

## **Boston Zoning - Selected Issues**

*Howard P. Speicher*  
*Ann M. Sobolewski*  
*Davis, Malm & D'Agostine, P.C.*

### **JURISDICTION**

Appeals of decisions of the Boston Board of Appeal may be filed in Superior Court, or, in cases otherwise conforming to Housing Court jurisdiction, in the Housing Court. Unlike cases under G. L. c. 40A, zoning appeals may not be filed in the Land Court. See, *Boston Zoning Enabling Act*, St. 1956, c. 665, §11, as amended by St. 1994, c. 461, §2. In cases not involving an appeal of a decision of the Board of Appeal, but in which the landowner seeks a determination of the extent to which the Boston Zoning Code affects the landowner's property, the Land Court will have jurisdiction pursuant to G. L. c. 240, §14A. See, *Banquer Realty Co., Inc. v. Acting Building Commissioner of Boston*, 389 Mass. 565 (1983).

### **BOND**

Unlike a more limited bond provision contained in G. L. c. 40A, §17, the Boston Zoning Enabling Act, in Section 11, allows the court to require a plaintiff contesting an award of zoning relief by the Board of Appeal, to post a bond to save the property owner who was awarded the relief harmless in the event the action of the Board is sustained. If the project is under fifty thousand square feet, the bond may not exceed \$25,000, and may be for a greater amount if the project is larger. G. L. c. 40A, §17 allows the court to impose a bond only up to \$15,000, and only in appeals involving subdivisions.

## CHALLENGES TO ZONING PROVISIONS

### **Procedural Requirements.**

*Statute of limitations.* Challenges to the adoption of a zoning text amendment or map amendment to the Boston Zoning Code, or to any procedural defect in such amendment or its adoption, must be filed in either the Land Court or the Superior Court by aggrieved persons within thirty days after the effective date of the amendment. *Boston Zoning Enabling Act, Section 10A, as amended by St. 1987, c. 371, §2.* However, it is unclear whether, or to what extent, this remedy, which the statute provides “shall be exclusive”, has any effect on the ability of a landowner to challenge the validity of or an interpretation of a zoning provision as it affects the landowners’ property pursuant to G. L. c. 240, §14A. See, e.g., *National Amusements, Inc. v. City of Boston*, 29 Mass.App.Ct. 305 (Mass.App.Ct. 1990). It would appear that Section 10A would bar procedural challenges to the manner in which a zoning amendment was adopted if the challenge was not filed within thirty days, but would not bar a landowner from making a substantive challenge to the application of the amendment to the landowner’s property pursuant to G. L. c. 240, §14A.

*Exhaustion of administrative remedies.* In *Banquer Realty Co., Inc. v. Acting Building Commissioner of Boston*, 389 Mass. 565 (1983) the Court held that where a plaintiff is seeking a determination of the validity of local zoning or an interpretation of local zoning pursuant to G. L. c. 240, §14A, exhaustion of administrative remedies is not required. However, the Court has subsequently attempted to distinguish and narrow the scope of the *Banquer* ruling by holding that *Banquer* is limited to questions of the validity of the zoning ordinance itself and does not apply to any matter involving the interpretation of rights under a special permit or other approval. In *Whitinsville Retirement Soc., Inc. v. Town of Northbridge*, 394 Mass. 757 (1985), the Court ruled that G. L. c. 240, §14A did

not give the Court jurisdiction, because the plaintiff was seeking a determination of the rights under a special permit that had already been granted, and not an interpretation of the provisions of the zoning by-law itself. In *Balcam v. Town of Hingham*, 41 Mass. App. Ct. 260 (1996), the Court ruled that the plaintiff was in effect seeking review of an unappealed order relating to a local (non-zoning) wetlands by-law and had failed to seek a required lot area variance. Under these circumstances, the plaintiff was not entitled to use G. L. c. 231A to bypass the proper zoning procedure for the granting of a variance.

### **Arbitrary and Capricious Standard.**

“There must be a showing of some substantial relation between the zoning code amendment and the general objectives of the enabling act . . . a zoning ordinance or by-law will be held invalid if it is unreasonable or arbitrary, or substantially unrelated to the public health, safety, convenience, morals or welfare. *Caires v. Building Commissioner of Hingham*, 323 Mass. at 593, 83 N.E.D. 550. *Schertzer v. Somerville*, 345 Mass. at 751, 189 N.E.D. 555. *Canteen Corp. v. Pittsfield*, 4 Mass.App.Ct. 289, 292-294, 346 N.E.D. 732 (1976). Despite the heavy momentum in favor of affirmation of local zoning action, the applicable principles are of judicial deference and restraint, not abdication.” *National Amusements, Inc. v. City of Boston*, 29 Mass.App.Ct. 305, 309-310 (Mass.App.Ct. 1990).

### **Substantial Relation to Legitimate Planning Objectives or Pretext?**

The *National Amusements* case highlighted the principle that zoning changes that might otherwise be acceptable will be invalid if they are pretextual efforts to block a particular project: “zone changes which have no roots in planning objectives but which have no better purpose than to torpedo a specific development on a specific parcel are considered arbitrary and unreasonable. The

vice is the singling out of a particular parcel for different treatment from that of the surrounding area, producing, without rational planning objectives, zoning classifications that fail to treat like properties in a uniform manner.” *National Amusements, Inc. v. City of Boston*, 29 Mass.App.Ct. 305, 312 (Mass.App.Ct. 1990). Thus, the proposed rezoning of a commercial zone to a residential zone was invalid because the proposed re-zoning to a residential district bore no rational relation to the existing commercial uses surrounding the targeted property. *Id.*

Despite rationally stated objectives of the proposed rezoning, a finding that the stated goals are pretextual may defeat the amendment. The most common reason for pretextual zoning, although one that may be difficult to prove, is a desire on the part of the municipality to protect local businesses from competition. Protection of local businesses from competition is not a proper land use objective. *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427, 429-430 (1949). “Zoning has many laudable purposes, but stifling of competition is not one of them.” *Verc, Inc. v. Putziger*, 1 Mass. Law Rep. 565, Norfolk Superior Court, C.A. No. 9200034 (1993) (Stearns, J.). See also *Sherrill House v. Board of Appeal of Boston*, 19 Mass. App. Ct. 274, 276 (1985).

Proof of the real reason for the zoning change may require proof of the statements of appropriate officials made in their official capacities. Such statements may be binding on the municipality in proving the pretextual nature of the zoning amendment. See *Pheasant Ridge Associates v. Burlington*, 399 Mass. 771, 780 (1987) (Uncontested remarks of chairman of board of selectmen at town meeting binding evidence of improper motive of town meeting in eminent domain taking.).

### **Uniformity Challenges.**

Another ground for invalidating a zoning amendment may be its violation of the uniformity requirements of Section 2 of the Boston Zoning Enabling Act, St. 1956, c. 665, as amended. The uniformity provision in Section 2 is similar to the uniformity provision in Section 4 of G. L. c. 40A. To the extent any zoning amendment purports to give discretionary authority to a zoning official or board to deny approval to a use that is allowed as a matter of right, or purports to make all uses in a district subject to discretionary approval, the amendment may violate the uniformity provisions of the Boston Zoning Code. See *SCIT v. Planning Board of Braintree*, 19 Mass. App. Ct. 101 (1984).

### **Interpretation Issues.**

*Extension of Nonconforming Use.* Short of the drastic and difficult to achieve objective of obtaining a judicial ruling invalidating a zoning provision, a proposed use might be protected by an interpretation of the zoning provision at odds with the interpretation of the zoning official. Typical disputes in this vein include disputes whether a proposed use is a protected continuation of a lawful prior nonconforming use or whether it is an impermissible expansion, different in kind as well as degree, from the prior nonconforming use. A corollary of this type of dispute is whether the prior nonconforming use has been abandoned or discontinued so as to deprive the proposed use of “grandfathered” status. See *Derby Refining Co. v. City of Chelsea*, 407 Mass. 703 (1990), in which the Supreme Judicial Court held that the prior use of property in Chelsea as a petroleum storage facility had not been abandoned or discontinued despite the fact that it had not been used to store petroleum for several years, and that the proposed storage of asphalt, a petroleum product that had not previously been stored at the facility, was not a change or substantial extension of the prior nonconforming use. (The SJC has recently tried to distinguish parts of the *Derby* ruling in determining that the mere cessation of use of an oil terminal can justify

loss of status as a lawful prior nonconforming use. See *Ka-hur Enterprises, Inc. v. Zoning Bd. Of Appeals of Provincetown*, 424 Mass. 404 (1997).)

*Incidental or Accessory Use; or Separate Principal Use?* Another potential source of zoning disputes is the issue of proper characterization of a proposed use. When it is not clear whether the proposed use is governed by a defined use item in the ordinance, a dispute may center on whether a proposed use in a multi-use building is reasonably incidental to the primary use or accessory to an allowed use, and therefore permissible without zoning relief, or whether it is a second principal use requiring a variance or conditional use permit. A two part test is used to determine whether a use is customarily incidental, and therefore accessory, to the principal use. *Harvard v. Maxant*, 360 Mass. 432, 438 (1971). First, the use must be incidental to the principal use by being: a) subordinate to the principal use and of minor significance and b) reasonably related to the principal use. *Id.* Second, the use must be “commonly, habitually and by long practice . . . established as reasonably associated with the primary use,” so that it can be deemed “customarily” incidental. *Id.* at 438-439. “Where the primary use is a business use, incidental uses are those which are ‘inferentially permitted as reasonably incident to the business.’” *Select Sites of Peabody, Inc. v. City of Peabody*, 2 Land Court Reporter 180 (1994), citing, *Needham v. Winslow Nurseries, Inc.*, 330 Mass. 95, 101 (1953).

In cases where the proper characterization of the use of the property is at issue, and the zoning ordinance does not adequately define the proposed use, courts assign “use” terms their common meanings. *Needham v. Winslow Nurseries, Inc.*, 330 Mass. 95, 101 (1953). When a zoning ordinance broadly uses words such as “retail” and “service” in conjunction with activities permitted in a business district, the courts have favored construction of the allowed use which accomplishes the permissive intent of the ordinance by including accessory and incidental uses which are necessary for the complete operation of the use. Thus,

even a facility for baking and sale of donuts in a bakery has been upheld as a permitted “retail establishment” despite an express prohibition against a “plant for manufacturing of bakery products”, where the prevailing character of the use was as a retail establishment. *Kraft v. Board of Appeals of Lynnfield*, 333 Mass. 573 (1956).

Under the *Harvard v. Maxant* test, a restaurant in a Borders Bookstore, which ordinarily would have been a separate principal use requiring a special permit, was determined to be an incidental, accessory use to the principal bookstore use. *Select Sites of Peabody, Inc. v. City of Peabody*, 2 Land Court Reporter 180 (1994). Similarly, in districts in which retail sales were allowed as a matter of right, but automobile repair garages required a special permit, the Land Court determined that twelve bay repair garages attached to automotive parts retail stores were incidental to the principal retail sales use of the property. The repair garage uses therefore avoided the special permit requirements the municipalities had tried to impose. *Pep Boys - Manny, Moe & Jack of Delaware, Inc. v. Board of Aldermen of the City of Everett*, Land Court Misc. No. 232190 (1998); *Pep Boys - Manny, Moe & Jack of Delaware, Inc. v. City Council of the City of Revere*, Land Court Misc. No. 239088.

## STANDING UPDATE

In recent years, it has become evident that the primary battlefield in zoning appeals and other land use litigation has moved away from consideration of the merits of the permits being litigated. Increasingly, the battle over who can build what, and where he or she can build it, is fought on the procedural and jurisdictional battlefield of standing. As abutters and other neighbors seek to stop or limit what they believe to be unwarranted intrusions into their neighborhoods, and as developers, and sometimes towns, seek ways to avoid the delay and risk of

litigation of the merits of variances, special permits and other land use permits, the law of standing has assumed an importance oftentimes greater than the importance of the merits of the project over which the battle is being fought. Indeed, the whole purpose of raising the affirmative defense that the plaintiff in a zoning challenge lacks standing, is to avoid any evaluation of the merits of the project whatsoever. In the case of a challenge to the granting of a variance, which seldom can be successfully defended on the merits, such a defense may be the developer's only hope.

Standing most commonly arises as an issue in zoning appeals under G. L. c. 40A, §17, subdivision appeals under G. L. c. 41, §81BB, and zoning appeals under the Boston Zoning Enabling Act, St. 1956, c. 665, as amended.<sup>1</sup> However, the issue arises in the context of other land use appeals as well, such as challenges to actions by redevelopment authorities authorizing or modifying urban renewal projects pursuant to G. L. c. 121A. See *Boston Edison Company v. Boston Redevelopment Authority*, 374 Mass. 37, 43 (1977); *St. Botolph Citizens Committee, Inc. v. Boston Redevelopment Authority*, 429 Mass. 1 (1999).

In the context of a zoning or subdivision appeal, plaintiffs must establish their standing as “persons aggrieved” by the decision of the local agency to grant the contested relief. The issue of standing in a zoning appeal is a “jurisdictional prerequisite” to judicial review. *Barvenik v. Board of Aldermen of Newton*, 33 Mass. App. Ct. 129, 131 (1992). In fact, a court has subject matter jurisdiction to consider a zoning appeal “only if it has been brought by a person with standing.” *Watros v. Greater Lynn Mental Health & Retardation Association, Inc.*, 421 Mass. 106, 107 (1995); *Barvenik v. Board of Aldermen of Newton*, 33 Mass. App. Ct. at 131.

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The reasoning of cases deciding whether a plaintiff is a “person aggrieved” under G. L. c. 40A is equally applicable to cases arising under the Boston Zoning Enabling Act. *Sherrill House v. Board of Appeal of Boston*, 19 Mass. App. Ct. 275 (1985).

For this reason, it may be appropriate to challenge standing in the form of a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), Mass. R. Civ. P., instead of waiting to present such a defense in the form of a motion for summary judgment. However, it is inappropriate to grant a motion to dismiss on the basis of lack of standing if the plaintiff is an abutter, with a consequent presumption of standing, where the plaintiff has not had an opportunity to present evidence to establish his status as an “aggrieved person”. *Cummings v. City Council of Gloucester*, 28 Mass. App. Ct. 345 (1990).

As a jurisdictional issue, the issue of standing is no mere pleading technicality but rather is “a vital element of all proceedings challenging administrative action[s].” *Barvenik v. Board of Aldermen of Newton*, 33 Mass. App. Ct. at 133 n.10. Because any judicial challenge stops a duly-permitted project in its tracks, the Supreme Judicial Court has warned of the danger of a serious erosion of the “efficacy of the administrative process” in the absence of “exact adherence to the requirements as to standing.” *Id.* at 133-134 n.10, *quoting*, *Save the Bay, Inc. v. Department of Public Utilities*, 366 Mass. 667, 672 (1975). Thus, “to preserve orderly administrative processes and judicial review thereof, a party must meet the legal requirements necessary to confer standing.” *Id.*

Although the issue is jurisdictional in nature, it is generally not incumbent upon the plaintiff to assert in the first instance that he or she has standing as a “person aggrieved”. Provided that the plaintiff is an abutter, or at least a property owner who is close enough to the contested project to have received official notice of the hearing from the local board, the plaintiff is clothed with a presumption of standing. *Marotta v. Board of Appeals of Revere*, 336 Mass. 199, 204 (1957). To be sure, the presumption disappears the instant the defendant challenges standing as an affirmative defense or offers any evidence tending to challenge the plaintiff’s standing. At that point, whether the plaintiff is a “person

aggrieved” must be determined on the evidence without the benefit of a presumption. *Waltham Motor Inn, Inc. v. Lacava*, 3 Mass. App. Ct. 210, 215 (1975). See also *Tsagronis v. Board of Appeals of Waltham*, 415 Mass. 329 (1993).

Generally, “[a] party has standing when it can allege an injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred.” *Massachusetts Ass’n of Independent Insurance Agents and Brokers, Inc. v. Commissioner of Insurance*, 373 Mass. 290, 293 (1977), citing, *Circle Lounge & Grille, Inc. v. Board of Appeal of Boston*, 324 Mass. 427 (1949). The injury, however, must be special or different from the concerns of the rest of the community. *Barvenik v. Board of Aldermen of Newton*, 33 Mass. App. Ct. at 131-132. It is not enough to merely be close, or even an abutter to the property that has received the benefit of the contested permit. “The status of the property or of the plaintiffs may be such that the plaintiffs are not aggrieved even though the property is very near.” *Marotta v. Board of Appeals of Revere*, 336 Mass. 199, 203 (1957).

To qualify as a “person aggrieved”, “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 132. It is not necessary that the plaintiff own property in the same zoning district as the challenged property, so long as the plaintiff can demonstrate “a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest.” *Jaffe v. Zoning Board of Appeals of Newton*, 34 Mass. App. Ct. 929, 930 (1993).

Subjective and unspecific fears about the possible impairment of aesthetics or neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood feeling, or the loss of open or natural space are all considered insufficient bases for aggrievement under Massachusetts law.” *Barvenik v. Board of Aldermen of Newton*, 33 Mass. App. Ct. at 132-133. However, this does not mean that the plaintiff must show that his property will suffer a greater harm from the project as approved than he would from a project that could have been built as a matter of right. A rule that would require a plaintiff to show a substantial likelihood of harm greater than that which would result from use of the property permissible as of right would be “inconsistent with the principle that the term ‘person aggrieved’ should not be construed narrowly.” *Chambers v. Building Inspector of Peabody*, 40 Mass. App. Ct. 762, 768 (1996), citing *Marashlian v. Zoning Board of Appeals of Newburyport*, 421 Mass. 719, 722 (1996).

In *Barvenik v. Board of Aldermen of Newton*, 33 Mass. App. Ct. 129 (1992), the Appeals Court appeared to swing the standing pendulum substantially toward the developer by making it more difficult for a plaintiff to establish standing. One conclusion that could have been drawn from *Barvenik* was that it would thereafter be virtually impossible to demonstrate standing without the benefit of expert testimony. Such feared negative impacts of a new project as increased traffic and lower water pressure, while legitimate issues which could prove standing, must be demonstrated by “specific evidence” and not by “conjecture and hypothesis.” *Barvenik v. Board of Aldermen of Newton*, 33 Mass. App. Ct. at 133.

Since *Barvenik*, there have been several appellate decisions denying standing to plaintiffs.<sup>2</sup> But on the whole the pendulum has been slowly swinging

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See, e.g., *Cohen v. Zoning Board. Of Appeals of Plymouth*, 35 Mass. App. Ct. 619 (1993), *cert. den.*, 417 Mass. 1102 (1994);

back the other way, making it easier for plaintiffs to establish standing in a variety of circumstances. In two of the post-*Barvenik* cases, the Supreme Judicial Court, on further appellate review, reversed decisions of the Appeals Court on the issue of standing. Post-*Barvenik* courts have found that plaintiffs established standing in the following circumstances:

Owner's (non-expert) affidavit asserting, on personal knowledge, negative effect on his property from increased foot traffic and "loud and boisterous parties" at home occupied by fourteen college students, as well as owner's opinion that this affected his property value, was sufficient to confer standing. *Jaffe v. Zoning Board of Appeals of Newton*, 34 Mass. App. Ct. 929 (1993).

Plaintiff property owners had standing to challenge issuance of permit for 190 foot tower on basis of its visual impact, where zoning by-law specifically provided that such structures should not detract from visual character or quality of neighborhood. Thus, an aesthetic, visual concern, which would ordinarily not be sufficient to confer standing, was elevated to a private property interest by the status conferred upon it by the zoning by-law. *Monks v. Zoning Board. Of Appeals of Plymouth*, 37 Mass. App. Ct. 685 (1994), *cert. den.*, 419 Mass. 1106 (1995).

In a reversal of the Appeals Court on further appellate review, the Supreme Judicial Court found that nothing had been presented at a hearing on a motion to dismiss which controverted the plaintiff abutters' presumption of standing. *Watros v. Greater Lynn Mental Health & Retardation Association, Inc.*, 421 Mass. 106 (1995).

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*Marashlian v. Newburyport Zoning Board of Appeals*, 37 Mass. App. Ct. 931 (1994) (reversed) 421 Mass. 719 (1996);

*Watros v. Greater Lynn Mental Health*, 37 Mass. App. Ct. 657 (1994) (reversed) 421 Mass. 106 (1995);

*Riley v. Janco Central Inc.*, 38 Mass. App. Ct. 984 (1995), *cert. den.*, 421 Mass. 1108 (1996).

“[M]inimal increase in traffic and a decrease in the number of currently available public parking spaces” as result of construction of new hotel was sufficient to confer standing on property owner across the street. Significantly, the non-expert testimony of the plaintiff, dismissed by the Appeals Court as “conjecture and hypothesis”, on further appellate review was deemed sufficient to confer standing by the Supreme Judicial Court. *Marashlian v. Zoning Board of Appeals of Newburyport*, 421 Mass. 719 (1996).

Enlargement of building over previously approved structure, and change in footprint so that the proposed building is closer to the plaintiff’s property line, as well as noisy air conditioning tower, were sufficient to confer standing. *Chambers v. Building Inspector of Peabody*, 40 Mass. App. Ct. 762 , *cert. den.*, 423 Mass. 1107 (1996).

Plaintiff abutters had standing to challenge extension of nonconforming mobile home park, on basis of a showing by the plaintiffs that there would be an increase in pedestrian traffic as a result of the extension of the use. *Cox v. Board of Appeals of Carver*, 42 Mass. App. Ct. 422 , *cert. den.*, 425 Mass. 1102 (1997).

Immediate abutters in the same zoning district as the property in question have “a legitimate interest in preserving the integrity of the district against a change to a use which is not allowed as of right in the district,” and which may afford standing. *Davis v. Touchette*, 6 Land Court Reporter 159, 162 (1998). Plaintiff abutters were also afforded standing by demonstrating that there would be an increase in intensity of the use with associated parking and traffic concerns. *Id.*

Other pre-*Barvenik* cases appear to retain their vitality as well. An important and oft-cited principle is that “a proprietor in a less restricted zone is not a ‘person aggrieved’ within the meaning of the statute by the introduction into

a more restricted zone of any use permitted in the zone in which the proprietor's property is located." *Circle Lounge & Grille v. Board of Appeal of Boston*, 324 Mass. 427, 432 (1949). See also *Sherrill House v. Board of Appeal of Boston*, 19 Mass. App. Ct. 274 (1985). A corollary of this rule is the principle that a business proprietor is not a "person aggrieved" by the introduction of another business on the ground that the new use will subject the plaintiff to unwanted competition. *Id.*, at 429-430. See also *Green v. Board of Appeals of Provincetown*, 404 Mass. 571 (1989). However, a plaintiff whose land lies in the same district as the subject locus may have "aggrieved person" status even though his land suffers from the same nonconformity which required the granting of the zoning relief of which he complains. *Tsagronis v. Board of Appeals of Wareham*, 33 Mass. App. Ct. 55, 59 (1992).

In the trenches of the Superior Court, however, the result is often a finding that the plaintiff does not have standing, and may not proceed to a challenge of the grant of relief on the merits. See, e.g., *Gillis v. City of Boston Board of Appeal*, Suffolk Superior Court Civil Action No. 02--1934C, *Memorandum and Decision on Defendant's Motion to Dismiss For Lack of Subject Matter Jurisdiction* (Riley, J., January 29, 2003).