lot 2. While construction of subdivision infrastructure and Lot 2 could take as little as seven months, the Decisions do not limit the period during which construction may occur. The Original Decision limits only blasting periods and the hours "pertaining to air hammering or similar practices...." The Second Subdivision Plan also restricts certain activities during rain events. While § 218-12(F)(6) of the Regulations purports to restrict the hours and days of construction activities, that subsection is presented as a "guideline or design objective[ ]," see § 218-12, Introductory paragraph, and there is no note on the Second Subdivision Plan or in the Decisions that makes § 218-12(F)(6) enforceable as to Finneral and Guthrie's approved subdivision.

35. The Conways timely appealed the Remand Decision to this Court.

* * *

The parties agree that planning boards may waive strict compliance with their own subdivision rules and regulations "where such action is in the public interest and not inconsistent with the intent and purpose of the subdivision control law." G.L. c. 41, § 81R; Regulations, § 218-7. A board's decision to grant or deny a waiver "will be upheld unless premised upon 'a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary.' " *Krafchuk v. Planning Bd. of Ipswich*, 453 Mass. 517, 529 (2009), *quoting Musto v. Planning Bd. of Medfield*, 54 Mass. App. Ct. 831, 837 (2002). *Krafchuk* goes on to hold that proving that a board has committed reversible error is no easy feat:

> The board's determination whether a particular waiver is in "the public interest" involves a large measure of discretion, and if "reasonable minds might in good faith differ, without doubting the reasonableness of the opposing view, the conclusion reached by the planning board should be sustained on judicial review. For it is the board, not the court, to whom the statute delegates the discretion, and the role of the court is merely to ascertain whether the board exceeded its authority.

Krafchuk, 453 Mass. at 529 (citations omitted), *quoting Arrigo v. Planning Bd. of Franklin*, 12 Mass. App. Ct. 802, 809 (1981). (While *Krafchuk* uses the phrase "the board's determination," Krafchuk is clear that a board needn't make explicit findings when waiving its own subdivision regulations. *See Krafchuk*, 453 Mass. at 529.) In *Krafchuk*, the trial court upheld a planning board's waivers, with conditions, of two subdivision requirements. Based on the facts presented at trial, the trial court reasoned that each waiver, as conditioned by the board, would "provide substantially the same level of safety and convenience to the public as would strict adherence to the board's own rules and regulations," and thus the board acted within its discretion in finding that the waivers were in the public interest. Id. at 531-532.

*6 *Krafchuk* suggests that in considering the other requirement for a valid waiver, that the waiver is "not inconsistent" with the intent and purpose of the Subdivision Control Law, a reviewing court needn't show any deference to the board. *See Krafchuk*, 453 Mass. at 529 (emphasis added; "*the court* determines whether there is a substantial derogation from the intent and purpose of the subdivision control law"). *Krafchuk* cites just one case, *Wheatley v. Planning Bd. of Hingham*, 7 Mass. App. Ct. 435 (1979), as an example of when a waiver is inconsistent with the purpose of the Subdivision Control Law. In *Wheatley*, the board

waived a regulation requiring subdivision plans to show municipal services such as water pipes, fire hydrants, telephone lines, fire alarm cables and boxes, and street lights. The Appeals Court held the waiver was inconsistent with the intent and purpose of the Subdivision Control Law because it would leave the resulting lots without basic utilities and municipal services, all of which the Subdivision Control Law requires. *See id.* at 441-444. Thus, while it's up to the court to determine whether "substantial derogation" has occurred, when *Krafchuk* talks of "substantial" derogation, it means "substantial."

But in order to challenge any waiver of the Regulations, the Conways first must have standing to appeal. General Laws c. 41, § 81BB provides such a right to any person "aggrieved" by a decision of a planning board concerning a plan for subdivision of land. "Because the Zoning Act, G.L. c. 40A, and the subdivision control law, G.L. c. 41, §§ 81K–81GG, share the similar purpose of regulating the use of land to ensure the safety, convenience, and welfare of the inhabitants of municipalities ... we are guided in our determination of the meaning of 'person aggrieved' in the context of the subdivision control law by our case law involving zoning, i.e., appeals pursuant to G.L. c. 40A, § 17." *Krafchuk*, 453 Mass. at 522; *see also Rattner v. Planning Bd. of W. Tisbury*, 45 Mass. App. Ct. 8, 10 (1998).

A "person aggrieved" is one who "suffers some infringement of his legal rights." *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 721 (1996). Of particular importance, the right or interest asserted by a plaintiff claiming aggrievement must be one that the applicable law is intended to protect, either explicitly or implicitly. *See Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 120 (2011). Abutters enjoy a rebuttable presumption that they are persons aggrieved. *See Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 33 (2006). But defendants have the opportunity to rebut the abutter's presumption of standing by "challeng[ing] the plaintiff's standing and offer[ing] evidence to support the challenge." *Id.* As *Krafchuk* notes, there are two ways that an abutter's opponent may overcome the abutter's presumption of standing. One is to show that the abutter's interests are not among those that the Subdivision Control Law or the municipality's subdivision rules and regulations protect. *See Krafchuk*, 453 Mass. at 522-523. The second way to overcome an abutter's presumed standing is to challenge, with evidence, the abutter's claims of injury. *Id.* When the opposing party rebuts the abutter's presumption of standing, "the burden rests with the plaintiff 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.' " *Id.*, quoting *Barvenik v. Aldermen of Newton*, 33 Mass. App. Ct. 129, 130-132 (1992).

Finneral and Guthrie defeat the Conways' standing using a combination of these methods. Yes, as abutters to 64 Main Street, the Conways enjoy a rebuttable presumption that they are persons aggrieved. *See Krafchuk*, 453 Mass. at 522. At trial they identified six harms. Three – those relating to construction noise, construction traffic, and construction dust – are not among those the Subdivision Control or the Westford Regulations protect. *See 81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 702 (2012) ("An abutter can have no reasonable expectation of proving a legally cognizable injury where the Zoning Act and related zoning ordinances ... do not offer protection from the alleged harm in the first instance.) While the Regulations include a "miscellaneous" limitation on residential and commercial construction between the hours of 7:00 p.m. and 7:00 a.m., *see* Regulations, § 218-12(F)(6), the Regulations don't otherwise restrict noise, traffic or dust associated with construction.

*7 That leaves the Conways with three other harms: general noise, traffic, and safety in the ROW. Those harms are within the ambit of interests the Subdivision Control Law protects. *See* c. 41, § 81M; *see also* Regulations, § 218-2. But as to these harms, Guthrie and Finneral called five witnesses that rebutted the Conways' presumption of injury: Westford's Town Engineer, Westford's Town Planner, a transportation consultant, an acoustical engineer, and a project engineer. Their combined testimony deprived the Conways of the benefit of the presumption, *see Standerwick*, 447 Mass. at 33, and put them in the hot seat to offer evidence of aggrievement. Persons in that position "must put forth credible evidence to substantiate claims of injury to their legal rights." *Rattner*, 45 Mass. App. Ct. at 20, *quoting Marashlian*, 421 Mass. at 723. *See also Denneny v. Zoning Bd. of Appeals of Seekonk*, 59 Mass. App. Ct. 208, 211-212 (2003) (plaintiff must provide direct evidence, and not "unsubstantiated claims or speculative personal opinions," of his or her claims of harm); *Butler v. City of Waltham*, 63 Mass. App. Ct. 435, 411 & n.13 (2005) ("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.").

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Mr. Conway testified that he will suffer from construction-related noise, dust, and traffic were Lot 2 developed, but the Conways provided no evidence of aggrievement from post-development noise or traffic. The Conways also didn't provide any testimony, expert or lay, contrary to the expert testimony offered by Guthrie and Finneral that the Conways won't suffer from noise, traffic or safety issues post-construction. The Court thus holds that because the Conways failed to produce qualitative, quantitative, or *any* proof of injury resulting from increased noise, traffic, or unsafe use of the ROW, after the construction of Lot 2, they lack standing to appeal the Board's decision.

Even if the Conways had established their standing (they didn't), the Court rejects their claims that the Applicant and Cul-de-Sac Waivers were improper. With respect to the Applicant Waiver, *Batchelder v. Planning Bd. of Yarmouth*, 31 Mass. App. Ct. 104, 108-109 (1991), *quoting Meyer v. Planning Bd. of Westport*, 29 Mass. App. Ct. 167, 170 (1990) (internal citations omitted), holds that municipalities may adopt "property-owner consent" regulations for the following purposes:

> Chief among the policy concerns underlying the enactment of the Subdivision Control Law was to ensure the provision of "adequate drainage, sewerage, and water facilities, without harmful effect to adjoining land and to the lots in the subdivision." One of the ways in which this objective is achieved by local planning boards is to secure a covenant from the "owner of record" which provides for the installation of adequate municipal services. If the owners of record are not fully identified or if the planning board has been misled as to the record owners, the public would not be protected because the board would be unable to ensure that it would receive a properly executed covenant, or in the event of a modification or amendment of a plan approval, a properly executed consent.

It's clear that requiring the Conways to sign Guthrie and Finneral's application isn't needed to achieve *Batchelder's* objectives. It's undisputed that, while the Conways own the fee in ROW, Mr. Finneral has an easement over the ROW for access and the provision of utilities to 64 Main Street. Finneral thus is entitled to make in the ROW all of the improvements the Board has required as a condition of approving his subdivision, as the Board found. *See also Silva v. Planning Bd. of Somerset*, 34 Mass. App. Ct. 339, 342 (1993). The Applicant Waiver thus meets Krafchuk's public-interest test, as even with the Applicant Waiver, the Remand Decision ensures "substantially the same level of safety and convenience to the public as would strict adherence to the board's own rules and regulations." *Krafchuk*, 453 Mass. at 531-532. And since the Remand Decision insures that necessary infrastructure will be built, notwithstanding the Applicant Waiver, that waiver thus does not substantially derogate from the intent and purpose of the Subdivision Control Law or the Regulations.

***8** The same holds true for the Cul-de-sac Waiver. The purpose of regulations like the Westford's cul-de-sac requirement is to ensure a proper turnaround for emergency vehicles. *See Federline v. Planning Bd. of Beverly*, 33 Mass. App. Ct. 65, 68 (1992), *quoting Wheatley*, 7 Mass. App. Ct. at 451 (cul-de-sac regulations " 'are enacted because of a concern that the blocking of a dead-end street, as by a fallen tree or an automobile accident, will prevent access to the homes beyond the blockage particularly by fire engines, ambulances, and other emergency equipment' "). Two facts establish that the Cul-de-sac Waiver was in the public interest. First, Lt. Donald R. Parsons, the Westford Fire Prevention Officer, reviewed the revised plans for the subdivision dated July 27, 2016, and advised that the "turnaround" depicted on the plan would be satisfactory to the Westford Fire Department. Second, the Town Engineer concurred with Lt. Parsons's assessment. The Conways offered no contrary evidence at trial, and the Court rejects their suggestion that the Fire Department or the Town Engineer reviewed the wrong plans (or incorrectly interpreted the right plans). The Fire and Engineering concurrences indicate that the approved road design provides "substantially the same level of safety and convenience to the public as would strict adherence to the board's own rules and regulations." *Krafchuk*, 453 Mass. at 531-532. The concurrences also prove that the Cul-de-sac Waiver does not substantially derogate from the intent and purpose of the Subdivision Control Law or Westford's Regulations.

Judgment to enter accordingly.

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CONWAY III

2019 WL 3070415
Only the Westlaw citation is currently available.
Massachusetts Land Court,
Department of the Trial Court,.
Middlesex County.

John CONWAY and Regina Conway, Plaintiffs,

v.

TOWN OF WESTFORD PLANNING BOARD; Dennis J. Galvin, Matthew Lewin, Michael Green, Kate Hollister, and Darrin Wiszt, in their capacities as members of the Town of Westford Planning Board; David A. Guthrie; and Christopher H. Finneral, Defendants.

16 MISC 000570 (MDV)
|
July 11, 2019

JUDGMENT OF DISMISSAL

By the Court (Vhay, J.)

*1 Plaintiffs John and Regina Conway, of 66 Main Street in Westford, MA, filed this action in September 2016. They appealed, pursuant to G.L. c. 41, § 81BB, the defendant Town of Westford Planning Board's approval of a definitive subdivision plan submitted by defendants David A. Guthrie and Christopher H. Finneral for a parcel of land located at 64 Main Street in Westford. The Conways own the fee in a 30-foot right of way that runs over the southwest edge of 66 Main Street. That right of way provides access to 64 Main Street.

In September 2018, this Court heard the parties' cross-motions for summary judgment. The Court denied summary judgment for the Conways because there were disputed issues of fact concerning the Conways' standing to appeal the subdivision-plan approval. The Court also denied summary judgment for Guthrie and Finneral on the merits of two issues, whether the Board properly waived a requirement in Westford's Subdivision Regulations that dead-end streets terminate in a cul-de-sac having a 70-foot outside curb radius (the "Cul-de-sac Waiver"), and whether the Board properly approved the subdivision application even though it lacked the Conways' signature (the "Applicant Requirement"). In the interests of judicial economy and the economy of the parties, the Court remanded the matter to the Board to determine whether it could make required findings supporting the Cul-de-sac Waiver and whether it would waive the Applicant Requirement.

The Board issued its remand decision in December 2018. In that decision, the Board made findings supporting the Cul-de-Sac Waiver and waived the Applicant Requirement (the "Applicant Waiver"). The Conways appealed the remand decision to this Court, challenging both Waivers. Finneral and Guthrie maintained their attack on the Conways' standing to challenge the Board's decision. The parties appeared for trial on April 16, 2019. In accordance with the Findings of Fact and Conclusions of Law issued this day, it is

ORDERED and **ADJUDGED**, that plaintiffs John and Regina Conway's claims in this action are hereby **DISMISSED, WITH PREJUDICE**.

SO ORDERED.

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CONWAY IV

98 Mass.App.Ct. 1110
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).
Appeals Court of Massachusetts.

John CONWAY & another[1]

v.

PLANNING BOARD OF WESTFORD & others.[2]

19-P-1414
|
Entered: September 2, 2020

By the Court (Blake, Sacks & Ditkoff, JJ.[3])

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

*1 John and Regina Conway (the Conways) own a parcel of land in the town of Westford that is burdened by a right of way (ROW) to access the property of the developers, Christopher H. Finneral and David A. Guthrie. The town's planning board (board) granted subdivision approval to divide the developers' property into two lots, one already improved with a house, and the second to support a new house. Following a summary judgment decision resolving some issues, and a trial on the remaining issues, a judge of the Land Court determined that the Conways lacked standing to appeal from the subdivision approval under G. L. c. 41, § 81BB, and, even if they had standing, the board did not abuse its discretion in granting contested waivers of the town's subdivision regulations. Assuming without deciding that the Conways have standing, we agree that the board did not abuse its discretion in granting the waivers. We therefore affirm the Land Court's judgment of dismissal.

1. Background. The facts relating to the history of the property are not in dispute. The parties' properties formerly were owned by Mary D. Agnew as a single parcel of land fronting on Main Street to the south. In 1969, the board approved a plan (1969 plan) that divided the property into two lots, lot A, containing the Main Street frontage, and lot B, containing 6.8 acres, to the rear or north of lot A. Access to lot B was shown on the plan to be by a thirty-foot wide right of way running along lot A's western boundary and ending in a partial cul-de-sac on lot B. The plan contained the notation, "[p]lanning [b]oard approval, subject to the condition that not more than one dwelling be erected on Parcel B without further approval of the Westfield [p]lanning [b]oard."

By a deed dated May 8, 1969, Agnew transferred lot A to predecessors of the Conways with reference to the 1969 plan and expressly reserved for herself and her heirs and assigns, "the right to use, in common with the grantees, their heirs and assigns, the thirty (30) foot right of way shown on said plan extending from Main Street northerly to other land of the grantor shown as Parcel B on said plan, for all purposes for which streets and ways are commonly used in the [town], including the right to pave or otherwise improve and maintain all or any part of said right of way and to install or permit to be installed in, upon or over said

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right of way water, gas, drainage or sewerage pipes and any and all other utility services." The reserved easement itself did not require additional board approval for more than one lot on parcel B. If not for access over the ROW, lot B would be landlocked.

Sometime after approval of the 1969 plan, Agnew constructed a house on lot B. The Conways purchased lot A in 1994; access to their home is not by the ROW, but by a separate driveway approximately one hundred feet east of the ROW on Main Street. Mr. Conway testified that his only use of the ROW has been that he has walked on it "a little bit" to retrieve an errant golf ball or view his property.

*2 The developers purchased lot B in 2015. They razed the existing house and constructed a new, large house referred to as the Finneral residence.[4] In 2016, the developers sought approval to subdivide lot B into two lots; lot one contained the Finneral residence, and lot two was to be the site of a new house. The distance from the Conway house to the proposed new house is 1,000 feet. The plan proposed to extend the ROW through lot two and, on the existing ROW on the Conway property, excavate the pavement, install a new water line, expand the width of the traveled way from twelve feet to eighteen feet, and add granite curbing and a catch basin.

The board approved the subdivision and either waived several local regulations or determined that no waiver was required. The Conways appealed to the Land Court. Following a hearing on cross motions for summary judgment,[5] the judge remanded to the board for consideration of whether the board wanted to waive the requirement that the applicant must "own" all of the property shown on the subdivision plan and that all owners sign portions of the application (ownership waiver). On remand, the board both decided to grant the ownership waiver and made the findings necessary to support the waiver of certain road width requirements. The board reasoned that "the primary intention" of the owner signature requirements was "to ensure that [a]pplicants (whether fee simple owners or otherwise) have the authority to undertake the improvements shown on the plan." Finding that the developers had that authority by virtue of the reserved rights for all purposes for which streets and ways are commonly used, the board concluded that the waiver was appropriate and "consistent with the [r]egulations."

Following a trial on standing and two waivers (the ownership waiver and the cul-de-sac waiver), the judge reasoned that three of the six harms that the Conways asserted were related to noise, traffic, and dust impacts of construction, which, the judge concluded, are not among those harms that the subdivision control law [G. L. c. 41, §§ 81K-81GG] or the Westford subdivision regulations protect.[6] The judge found that the other three alleged harms related to post-construction noise, traffic, and safety in the ROW. As to these harms, however, the judge concluded that the developers' witnesses had rebutted the Conways' presumption of standing, and that the Conways failed to produce <u>any</u> proof of injury resulting from increased noise, traffic, or unsafe use of the ROW after construction was complete. Thus, the judge concluded that the Conways lack standing to appeal from the board's decision to grant subdivision approval.

*3 The judge further concluded that even if the Conways had standing, the board did not abuse its discretion in approving the ownership waiver.[7] The judge reasoned that the developers, through their ownership and easement rights, had the authority to "undertake all of the improvements shown on the" proposed subdivision plan, and concluded that the waiver of the signature requirement "does not substantially derogate from the intent and purpose of the Subdivision Control Law or local regulations."

2. <u>Discussion</u>. <u>Waivers</u>. Assuming without deciding that the Conways have standing,[8] we consider whether the board abused its discretion in waiving strict compliance with its rules and regulations and in concluding that the waivers are in the public interest and not inconsistent with the intent and purpose of the subdivision control law. See G. L. c. 41, § 81R. See also <u>Krafchuk</u> v. <u>Planning Bd. of Ipswich</u>, 453 Mass. 517, 529 (2009). "A planning board's decision to grant or deny a waiver will be upheld unless premised upon 'a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary.' " <u>Krafchuk</u>, <u>supra</u> at 529, quoting <u>Musto</u> v. <u>Planning Bd. of Medfield</u>, 54 Mass. App. Ct. 831, 837 (2002). "The board's determination whether a particular waiver is in 'the public interest' involves a large measure of discretion, and if 'reasonable minds might in good faith differ, without doubting the reasonableness of the opposing view, the conclusion reached by the planning board should be sustained on judicial review. For it is the board, not the court, to whom the statute delegates the discretion, and the role of

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the court is merely to ascertain whether the board exceeded its authority.' " Id., quoting Arrigo v. Planning Bd. of Franklin, 12 Mass. App. Ct. 802, 809 (1981).

On appeal, the Conways limit their argument to the ownership waiver addressed at trial and the waiver of the fifty-foot road width requirement and requirement that there be sidewalks on both sides of the road (collectively the road width waiver). We address each in turn.

a. Ownership waiver. The board waived the requirement of the local subdivision rules and regulations that all owners sign the application. The Conways argue that because they are owners of the underlying fee in a portion of the ROW, the board could not consider the proposed subdivision plan without their signature. We have recognized "that a planning board has a legitimate interest in ascertaining whether the applicant has (or prospectively will have) sufficient ownership rights in the property to go forward with the project." Brady v. City Council of Gloucester, 59 Mass. App. Ct. 691, 697 (2003). And, it is true that where the identity of the owner of a portion of the property in a proposed subdivision was genuinely contested, we concluded that it would not be in the public interest to waive a requirement that all owners sign off on the application. See Batchelder v. Planning Bd. of Yarmouth, 31 Mass. App. Ct. 104, 106-109 (1991). Here, however, the developers have an express easement over the ROW and the uncontested right to improve and maintain the ROW consistent with the proposed plan. Accordingly, there is no ownership dispute.

*4 The Conways contend that, as in Batchelder, the developers will be unable to comply with certain requirements of the subdivision approval because they are not the owners of the fee in the ROW. Specifically, the Conways argue that the developers will be unable to comply with condition two of the "site specific conditions for the definitive subdivision plan," which provided that the ROW would be a "private way," and required the "owner or owners of Lots 1 and 2 (as shown on the Plan) ... to assume all ownership, responsibility and liability for said roadway that may otherwise be assumed by the Town on roads that have been approved and accepted by the Town." Condition 2 also required, "prior to the release of lot 2, that the applicant ... execute and record a covenant with the planning board, running with the land, and acknowledging that the roadway is a private roadway, constructed to planning board standards, and the developer agrees that it shall never be submitted to town meeting for a vote to have it become an accepted street ...."

The conditions, however, apply to and are binding on the applicant and the owners and subsequent owners of lots one and two on the subdivision plan and run with lots one and two in perpetuity. The conditions do not require the Conways' signature and are not binding on them. While we agree that the developers would not be able to assert ownership, the board was well aware of the limits of the developers' interest in the ROW. We conclude that the condition applies to the interests the applicants hold, and that they have the authority to comply with the conditions.[9]

b. Road width waiver. Because the board waived the requirements that the subdivision road layouts be at least fifty feet wide and include sidewalks on both sides, and the developers agreed to construct off-site sidewalks or make a contribution to the town's sidewalk gift account, the Conways argue that the board essentially allowed the developers to "purchase" waivers.[10] Indeed, as the judge found, the developers volunteered and agreed to either make a payment of $12,838.50 to the sidewalk gift account or construct 1,131 linear feet of offsite sidewalk "in lieu" of constructing onsite sidewalks.[11] The judge observed, "[T]he board found that by granting the waiver (and other related waivers), the public interest would be served by either providing or planning for pedestrian access and safety measures that would benefit the public, as opposed to non-public improvements for the benefit of a single additional residential lot."

On remand, the board made additional findings relating to the road width waivers, among others. It found that they protected the environment by minimizing impervious areas and preserving more of the existing vegetative cover and also allowed for smaller storm water management, less grading and clearing, and resulted in a larger natural buffer to adjacent properties. The board emphasized that the improvements to the road are to serve only one additional residence. In light of these findings, we are satisfied that, separate and apart from the developers' payment to the sidewalk gift account, the waivers were in the public interest and not inconsistent with the intent and purpose of the subdivision control law.

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Judgment affirmed.[12]

All Citations

98 Mass.App.Ct. 1110, 155 N.E.3d 747 (Table), 2020 WL 5229094

Footnotes

1 Regina Conway.

2 Christopher H. Finneral and David A. Guthrie.

3 The panelists are listed in order of seniority.

4 The judge found that the use of the ROW to bring in fill and construction materials and equipment was "dramatically different" from what the Conways had experienced during the "Agnew years." "Increased traffic and the considerable construction activity on the Finneral site increased noise on the Conway Property while construction was underway. Construction-related noise and traffic ended once the Finneral Residence was built."

5 The judge determined that factual disputes regarding the Conways' claims of standing would have to be resolved at trial. The judge rejected on the merits, however, the Conways' contention that, because the property lacked adequate frontage, the approval was invalid. The judge also rejected the board's initial conclusion that the term "owner" included the holder of an easement. While concluding as a matter of law that the road width waiver was in the public interest, the judge found that the board did not make a determination whether it was consistent with the intent and purpose of the subdivision control law. Similarly, the judge concluded that the board made inadequate findings to support the waiver of the dead-end cul-de-sac requirement.

6 The judge found that the Conways will hear temporary, not constant, construction-related noise and will encounter construction-related dust on their property during construction on lot two, and that the board's decisions did not limit the period during which construction may occur.

7 The judge also found that the board did not abuse its discretion as to the cul-de-sac waiver; the Conways have not pursued this on appeal.

8 Only persons aggrieved have standing to appeal from a board's decision to approve a subdivision plan. See G. L. c. 41, § 81BB; Krafchuk v. Planning Bd. of Ipswich, 453 Mass. 517, 522 (2009). "Abutters entitled to notice of planning board hearings, pursuant to G. L. c. 41, § 81T, enjoy a rebuttable presumption that they are persons aggrieved." Id. Here, the Conways are abutters, and also own the underlying fee of the ROW; they undoubtedly enjoy a rebuttable presumption of standing. Because the Conways do not prevail on the merits, the issue of standing is not outcome determinative, and, we need not resolve the question of whether the presumption was rebutted. See Mostyn v. Department of Envtl. Protection, 83 Mass. App. Ct. 788, 792 & n.12 (2013) (question of standing need not be resolved where not outcome determinative).

9 The Conways also contend that the developers are unable to authorize the town to maintain the storm drains if the owners fail to do so. The easement, however, authorizes the developers to maintain the easement and does not prevent them from engaging others to do so on their behalf.

10 The Conways do not argue that the ROW, serving two houses, must comply, for safety or other reasons related to the purposes of subdivision control, with the fifty-foot width requirement and have sidewalks on each side or even that it was an abuse of discretion for the board to grant those waivers.

11 The subdivision regulations, set forth in section 218-19 C, expressly allow for such a contribution or alternative construction.

12 Here, the judgment of dismissal did not differentiate between those claims dismissed on the merits and those dismissed for lack of standing. On appeal, no party contends that, to the extent the judge ruled in the defendants' favor on the merits, a judgment affirming the board's decision should have entered. Thus the form of the judgment will remain the same regardless of the ground(s) on which we agree with the judge's rulings.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Shoestring Ltd. Partnership v. Barnstable Conservation Com'n., Mass.Super., June 6, 2005

31 Mass.App.Ct. 104
Appeals Court of Massachusetts,
Barnstable.

Theron BATCHELDER et al.
v.
PLANNING BOARD OF YARMOUTH; Palmer Davenport, Trustee, Intervener.

No. 89–P–1338.
|
Argued Jan. 23, 1991.
|
Decided July 23, 1991.
|
Further Appellate Review Denied Sept. 26, 1991.

Synopsis
Application for approval of definitive subdivision plan was approved by the planning board, and owners of abutting property brought action to annul decision. Applicant intervened. The Superior Court, Barnstable County, George C. Keady, Jr., J., entered judgment annuling action of board, and applicant appealed. The Appeals Court, Brown, J., held that: (1) applicant's mere filing of complaint to register land, based solely upon claim of title by adverse possession, was not sufficient to clothe applicant with "owner of record" status required by planning board regulation to apply for approval of definitive subdivision plan, and (2) planning board lacked authority to waive "owner of record" requirement for applicant for definitive subdivision plan.

Affirmed.

West Headnotes (5)

[1] **Zoning and Planning** ← Persons entitled to apply

Applicant's mere filing of complaint to register land, based solely upon claim of title by adverse possession, was not sufficient to clothe applicant with "owner of record" status required by planning board regulation to apply for approval of definitive subdivision plan; applicant voluntarily withdrew its land registration complaint to most of land after board's approval of definitive plan. M.G.L.A. c. 41, § 81L; c. 185, §§ 1 et seq., 1(a).

7 Cases that cite this headnote

[2] **Records** ← Registration of Titles to Land; Torrens System
Records ← Particular matters affecting or affected by registered title

Effect of complaint to register property based on claim by title of adverse possession, if allowed, is to vest title to land in claimant, thereby making ownership certain and indefeasible, but mere act of filing complaint for registration does not, in itself, affect state of title. M.G.L.A. c. 185, §§ 1 et seq., 1(a), 30.

2 Cases that cite this headnote

[3] **Zoning and Planning** ⟵ Persons entitled to apply

Planning board lacked authority to waive "owner of record" requirement for applicant for definitive subdivision plan, as waiver would undermine one of principal aims of subdivision control law, which seeks to ensure provision of adequate drainage, sewage, and water facilities, without harmful effect to adjoining land and lots. M.G.L.A. c. 41, §§ 81M, 81R, 81U, 81W.

10 Cases that cite this headnote

[4] **Zoning and Planning** ⟵ Proceedings on Permits, Certificates, or Approvals

Although planning board may, when appropriate, waive strict compliance with its rules and regulations, it may not do so unless such waiver is in public interest and not inconsistent with intent and purpose of subdivision control law. M.G.L.A. c. 41, § 81R.

6 Cases that cite this headnote

[5] **Zoning and Planning** ⟵ Persons entitled to apply

Waiver of planning board's regulations requiring record owner to be applicant for definitive subdivision plan approval, or at minimum to participate in application process by executing forms and appearing at hearing, would undermine one of principal aims of Subdivision Control Law. M.G.L.A. c. 41, §§ 81M, 81R, 81U, 81W.

12 Cases that cite this headnote

Attorneys and Law Firms

****367 *104** Matthew J. Dupuy, West Yarmouth, for intervener.

Charles M. Sabatt, Hyannis, for plaintiffs.

Before BROWN, PERRETTA and LAURENCE, JJ.

Opinion

BROWN, Justice.

This case arises out of an approval by the defendant, planning board of Yarmouth (board), of a defective subdivision plan submitted by the trustees of Davenport Realty Trust (trust) for a development which would adjoin the Blue Rock golf course in Yarmouth. The plaintiffs own property abutting the locus. We are asked to decide whether the trust's ownership interest in the locus was sufficient to obtain approval of its definitive subdivision plan, and if not, whether the board had the power to waive "the requirements of its regulations relative to the applications [for approval of a subdivisionplan] ***105** and the presence at any hearing of the owner of record." We conclude that the trust lacked standing to apply for definitive plan approval and that the board's purported waiver of the so-called "owner of record" requirement was inconsistent with the intent and purpose of the Subdivision Control Law. See G.L. c. 41, §§ 81K et seq.

The pertinent facts giving rise to this dispute are as follows. In 1982, the trust filed a complaint in the Land Court to register a parcel of land in South Yarmouth consisting of 6.44 acres (the locus).[1] The complaint was based solely on the trust's "claim

of title to [the] locus ... by adverse possession." The Land Court, as required by G.L. c. 185, § 37, as appearing in St.1981, c. 658, § 19, referred the complaint for registration to one of its title examiners to "search the records and investigate all facts stated in the complaint or otherwise brought to his notice, and [to] file in the case a report thereon, concluding with a certificate of his opinion upon the title."

During the pendency of the registration proceeding, on July 14, 1986, the trust filed an application with the board for approval of a preliminary subdivision plan of the locus. This application identified the trust as the owner of record and was signed by one of its trustees, Dewitt Davenport, in the space reserved for "signature of owner of record." In the space requesting a deed reference for the property, the trust inserted a reference to a deed recorded in the Barnstable registry of deeds in book 4572, **368 page 155, which covered real property in West Yarmouth more than one mile away from the locus and having no connection with the locus. The application for approval of the preliminary plan was subsequently denied by the board at a meeting held on September 4, 1986.[2]

*106 By an application dated January 16, 1987, the trust filed a plan with the board seeking approval of a definitive plan. The application identified the owner of record as "John Doe, c/o Town of Yarmouth." The title reference provided in the application referred to the docket number assigned to the trust's land registration complaint. The definitive plan was subsequently approved by the board on May 20, 1987, and a certificate of approval was filed with the town clerk on June 1, 1987.

Subsequent to the board's approval of the definitive plan, the Land Court examiner concluded that the trust "did not have good record title to one hundred percent (100%) of [the] locus" as of the date either plan had been submitted.[3] The trust thereafter voluntarily withdrew its land registration complaint to all but one-half acre of the locus.

On June 10, 1987, the plaintiffs commenced this action to annul the decision of the board approving the definitive plan, alleging that the board's actions were arbitrary and capricious, and in excess of its authority. The trust was allowed to intervene. On July 19, 1989, a judge of the Superior Court entered a judgment annulling the action of the board as having been in excess of its authority. This appeal from that judgment ensued pursuant to G.L. c. 41, § 81BB.

The trial court's duties in hearing and deciding appeals under § 81BB are to conduct a hearing de novo, find the relevant facts, and determine the validity of the planning board's decision. *Fairbairn v. Planning Board of Barnstable,* 5 Mass.App.Ct. 171, 173, 360 N.E.2d 668 (1977). This court will not upset the factual determinations of the lower court unless clearly erroneous.

[1] 1. It is settled that a planning board regulation requiring the applicant for definitive plan approval to be an "owner of record" is a reasonable regulation. *Kuklinska v. Planning Board of Wakefield,* 357 Mass 123, 129, 256 N.E.2d 601 (1970). We think it important that the "owner" of a site be properly identified on *107 a definitive plan to be recorded. In *Kuklinska,* the plaintiffs sought to overturn a definitive plan on the ground that the applicant did not own all the land included within the plan. Because the planning board regulation at issue in that case required that the "applicant must be the owner of all the land included in the proposed subdivision," the court held that the definitive plan did not conform to the regulation and was thus invalid.[4] The opinion underscored the point that the regulation was consistent with G.L. c. 41, § 81L, as amended by St.1961, c. 331, which defines a subdivision applicant as an "owner or his agent". See also *Hahn v. Planning Board of Stoughton,* 24 Mass.App.Ct. 553, 556, 511 N.E.2d 20 (1987), where this court reiterated that G.L. c. 41, § 81L, defines an applicant as an "owner or his agent," and upheld the validity of a planning board regulation requiring that the applicant must hold record title to the land shown on the plan.

Here, the regulations promulgated by the board relating to the requirements for obtaining plan approval are not dissimilar to those at issue in *Kuklinska* and *Hahn.*[5] **369 Therefore, the crucial issue is whether the trial judge erred in ruling that the mere filing of a complaint to register land, based solely upon a claim of title by adverse possession, is not sufficient to clothe the plaintiff with "owner of record" status (as required by the board's regulations, note 5, *supra*) for purposes of applying for subdivision approval.

[2] *108 The defendant filed a complaint to register the property pursuant to G.L. c. 185. The effect of such a complaint, if allowed, is to vest title to the land in the petitioner, thereby making ownership certain and indefeasible. G.L. c. 185, § 1(*a*). *Deacy v. Berberian,* 344 Mass. 321, 328, 182 N.E.2d 514 (1962). Contrary to the board's contention, however, the mere act of filing a complaint for registration does not, in itself, affect the state of title. See G.L. c. 185, § 36. Here, the trust withdrew its registration complaint before the Land Court issued a final decree establishing title to the locus. Therefore, there was no sufficient basis upon which the trust could establish that it was the "record owner" of the locus at the time it submitted the preliminary and definitive plans. Accordingly, the trust had no standing to apply for subdivision approval as of the dates the plans were submitted.[6]

[3] [4] 2. The board argues that the trial judge erred as matter of law when it ruled that the board did not have the power to waive its regulation that the "owner of record" must sign its application forms and be present at the hearings.[7] We disagree. While it is true that a planning board may, when appropriate, waive strict compliance with its rules and regulations, it may not do so unless such waiver "is in the public interest and not inconsistent with the intent and purpose of the subdivision control law." G.L. c. 41, § 81R, as appearing in St.1953, c. 674, § 7. See *Wheatley v. Planning Bd. of Hingham,* 7 Mass.App.Ct. 435, 440, 388 N.E.2d 315 (1979).

[5] Chief among the policy concerns underlying the enactment of the Subdivision Control Law was to ensure the provision of "adequate drainage, sewerage, and water facilities, without harmful effect to adjoining land and to the lots in the *109 subdivision." *Meyer v. Planning Bd. of Westport,* 29 Mass.App.Ct. 167, 170, 558 N.E.2d 994 (1990). See G.L. c. 41, § 81M. One of the ways in which this objective is achieved by local planning boards is to secure a covenant from the "owner of record" which provides for the installation of adequate municipal services. G.L. c. 41, § 81U. If the owners of record are not fully identified or if the planning board has been misled as to the record owners, the public would not be protected because the board would be unable to ensure that it would receive a properly executed covenant, or in the event of a modification or amendment of a plan approval, a properly executed consent. G.L. c. 41, § 81W. See *Stoner v. Planning Bd. of Agawam,* 358 Mass. 709, 715, 266 N.E.2d 891 (1971). Therefore, a waiver, as here, of the board's regulations which require the record owner to be the applicant for plan approval, or at a minimum to participate in the application process by executing forms B and C and appearing at the hearing, would undermine one of the principal aims of the statute. **370 *Wheatley v. Planning Bd. of Hingham, supra.*

Judgment affirmed.

All Citations

31 Mass.App.Ct. 104, 575 N.E.2d 366

Footnotes

1 The locus, owned by the trust since 1962, abuts the Blue Rock golf course.

2 As will be seen, we are not faced with the question whether a planning board properly may allow filing of a preliminary plan by a person who expects to own but does not yet have record title.

3 The judge found that the trust had "apparently ... acquired by deed dated May 11, 1987, ... good record title to [only] a fractional interest, less than 7/28, in the locus."

4 Implicit in the court's reasoning in the *Kuklinska* decision was the determination that it is reasonable under G.L. c. 41, § 81M, for a planning board to require that an applicant be an owner of record.

5 Yarmouth planning board regulation § III, par. 312, requires that the "owner or his representative" be present at the hearing. Section III, par. 332, requires that applicants for preliminary plan approval must submit "Form B" which in turn requires "Name of Owner of Record," a title reference from the Barnstable registry of deeds, and a "Signature of Owner of Record." Section III, par. 333(b), requires that the preliminary plan must contain the "names and addresses of the record owner and the applicant" Section III, par. 341(a), states that the applicant must submit copies of a properly executed form C which requires the "Name of Owner of Record," a

registry of deeds title reference, and "Signature of Owner of Record." Finally, § III, par. 342(b), requires that the name of the "record owner" be placed on the application for definitive plan approval.

6 We have no occasion to address the board's argument that the trust's subsequent purchase of a fractional interest in the locus relates back to the time the plans were filed, and thus is sufficient to confer "owner of record" status (see *Kuklinska*, 357 Mass. at 129, 256 N.E.2d 601), because on the date the definitive plan was approved, the trust had title only to a portion of the locus. See note 3, *supra*.

7 The trial judge concluded that although the board never specifically waived these requirements of its regulations, "it attempted to do so de facto."

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357 Mass. 123
Supreme Judicial Court of Massachusetts, Middlesex.

Anna J. KUKLINSKA
v.
PLANNING BOARD OF WAKEFIELD. (and two companion cases[a]).

Argued Nov. 5, 1969.
|
Decided March 5, 1970.

Synopsis

Bill in equity by owner of easterly tract seeking injunctive relief and damages arising out of alleged trespass by owner of westerly tract was tried together with two bills in equity brought by easterly owner and owner of tract abutting easterly and westerly tracts on north by way of appeal from decision of Town Planning Board. The Superior Court, Ponte, J., entered final decree dismissing bills and easterly and northerly owners appealed. The Supreme Judicial Court, Spalding, J., held that where common owner partitioned lot and conveyed eastern portion described as measuring 35 rods on south and 36 rods on north side, and thereafter conveyed western tract described as so much as not partitioned and set off to grantee of easterly tract, trial court's finding that disputed land which was included within boundary established by 35 and 36 rod-dimensions was property of owner of westerly lot was erroneous and that decree upholding planning board's decision approving westerly owner's subdivision plan which included land subject to title dispute was vitiated by holding that title to disputed land was not in subdivider.

Final decree dismissing bill reversed in each case and each case remanded for further proceedings.

West Headnotes (6)

[1] **Appeal and Error** ⬅ Effect of motion to vacate or set aside
Equity ⬅ Grounds

Failure of trial court to consider modification of master's report agreed to by parties to boundary dispute before entering final decree and dismissing actions on April 25, 1968 constituted error which court could remedy by vacating decree and plaintiffs' appeal on July 12, from final decree which was entered on June 28 after court had vacated previous final decrees was timely. M.G.L.A. c. 214, § 19.

[2] **Appeal and Error** ⬅ Clear, manifest, or plain error

Where evidence which was before master in trespass action was reported on appeal, it could be used to show that master's finding on issue of ownership of disputed area was plainly wrong.

2 Cases that cite this headnote

[3] **Real Property Conveyances** ⬅ References to Other Instruments or Records

Where common owner partitioned lot and conveyed eastern portion described as measuring 35 rods on south and 36 rods on north side, and thereafter conveyed western tract described as so much as not partitioned and set off to grantee

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of easterly tract, trial court's finding that disputed land which was included within boundary established by 35 and 36-rod dimensions was property of owner of westerly lot was erroneous.

[4] **Appeal and Error** ← Ordering reference or recommittal to referee

Equity ← Form and sufficiency in general

In action brought by owner of easterly tract against owner of westerly tract, master's finding, based on erroneous conclusion that owner of westerly tract was owner of area where alleged act of trespass occurred, that acts complained of "do not amount to trespass" was vague and was required to be reversed to allow easterly owner to establish what, if any, acts of trespass on part of westerly owner had occurred and damage caused thereby.

[5] **Zoning and Planning** ← Affirmance, modification, reversal, vacation, or setting aside

Decree upholding planning board's decision approving subdivision plan which included land subject to title dispute was vitiated by determination that title to disputed land was not in subdivider. M.G.L.A. c. 41, §§ 81L, 81M, 81BB.

4 Cases that cite this headnote

[6] **Zoning and Planning** ← De novo review in general

In passing on correctness of planning board's decision approving subdivision plan, it was incumbent upon superior court to make its own finding as to whether board complied with its own regulations requiring provision for projection of streets in proposed subdivision into adjoining property. M.G.L.A. c. 41, §§ 81L, 81M, 81BB.

10 Cases that cite this headnote

Attorneys and Law Firms

***124** ****602** Sherman Davison, Arlington, for plaintiffs.

Mario Misci, Boston, for John C. Luciani and another (Francis C. McGrath, Jr., Town Counsel, for Planning Board of Wakefield, with him).

M. Gardner Clemons, Wakefield, for Wakefield Cooperative Bank, joined in a brief.

Before ***123** WILKINS, C.J., and SPALDING, CUTTER, KIRK, and REARDON, JJ.

Opinion

SPALDING, Justice.

These are three cases which were tried together. Two are bills in equity by way of appeal from decisions of the planning board of the town of Wakefield. G.L. c. 41, s 81BB. The other case is a bill in equity seeking injunctive relief and damages arising out of an alleged trespass. The cases were referred to a master. At issue are the boundary between two adjoining properties and the approval given by the planning board of Wakefield to a subdivision plan of one of the properties.

Mary Kuklinsky and the Lucianis own adjoining tracts of land in Wakefield that abut Montrose Avenue on the south. Anna J. Kuklinska owns property abutting the other two properties to the north. (Her property also abuts Mary Kuklinsky's to the east.) In Mary Kuklinsky vs. John C. Luciani & another, the plaintiff alleges a trespass to land allegedly owned by her both

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in fact and of record since 1914. The dispute concerns the boundary between the plaintiff's and the defendants' property. The disputed area measures six and one-half feet on Montrose Avenue and extends to the rear line of their parcels, where it measures about forty feet, thus comprising about 7,200 square feet. Within the disputed area a narrow, winding, unpaved way, known as Wood Road, some eight feet wide, runs from Montrose Avenue to the rear of the property. The defendants acquired the tract adjoining the plaintiff's land in 1962, and at the time this suit was commenced were subdividing for a housing development. The plaintiff alleges that in April, 1966, the defendants committed various acts of trespass on the land claimed as hers, including the removing of boundary markers, cutting of tress, and blocking of Wood Road.

Mary Kuklinsky vs. Planning Board of Wakefield is an ***125** appeal under G.L. c. 41, s 81BB, seeking an annulment of the planning board's decision approving a subdivision plan of the Luciani property. Mary Kuklinsky alleges that approval was erroneous because the applicants, the Lucianis, were not the owners of all the land included in the subdivision plan, as required by statute and the rules and regulations of the planning board. The plan submitted by the Lucianis included the property which is the subject of the trespass action between them and Mary Kuklinsky.

In Anna J. Kuklinska vs. Planning Board of Wakefield, which is also an appeal under s 81BB, the plaintiff alleges that the planning board's approval violated its own rules and regulations because the plan failed to provide for the projection of streets within ****603** the subdivision into the plaintiff's adjoining land. In both cases involving the Subdivision Control Law, the Lucianis were permitted to intervene as defendants.

The cases were heard in the Superior Court upon the master's report, a motion to confirm his report, and upon the plaintiffs' exceptions thereto. On April 25, 1968, the judge entered an interlocutory decree confirming the master's report; he also entered final decrees dismissing the three bills. On May 13, 1968, the plaintiffs moved to vacate the interlocutory and final decrees in order to correct errors and omissions in the master's report that had been orally agreed to by counsel in open court on November 7, 1967. Through inadvertence, these had not been considered by the judge in entering the decrees. On May 24, 1968, the judge entered a revised interlocutory decree confirming the master's report with modifications. Final decrees dismissing the bills were again entered. On June 28, 1968, on motion of the plaintiffs made on June 4, the judge vacated the interlocutory and final decrees of May 24, 1968, and entered in each case a second revised interlocutory decree confirming the master's report with modifications and a new final decree dismissing the bill. From the decrees of June 28, 1968, the plaintiffs appealed on July 12, 1968. The judge entered a nunc pro tunc order that the testimony before the ***126** master, which had been taken by a stenographer, be reported. He also ordered all the exhibits to be incorporated by reference in the master's report.

THE TIMELINESS OF THE APPEALS.

[1] The defendants contend that the plaintiffs' appeals were not timely, and therefore ought to be dismissed. We disagree. General Laws c. 214, s 19, prescribes a period of twenty days from entry of a final decree to appeal therefrom. Within the twenty days after the final decrees of April 25 and May 24, 1968, instead of appealing, the plaintiffs moved to vacate the interlocutory and final decrees because modifications, previously agreed upon, had not been included in the master's report. On July 12 the plaintiffs appealed from the final decrees of June 28.

The defendants invoke the rule that 'after the entry of a final decree the case is disposed of subject to the right of appeal; and the decree cannot be vacated because of supposed errors in the court's decision, because of false testimony on any of the issues involved, or because the case of the petitioner was not properly presented.' Sullivan v. Sullivan, 266 Mass. 228, 229, 165 N.E. 89, 90 and cases cited. Recognizing that there is an exception to this rule in cases of 'clerical errors, mistakes in computation or irregularities in making up the record,' Thompson v. Goulding, 5 Allen, 81, 82 the defendants argue that the exception is not applicable here. In Hyde Park Sav. Bank v. Davankoskas, 298 Mass. 421, 424, 11 N.E.2d 3, 5, we said that the 'power to set aside a final decree on motion because of accident or mistake * * * is not limited to the instances enumerated * * * (in Thompson v. Goulding) but extends to other cases analogous in principle.' We think that the court's failure to consider the master's report in light of the modifications agreed on by counsel is 'analogous in principle' to the exceptions mentioned in

Thompson v. Goulding. It is to be noted that the plaintiffs brought the errors in the master's report to the attention of the court in each instance by a motion to vacate within the time allowed for an appeal.

***127** THE TRESPASS CASE.

[2] We turn to the trespass case of Mary Kuklinsky vs. John C. Luciani & another. Where, as here, the evidence before the master is reported, the 'evidence may be used to show that * * * (his) findings of fact are plainly wrong.' Morin v. Clark, 296 Mass. 479, 483, 6 N.E.2d 830, 833; Shelburne Shirt Co. Inc. v. Singer, 322 Mass. 262, 265, 76 N.E.2d 762. Within this scope of review, we are of ****604** opinion that the findings of the master on the crucial issue (ownership of the disputed area) cannot stand. The essence of the controversy is the boundary between the land of the plaintiff and the land of the defendants. The master's conclusion that the area in dispute belonged to the defendants cannot be sustained in light of the evidence relevant to title. All parties trace their claim of title to a common owner, one David Wiley, whose Lot no. 4 originally comprised both tracts. A partition of this lot into two parts was made September 17, 1849, and recorded on September 22, 1849. The westerly half of Lot no. 4 went to William Wiley and the easterly portion to Sally L. Wiley. That the plaintiff takes under Sally Wiley's deed and that the Lucianis' title derives from that of William Wiley are not in dispute. The 1849 partition deed conveys to William Wiley 'so much of Lot No. Four as is not hereinafter partitioned and set off to Sally L. Wiley.'[1] It thus appears that the western boundary of Sally Wiley's (Kuklinsky's) property was to serve as a monument that fixed the easterly boundary of the remainder or westerly part of Lot no. 4 (the Luciani property). There was evidence that the deed assigning to Sally Wiley the easterly part of Lot no. 4 described the property granted to her as measuring thirty-five rods on the south and thirty-six rods on the north side. A deed from the estate of Sally Wiley and from the estate's grantee contained identical measurements. In the partition deed assigning the westerly part of Lot no. 4 to William Wiley (the Luciani property) no dimensions appear other ***128** than a description of the total tract as six and one-half acres. The testimony and exhibits prepared by the plaintiff's expert witness show that the thirty-five and thirty-six rod dimensions establish the westerly boundary of Sally Wiley's tract as including the disputed area.

[3] It appears that in concluding that the land belonged to the Lucianis, the master relied on a Land Court decree entered in a proceeding between the Lucianis and Anna Kuklinska, in which the northerly boundary of the Luciani property was in issue. It is undisputed that Mary Kuklinsky was not a party to this proceeding. In the course of this proceeding the Land Court referred to a stone wall 359 feet from Montrose Avenue as a boundary marker. The master used this monument to determine the easterly boundary of the Luciani property, despite the fact that Mary Kuklinsky was not a party to this proceeding and was not bound by it. It further appears that the experts called by the Lucianis were not conversant with the original deed of partition, and based their measurements of the easterly boundary on the stone wall mentioned in the Land Court decree. In the light of all the evidence the master's conclusion that title to the disputed area was in the Lucianis was plainly wrong. The evidence on this point, most of which was documentary, also shows that the plaintiff is the record owner of this area.

[4] Having determined that the plaintiff is the owner of the disputed area, we turn to the matter of damages. The master found that there was no damage. It is apparent that this finding was based in whole or in part on his conclusion that the defendants were the owners of the area where the alleged acts of trespass occurred. There was a substantial amount of evidence introduced by the plaintiff tending to show acts of trespass on the part of the defendants causing damage. This evidence was not contradicted. The master made no finding that these acts did not occur or that they did. Rather, he concluded that the 'acts complained of * * * do not amount to trespass.' This conclusion is ****605** so vague that it is in doubt whether the master found they any of these acts occurred at all. We are of opinion that the ***129** plaintiff should be given an opportunity to establish what, if any, acts of trespass on the part of the defendants occurred, and to prove the damage caused thereby. The final decree is reversed and the case is to stand for further hearing on these issues and on the matter of the issuance of an injunction restraining trespass. The plaintiff is to have costs of appeal.

So ordered.

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MARY KUKLINSKY'S APPEAL IN THE SUBDIVISION CONTROL CASE.

[5] The master's findings in favor of the Lucianis on the issue of ownership appear to be the basis for the decree upholding the planning board's decision. But our decision above that Mary Kuklinsky has title to the disputed land vitiates that decree. Since the Luciani subdivision plan includes the disputed area, the Lucianis are clearly not the owners, of record or otherwise, of all the land included in the subdivision plan.

General Laws c. 41, s 81L, defines a subdivision applicant as an 'owner or his agent.' The rules and regulations of the Wakefield planning board require that the 'applicant must be the owner of all the land included in the proposed subdivision'; and the owner is defined as the 'owner of record.' Section 81M states that 'It is the intent of the subdivision control law that any subdivision plan * * * shall receive the approval of such board if said plan conforms to the * * * reasonable rules and regulations of the planning board pertaining to subdivisions of land.' See Doliner v. Planning Bd. of Millis, 343 Mass. 1, 6, 175 N.E.2d 919. The plan in question clearly does not conform to the rules and regulations of the planning board because it includes land not owned by the applicant.

The final decree dismissing the bill is reversed. A new decree is to be entered annulling the decision of the planning board and remanding the plan to it for further consideration and action.

So ordered.

*130 ANNA KUKLINSKA'S APPEAL IN THE SUBDIVISION CONTROL CASE.

[6] Anna Kuklinska seeks an annulment of the planning board's approval of the Luciani subdivision plan on the ground that the board did not comply with its own regulations requiring provision for the projection of streets in the proposed subdivision into adjoining property.[2] The master made no findings on the question of access. He did state that the board found that the plaintiff 'had access to and from her land on Montrose Avenue and other streets.' But in passing on the correctness of the board's decision it is incumbent on the court (the master here) to make its own finding. Rettig v. Planning Bd. of Rowley, 332 Mass. 476, 479, 126 N.E.2d 104.

In view of our decision in the Kuklinsky case against the planning board, the final decree is reversed, and a new decree is to be entered annulling the decision of the planning board and remanding the plan to it for further consideration and action.

So ordered.

All Citations

357 Mass. 123, 256 N.E.2d 601

Footnotes

a The companion cases are Mary Kuklinsky v. Planning Board of Wakefield and Mary Kuklinsky v. John C. Luciani & another.

1 The next deed in the Luciani chain of title also states 'so much of said lot No. 4 as was not by a deed of partition among the heirs of David Wiley, assigned and set off to Sally L. Wiley.'

2 Section IV A 1 d of the planning board's regulations reads: 'If adjoining property is not subdivided but is, in the opinion of the Board, suitable for ultimate development, provision shall be made for proper projection of streets into such property by continuing appropriate streets within the subdivision to the exterior boundary thereof.'

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