



MAAP2009-P-0827-02

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APPELLEE'S BRIEF

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

DOCKET No. 2009-P-0827

PETER K. FREI
Plaintiff/Appellant

v.

TOWN CLERK, PLANNING BOARD and
ZONING BOARD OF APPEALS OF THE
TOWN OF HOLLAND, et al
Defendants/Appellees

BRIEF OF DEFENDANTS/APPELLEES

The Defendants/Appellees

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Board and Zoning Board
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of Holland, et al,
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Dated: July 17, 2009

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ISSUES PRESENTED FOR REVIEW

Whether the dismissal of this cause of action by the trial court should be affirmed as the Plaintiff/Appellant Peter Frei ("Frei") lacks standing to bring this cause of action because he is not an aggrieved party and because Frei failed to follow mandatory statutory procedural requirements.

STATEMENT OF THE CASE

In September, 2008, Frei filed a verified complaint in Hampden County Superior Court seeking, *inter alia*, a request for *mandamus* and for declaratory judgment. The Defendants included the town clerk, selectmen, members and former members of the Zoning Board of Appeals ("ZBA") and the Planning Board ("PBH") for the Town of Holland and owners of the subject property ("Defendants").

The complaint alleges that Frei filed two requests to enforce the zoning laws with the town clerk and building inspector on March 4, 2008 pursuant to Mass. Gen. Laws, c. 40A, § 7. (Complaint, ¶ 75.

App. p. 14.)¹ The requests were denied on March 17, 2008. (Complaint, ¶ 77. App. p. 14.) Frei further alleges that he filed two timely appeals pursuant to Mass. Gen. Laws, c. 40A §§8 and 15 (Complaint p. 78. App. p. 14.)

Defendants filed a Motion to Dismiss the Complaint pursuant to Mass. R. Civ. P. 12(b)(6) which was allowed by the Court (Velis. J.) on January 15, 2009. Judgment entered in favor of the Defendants on February 19, 2009 and was amended on February 20, 2009. Frei filed a notice of appeal on March 10, 2009.

STATEMENT OF FACTS

In his verified complaint filed in September, 2008, Frei alleged an abuse of power scheme that spans a period of more than twenty-six (26) years. The purported basis for the verified complaint is the existence of two dwellings which Frei alleges are in violation of the Subdivision Control Law and local zoning laws. (Appendix, p. 8, ¶¶ 10 and 11).

¹ All references are to the Appendix filed by Frei.

In January, 2004, the ZBA granted one of the property owner defendants a special permit. (Complaint, ¶ 42, App. p. 11). A dwelling was constructed on the property pursuant to the special permit. (Complaint, ¶ 53, App. p. 12).

The complaint alleges that on February 7, 2006, one of the property owner defendants applied for a special permit with the PBH. (App. 12, ¶ 58). After a public hearing conducted on March 7, 2006, the PBH granted a special permit for a common driveway. (App. 12-13, ¶¶ 59 and 63).

On or about March 4, 2008, **two (2) years** following the granting of the special permit for a common driveway, and **four (4) years** following the granting of the original special permit pursuant to which the dwelling was built, Frei allegedly filed two requests to enforce the zoning laws with the town clerk and building inspector pursuant to Mass. Gen. Laws c. 40A, § 7. (App. p. 14, ¶ 75). On or about March 17, 2008 the requests were denied. (App. p. 14, ¶ 77). Frei alleges that he filed two timely appeals pursuant to Mass. Gen. Laws c. 40A, §§ 8 and 15 on

March 31, 2008. (App. p. 14, ¶ 78). On or about May 22, 2008, Frei was notified by the ZBA that he failed to follow proper procedures for perfecting a timely appeal including failing to complete and file a Procedure Sheet and failing to tender the requisite appeal filing fee. (App. 14, ¶ 79). On or about July 1, 2008, Frei was also notified that any purported appeal was untimely. (App. p. 14, ¶ 81).

Frei filed this cause of action in September, 2008, more than twenty (20) days following any decision filed in the Clerk's office. Furthermore, Frei has never filed the affidavit required by Mass. Gen. Laws, c. 40A, § 17 which requires dismissal of this action.

Frei is not an abutter to the real property which is the subject of this cause of action and therefore, there is no presumption of standing.

LEGAL ARGUMENT

I. THE SUPERIOR COURT CORRECTLY
FOUND THAT FREI LACKS STANDING
BECAUSE HE CANNOT DEMONSTRATE
THAT HE IS AN AGGRIEVED PARTY

A. Standing Is A Jurisdictional
Prerequisite Under Mass. Gen.
Laws c. 40A, §17

Standing is a jurisdictional predicate and therefore appropriately addressed prior to addressing a claim on the merits in an appeal pursuant to Mass. Gen. Laws c. 40A, § 17.² *Barvenik v. Aldermen of Newton*, 33 Mass. App. Ct. 129, 130-131 (1992); *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 574 (1989); *Rattner v. Planning Bd. of W. Tisbury*, 45 Mass. App. Ct. 8, 10 (1998); *Watrov v. Greater Lynn Mental Health & Retardation Assn.*, 421 Mass. 106, 108-109 (1995). The relevant portion of Mass. Gen. Laws c. 40A, § 17 provides as follows:

(A)ny person aggrieved by a decision of the board of appeals or any special permit granting authority or by the failure of the board of appeals to take final action concerning any appeal, application or petition within the

² Frei apparently filed his verified complaint pursuant to Mass. Gen. Laws c. 40A, § 17 (App. p. 15, ¶¶ 84 and 86).

required time or by the failure of any special permit granting authority to take final action concerning any application for a special permit within the required time, whether or not previously a party to the proceeding, or any municipal officer or board may appeal . . .

In this case, the Superior Court correctly allowed the defendants' motion to dismiss and correctly found that Frei lacked standing to pursue his complaint because Frei offered no evidence that he was an aggrieved person as defined by the statute. On the contrary, Frei readily admits that his motivation in this action is to combat his perception of political corruption and in retaliation for an unrelated personal zoning matter.³

³ Frei unabashedly states: "While town officials deny members of the community who are critical of the government their rights, they grant themselves benefits that are clearly outside the law. Frei was recently forced to go through motions and expense of a sure-file appeal and wasted judicial resources, everyone's time and money to get a simple 'approval not required' (ANR) plan endorsed." Appellant's Brief, p. 13. The appeal to which Frei refers is not included in the record of this appeal.

B. Only An "Aggrieved Party"
Has Standing To Challenge
Any ZBA Action

Only an aggrieved party has standing to appeal a zoning decision. A party is aggrieved when he suffers some infringement of his legal rights. *Marashlian v. Zoning Board of Appeals of Newburyport*, 421 Mass. 719, 721 (1996).⁴

In his brief, Frei acknowledges that Mass. Gen. Laws, c. 40A, § 17 governs this matter and acknowledges that only aggrieved parties have the right to appeal a zoning decision: "The legislature provided in its language of section 17 aggrieved parties the right to appeal . . ." Appellant's Brief, p. 11. However, Frei misconstrues what an aggrieved party is.

⁴ There is a rebuttable presumption of standing given to certain abutters who are entitled to notice of the public hearing under Mass. Gen. Laws, c. 40A, § 11. *Marashlian v. Zoning Board of Appeals of Newburyport*, 421 Mass. at 721. Frei readily admits that he is not an abutter. Appellant's Brief, p. 8. Thus it is undisputed that Frei is not entitled to the presumption and "the question of standing will be determined on all the evidence without benefit" of any presumption. *Denneny v. Zoning Bd. of Appeals of Seekonk*, 59 Mass. App. Ct. 208, 212 (2003).

C. Frei Has Not Suffered, Or
Even Alleged, A Violation Of
A Cognizable Legal Right

The trial judge found that Frei did not have standing to pursue this matter. "A trial judge's findings of aggrieved person status will not be reversed unless clearly erroneous." *Wells v. Zoning Board of Appeals of Billerica*, 68 Mass. App. Ct. 726, 731 (2007) citations omitted.

In order to be aggrieved and to have standing, Frei must allege some infringement of a legal right. *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. at 721. The infringement must cause an injury particular to Frei, and not merely raise a concern general to the community. There must be sufficient evidence of "a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest' necessary to challenge the permit at issue." *Bell v. Zoning Bd. of Appeals of Gloucester*, 429 Mass. 551, 554 (1999); *Harvard Square Defense Fund, Inc. v. Planning Bd. of Cambridge*, 27 Mass. App. Ct. 491, 493 (1989).

To qualify for that limited class, a plaintiff must 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. He must show that his legal rights have been, or likely will be, infringed or his property interests adversely affected.

Barvenik v. Board of Aldermen of Newton, 33 Mass. App. Ct. at 129. To survive the challenge to standing, Frei must first identify a personal right derived from his ownership or use of the property that the zoning by-laws were designed to protect. *Circle Lounge & Grille, Inc. v. Bd. of Appeals of Boston*, 324 Mass. 427, 431-32 (1949).

Furthermore, Frei must allege any injury with specificity and "must put forth credible evidence to substantiate his allegations." *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. at 721.

"Even when positing legitimate zoning-related concerns, including possible vehicular traffic increases, anticipated parking problems, and the potential for litter, a plaintiff must nonetheless

offer more than conjecture and hypothesis." *Barvenik v. Board of Aldermen of Newton*, 33 Mass. App. Ct. at 133. Frei's evidence "must be more than unsubstantial claims or speculative personal opinions." *Denneny v. Zoning Bd. of Appeals of Seekonk*, 59 Mass. App. Ct. at 212; *Marotta v. Board of Appeals of Revere*, 336 Mass. 199, 204 (1957).

D. Political Gripes Or Even
General Zoning Concerns Do
Not Confer Standing

Frei fails to allege any particularized injury to himself or his property caused by the issuance of the special permit and approvals to the property owners in this matter. Instead, he claims that "Frei is 'aggrieved' by the unanimous illegal actions by the members of involved Boards and is entitled to standing under Article V and VII."⁵ There is no allegation that the approvals given to the property owners have any legitimate zoning-related impact on him as a private property owner. Frei's complaint only concerns some unspecified allegations about corruption in the

⁵ Frei refers to the Massachusetts Constitution which is inapplicable to a discussion of standing in zoning matters.

issuance of the permits by town officials.⁶ But these concerns in no way cause him to be aggrieved under the zoning laws. Even any claim that he has a "general interest in the enforcement of zoning [regulations]" is insufficient. *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 218 (1975).⁷

As there is no evidence that Frei is in fact an aggrieved person as defined by statute and case law, the trial judge's findings that Frei does not have standing are not clearly erroneous and should be upheld.

⁶ Frei's brief is peppered with conclusory allegations about ZBA misconduct. He claims "they granted one of their own - repeatedly - by anonymous vote - permits outside the provisions of G.L. This conduct by officials violates each individual's right to be governed by law abiding elected or appointed officials, officials who are free of corruption." Appellant's Brief, pp. 17 - 18.

⁷ Courts have routinely denied standing to appeal zoning permits when posited on generalized notions of aesthetics, noise, traffic, and "quality of the neighborhood." *Harvard Square Defense Fund, Inc. v. Planning Board of Cambridge*, 27 Mass. App. Ct. at 493. "Subjective and unspecific fears about the possible impairment of aesthetics of neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood feeling, or the loss of open or natural space are all considered insufficient bases for aggrievement under Massachusetts law." *Barvenik v. Board of Aldermen of Newton*, 33 Mass. App. Ct. at 132-133.

II. FREI FAILED TO COMPLY WITH MANDATORY APPEAL PROCEDURES

A. Frei Failed To Timely Appeal The Issuance Of The Permits

Notwithstanding the fact that Frei lacks standing to bring this cause of action, the cause of action should be dismissed as untimely. Any appeal of the special permit issued in January, 2004 was required to be filed within twenty (20) days of said issuance. Frei first attempted to request enforcement of the zoning laws **four (4) years** after the issuance of said permit. This attempted enforcement action is well beyond the twenty (20) day period for filing any appeal as established by Mass. Gen. Laws c. 40A, § 17. By instead delaying any action for four (4) years and seeking enforcement of the zoning laws purportedly pursuant to Mass. Gen. Laws c. 40A, § 7, Frei inexplicably and inexcusably attempts to circumvent the established statutory scheme. Frei has not offered any explanation or justification for this four (4) year delay.

Similarly, Frei failed to timely appeal the grant of a special permit for a common driveway issued in

March, 2006. Instead of filing an appeal within twenty (20) days of the approval, Frei again attempted to circumvent the established statutory procedure for zoning appeals and by seeking enforcement of the zoning laws **two (2) years** following this action by the ZBA. Frei offers no justification for failing to timely file the appeals. The denial of the requests for enforcement specifically refers to and is based upon the earlier actions of the ZBA. (App. pp. 37-38 and 39-40).

B. Frei Did Not Properly File His
Petitions For Appeal

Frei's requests for enforcement of the zoning laws were denied by letters dated March 17, 2008. (App. 37-40.) Although Frei attempted to appeal the denials on March 31, 2008, he failed to follow the established procedures for properly filing an appeal. Frei did not attempt to file the required filing fee until *seventy-one (71) days* following the denials of his requests for enforcement. Frei was required to file his appeal within thirty (30) days following the denial of his requests for enforcement. Mass. Gen. Laws c. 40A, § 15. Thus, Frei was required to

properly file his appeals no later than April 16, 2008. He did not even attempt to file the required fee until May 27, 2008. The appeal to the ZBA was untimely.

In *Murphy v. Planning Board of Hopkinton*, 70 Mass. App. Ct. 385, 390 (2007) this Court noted that parties affected by planning board action under the Subdivision Control Law should be able "to rely on those actions that have not been promptly challenged." The same policy applies to the zoning laws. There is no justification for allowing a request to destroy a dwelling four years following the issuance of the building permit and two years following the issuance of the special permit.

As Frei failed to timely file his appeal of the denial of his requests for enforcement, the cause of action should be dismissed.

C. Frei Failed To Properly File His Cause Of Action In Superior Court

Any appeal to the Superior Court under Mass. Gen. Laws, c. 40A, § 17 must be filed within twenty (20)

days after any decision has been filed in the office of the city or town clerk. A plaintiff shall file with the clerk of court an affidavit of notice given to all defendants within twenty-one days after the entry of the complaint. "If no such affidavit is filed within such time the complaint shall be dismissed." Mass. Gen. Laws, c. 40A, § 17. The complaint was entered on the Superior Court docket September 2, 2008. No required affidavit has ever been filed. (App. pp. 1-6). Frei concedes that Mass. Gen. Laws, c. 40A, § 17 governs this action. (Appellant's Brief, pp. 11, and 19-20). Therefore, his failure to file the statutorily required affidavit should result in dismissal of the cause of action.

By its plain language, Mass. Gen. Laws, c. 40A, § 17 establishes that a person aggrieved by a decision granting a special permit must seek review of that decision within twenty (20) days of the filing of the decision with the city clerk. *Iodice v. Newton*, 397 Mass. 329, 333 (1986). It is well established that the timely commencement of an appeal under Mass. Gen. Laws, c. 40A, § 17 is jurisdictional and the failure to file a timely appeal deprives the court of

jurisdiction to hear the appeal. *Bingham v. City Council of Fitchburg*, 52 Mass. App. Ct. 566, 569 (2001); *Bonfatti v. Zoning Bd. of Appeals of Holliston*, 48 Mass. App. Ct. 46 (1999); *Costello v. Board of Appeals of Lexington*, 3 Mass. App. Ct. 441, 442-43 (1975); *Pierce v. Board of Appeals of Carver*, 369 Mass. 804, 811 (1976). Timely commencement of the appeal is a condition to maintaining it, "a condition *sine qua non*," and is a requirement that the Supreme Judicial Court has 'policed in the strongest way.'" *Cappuccio v. Zoning Bd. of Appeals of Spencer*, 398 Mass. 304, 311-312 (1986).

"Timely filing in court is a jurisdictional prerequisite in appeals from administrative decisions." *Calnan v. Planning B. of Lynn*, 63 Mass. App. Ct. 384, 389 (2005) citations omitted. Frei was notified on May 22, 2008 and on July 1, 2008 that his appeal had not been properly filed as he failed to comply with established procedures. (App. p. 14). Thus, assuming *arguendo* that on these facts Frei could statutorily file an action pursuant to Mass. Gen. Laws, c. 40A, § 17, any such action had to be filed by July 31, 2008. Frei did not file this cause of action

in Superior Court until September 2, 2008. Timely filing of a zoning appeal in court is jurisdictional. *Id.*

CONCLUSION

For the foregoing reasons, the Defendants/Appellees request that the dismissal of this action by the trial court be affirmed. Defendants/Appellees request an award of attorneys' fees and costs incurred in this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the above document was served upon the following, by mailing two (2) copies of it, postage prepaid, to:

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I certify that I complied with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers.)

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