BROOKS & DERENSIS, P.C.

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STANDING TOO CLOSE

On September 30 , 2019 the Appeals Court reviewed the concept of "standing" when it comes to appeals from zoning permits, in the case known as "Murchison v. Zoning Board of Appeals of Sherborn, and others". In that case, the plaintiffs own a single-family home; the defendants own a vacant three-acre lot across the street from the plaintiffs' property. Both lots are in the town's Residence C zoning district. The town's zoning bylaws impose a requirement that each lot in that district have a minimum lot width of 250 feet.

On June 29, 2016, the town's zoning enforcement officer (ZEO) issued a foundation permit for a single-family residence on the defendants' property (the "proposed development"). On July 19, 2016, the plaintiffs filed a timely notice of appeal to the town's zoning board of appeals (the "board"), which held a public hearing on the matter on September 14, 2016. On October 5, 2016, the board upheld the ZEO's issuance of the permit. The plaintiffs then appealed the board's ruling to the Land Court under G. L. c. 40A, § 17.

In the Land Court, the plaintiffs argued that the proposed development violated the bylaws because the lot had insufficient width. The bylaws state that "minimum lot width" is to be "[m]easured both at front setback line and at building line. At no point between the required frontage and the building line shall lot width be reduced to less than [fifty] feet, without an exception from the Planning Board."

The bylaws define "Width, Lot" as "[a] line which is the shortest distance from one side line of a lot to any other side line of such lot, provided that the extension of such line diverges less than [forty five degrees] from a line, or extension thereof, which connects the end points of the side lot lines where such lines intersect the street right-of-way." There is no definition of "front setback line". The definition of "building line" is "[a] line which is the shortest distance from one side line of the lot to any other side line of the lot and which passes through any portion of the principal building and which differs by less than [forty five degrees] from

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SUPERIOR COURT REINSTATES POLICE CHIEF'S BYPASS DECISION AND VACATES CIVIL SERVICE ORDER

Superior Court Judge Paul D. Wilson recently vacated an order by a divided Civil Service Commission that had previously overturned the decision of the town's Police Chief to bypass a candidate for appointment as a police officer. The Chief determined that the bypassed candidate: (1) interviewed poorly; (2) associated in romantic relationships with improper individuals who the police department knew, and who the candidate should have known, had a reputation in the community for involvement in criminal behavior; and (3) was judged not as qualified as a lower ranked candidate, who was appointed.

THE CIVIL SERVICE COMMISSION'S DECISION

Historically, the Civil Service Hearing Officer reviewed the candidate's interview tape and disagreed with the unanimous conclusions of the two Lieutenants, a Detective and a Sergeant that the candidate appellant scored lower on the interview than the appointed candidate. Both interviewing Lieutenants informed the Chief that the appellant's interview was "one of the worst ever." The Chief reviewed that interview recording, and he concluded that the candidates interview performance was "atrocious."

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Keep Your Eye Out for Changes in Site Plan Approval

The Land Court recently reflected on the "hodge-podge" of municipal approaches to the Site Plan review process, calling for legislative changes to the zoning statutes that govern that land development mechanism. The confused, and confusing, nature of those site plan applications and approvals was illustrated in a recent Land Court case entitled "*Corner v. Forest Delahunt Development, LLC*", wherein a developer proposed a sporting complex facility comprised of three skating rinks, with seating for 1,500 spectators, a 300 seat restaurant and parking for 400 vehicles. In *Corner*, Judge Speicher ultimately dismissed the abutters' complaint finding that it was "not ripe" for review as certiorari was unavailable to appeal from that site plan approval. This was concerning to the court. Not the least of these concerns is the vexing task of trying to determine the rules governing the appellate process: How, When and even IF such approvals can be appealed.

As Land Court Judge Speicher set forth in his opinion concerning the *Corner* dispute, municipalities "appear to be struggling with how best to put together a complicated tool for which they were given no assembly instructions". Given the time of year, we all know how very difficult that can be! As Land Court Judge Speicher wrote, "[t]he problem cries out for a legislative solution in the form of an amendment to G.L. c. 40A providing municipalities with a standard procedure and appellate path for review of site plans. Lacking such instructions, municipalities…and developers and abutters…are left with an inadequate tool for which the courts can offer tape and bailing wire but no real fix".

HOW to "tweak" G.L. c. 40A may not be so easy, even if land use counsel could agree that such a fix is even necessary. Some counsel suggest that Section 17 of the zoning statutes could be amended to provide for a specific right to appeal site plan decisions, while others disagree suggesting that such an addition to G.L. c. 40A will only open up new- and some would say unnecessary- avenues for appeal; still others suggest that Building Commissioners shoulder the burden when analyzing the facts and making determinations on the issuance of building permits. How about a town by town approach? While that may relieve a particular town from a lawsuit sometime in the future, it doesn't solve the problem, and widespread confusion would still exist. Stay tuned, perhaps the legislature will light the way.

Superior Court Reinstates Police Chief's Bypass Decision and Vacates Civil Service Order

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The majority opinion of the Civil Service Commission adopted the Hearing Officer's decision, with the disclaimer that, in their opinion, the Hearing Officer's "comments", "do not mean to suggest that the department's selection process was intentionally or knowingly skewed for ulterior reasons of personal animus or bias." On the contrary, the majority recognized that the department's interview plan had much to be commended, noting that the candidates were asked the same series of questions and that the Chief strived to appoint interview panel members who would be fair and independent and that he chose not to sit on the panel himself so as to minimize any risk that the other panel members would give undue weight to his assessments. And a uniform numerical score sheet was used to rank each candidate's interview performance, which was independently graded by each panel member. The Chief required all interviews to be audio-video recorded and used the recordings as an essential tool in making his own decision as the appointing authority about who to select for appointment.

Nonetheless, the Hearing Officer's "comments" raised, in the majority's view, "red flags" by which the majority concluded that, "the absence of the recording of [the successful candidates] interview (which was not recorded due to a malfunction in the recording device) is fatal." Without that recording, the majority concluded, the department's decision to bypass the complainant could not be found to be reasonably justified and free of overtones of disparate treatment after a reasonably through review.

That however was not a view shared by all. In a Dissent to that opinion, one highly esteemed and long-standing member of the Commission noted that, "The video recording of [the unsuccessful candidate's] interview and [the testimony of the department supervisory personnel] before the Commission support the conclusions they reached at the time of bypass."

A background investigation revealed that the unsuccessful candidate had relationships with three individuals with questionable background histories, one of which was described by an associate as "a dirtbag". Another one of those associations involved an individual described as a "career criminal", and yet another was with an individual known to the department to have drug related connections.

Despite the fact that another well respected and highly qualified member of the Commission cited the correct standard in her dissent:

. . . this decision finds that the Appellant repeatedly engaged in associations with people who appear to qualify as "persons under criminal investigation ... or who have a reputation in the community or the Department for present involvement in

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Standing Too Close

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a line which connects the end points of the side lot lines at the point at which they intersect the street right-of-way."

The plaintiffs argued that, applying these definitions, the lot widths were 209.56 feet and 192.42 feet at the front setback line and building line respectively, neither of which satisfied the minimum lot width requirement of 250 feet. The defendants argued that their proposed development satisfied the minimum lot width requirement. After a four-day trial, the Land Court judge issued a judgment that did not reach the merits of the case, and instead dismissed it for lack of standing. The defendants appealed.

G. L. c. 40A, § 17, allows any "person aggrieved by a decision of the board of appeals" to challenge that decision in the Land Court. "A 'person aggrieved' is one who 'suffers some infringement of his legal rights.'" Sweenie v. A.L. Prime Energy Consultants, 451 Mass. 539, 543 (2008), quoting Marashlian v. Zoning Bd. of Appeals of Newburyport, 421 Mass. 719, 721 (1996). There is a rebuttable "presumption of standing" to all parties satisfying the definition of "parties in interest" in G. L. c. 40A, § 11; see 81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692, 700 (2012). This definition includes "owners of land directly opposite on any public or private street or way." G. L. c. 40A, § 11.

Since the plaintiffs are owners of land directly opposite the lot in question, they satisfy the definition of "parties in interest" and are therefore entitled to a rebuttable presumption of standing. This rebuttable presumption does not displace the general rule that a plaintiff has the burden to prove aggrievement under the statute. The rebuttable presumption of standing merely "places on the adverse party the initial burden of going forward with evidence." 81 Spooner Rd., supra at 701.

Defendants can rebut the presumption of standing in two ways. First, they can "show[] that, as a matter of law, the claims of aggrievement raised by an abutter, either in the complaint or during discovery, are not interests that the Zoning Act[, G. L. c. 40A,] is intended to protect," 81 Spooner Rd., 461 Mass. at 702, or that these claims are not "within the legal scope of the protected interest created by the bylaw." Sweenie, 451 Mass. at 545. "Second, where an abutter has alleged harm to an interest protected by the zoning laws, a defendant can rebut the presumption of standing by coming forward with credible affirmative evidence that refutes the presumption," by, for example, "establishing that an abutter's allegations of harm are unfounded or de minimis," 81 Spooner Rd., supra, "or by showing that the plaintiff has no reasonable expectation of proving a cognizable harm." Picard v. Zoning Bd. of Appeals of Westminster, 474 Mass. 570, 573 (2016).

If the defendants rebut the presumption, the burden shifts to the plaintiffs. "[T]he plaintiff must prove standing by putting forth credible evidence to substantiate the allegations. . . . This 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" (quotation omitted). 81 Spooner Rd., supra at 701. "A review of standing based on 'all the evidence' does not require that the fact-finder ultimately find a plaintiff's allegations meritorious. To do so would be to deny standing, after the fact, to any unsuccessful plaintiff. Rather, the plaintiff must put forth credible evidence to substantiate his allegations." Kenner v. Zoning Bd. of Appeals of Chatham, 459 Mass. 115, 118 (2011), quoting Marashlian, 421 Mass. at 721.

The plaintiffs in this case claim that they are aggrieved because the lot width requirement protects their interest in preventing the overcrowding of their neighborhood and that this interest would be harmed by the proposed development. The Appeals Court then assumed, without actually finding, that the defendants offered enough evidence to warrant a finding contrary to the presumed fact of aggrievement, and then it turned to the question whether the plaintiffs have introduced sufficient evidence of aggrievement to give them standing. Upon review the Appeals Court determines whether the judge's determination on standing for clear error; see Cornell v. Michaud, 79 Mass. App. Ct. 607, 615 (2011).

As noted by the Appeals Court, "[t]o begin with, we must assess the claimed legal interest whose invasion is alleged to cause injury to the plaintiffs, in this case, the interest against overcrowding". The Court noted that "[a]s a general matter, "[t]he right or interest asserted" to be invaded "by a plaintiff claiming aggrievement must be one that G. L. c. 40A is intended to protect." Kenner, 459 Mass. at 120. Many cases hold that the prevention of overcrowding (sometimes referred to as "density") is an interest protected by the Zoning Act; see, e.g., Picard, 474 Mass. at 574 (referring to "density" as "typical zoning concern[]"); Aiello v. Planning Bd. of Braintree, 91 Mass. App. Ct. 354, 364 (2017), quoting Sheppard v. Zoning Bd. of Appeal of Boston, 74 Mass. App. Ct. 8, 12 (2009) ("crowding of an abutter's residential property by violation of the density provisions of the zoning by-law will generally constitute harm sufficiently perceptible and personal to qualify the abutter as aggrieved and thereby confer standing to maintain a zoning appeal"); Dwyer v. Gallo, 73 Mass. App. Ct. 292, 297 (2008).

A plaintiff can also independently "establish standing based on the impairment of an interest protected by [a town's] zoning bylaw." Kenner, 459 Mass. at 121. And, contrary to the defendants' contention that the town "does . . . not . . . purport to zoning bylaws also protect the plaintiffs' interest against overcrowding as the zoning bylaws contain dimen-

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Superior Court Reinstates Police Chief's Bypass Decision and Vacates Civil Service Order

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felonious or criminal behavior". The Appellant herself acknowledged that she had made "bad choices" in that regard repeatedly and fairly recently. Even giving the Appellant the benefit of the doubt, that she did not know that the several persons with whom she associated fell under the category of persons referenced in [the Police Department's Rules], it is troublesome either that she did not detect their status and/or chose not to find out. Combined with her low interview scores, and in view of the more than reasonably thorough review of the candidates conducted by the Respondent, I believe that the respondent established, by a preponderance of the evidence, that it had reasonable justification to bypass the Appellant.

The Commission unexplainably accepted the Hearing Officer's conclusion that the candidate's history of improper associations provided no reasonable justification supporting the department's decision to bypass the candidate.

THE TOWN'S APPEAL

The Town appealed. In its argument to the Superior Court, it noted the prior admonition of the Appeals Court that:

> **The commission must stay focused on its mission "to guard against political considerations, favoritism, and bias in governmental employment decisions." If it ignores the limits on its authority and continues to seek to substitute its judgment for reasonable decisions of appointing authorities of the Commonwealth, as recognized by the dissenting commissioner, it will waste resources of all involved as its rulings will continue to be overturned in the courts.** Town of Randolph v. Civil Service Commn 81 Mass.App.Ct. 1123, f.n. 2 (2012)

Here, the Commission apparently ignored that admonition by deciding that the majority knew better than the Appointing Authority about whether the department should take the risk of hiring an unqualified police officer candidate. Instead of fulfilling their proper function, i.e. finding whether or not the department sustained its burden of proving that there was "reasonable justification" for the department's decision to bypass the candidate, the majority instead, (improperly and of their own volition), decided whether, in their *own* view, the candidate should have been bypassed. This was wrong. The majority inserted themselves as interviewers in the process, and determined whether the candidate's interview passed **their** muster, rather than focusing on the fundamental purposes of the Civil Service system – to guard against political considerations, favoritism and bias in governmental employment decision. Moreover, there was no evidence that favoritism or bias factored into the department's decision to bypass the candidate. Accordingly, the Court reversed the majority's decision because in substituting their judgement for the reasonable decision of the department, the Civil Service Commission exceeded its authority and committed an error of law.

THE SUPERIOR COURT'S DECISION

As the Superior Court ruled, "Not only is the record devoid of any substantial evidence to support the Commission's conclusion, but the evidence is directly to the contrary." Thus, in addition to exceeding its authority, the Court found that the Civil Service Commission lacked substantial evidence to support its conclusion.

The Court noted that, "An important basis - arguably the most important basis - for the Commission's decision to overturn the Chief's bypass decision was its view that he was wrong to worry about the candidate's prior improper associations. The Town is correct in arguing that the Commission overstepped its statutorily assigned role in this regard. The Decision makes clear that the Commission simply draws a different conclusion about whether this history warranted the Chief's fear that the candidate might be prone to repeating these 'bad choices' in a manner that would affect her fitness to serve as a police officer. Such judgment calls are left to the Town, so long as the Town's decision was made after an 'impartial and reasonably thorough review' of the background and qualifications of the candidates' fitness to perform the duties of the position and that there was 'reasonable justification' for the decision." Thus, the Superior Court concluded, "the Commission overstepped its statutory role, by evaluating the merits of the bypass decision, and determining that it would not have bypassed the candidate. That was an error of law." The Chief, and the Town prevailed; that is how it should be.

For further information on this case, or the law regarding same, contact Attorney Peter J. Berry.

Cold Comfort

In a recent case before the Massachusetts Commission Against Discrimination, a hearing officer did not err in concluding that it would have been an undue hardship on the New Bedford Housing Authority to grant a tenant's request to keep her pet snake in her apartment as an emotional support animal. Dogs Rule…

Standing Too Close

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sional requirements that protect neighbors from overcrowding, and that "the minimum lot width requirement at issue here is a prime example".

The Court noted that that aspect of the bylaws which require that lots be of a certain minimum width as measured in a specific way at two defined points, ensures that buildings are not constructed within a certain distance of one another, which, the Court found, "puts a limit on the neighborhood's maximum possible density"; the Court concluded that both the Zoning Act and town's zoning bylaws protect the interest against overcrowding, and its invasion may suffice to give the plaintiffs standing.

In Murchison the plaintiffs asserted that if the proposed development goes forward, they will suffer a particularized injury to their protected interest against overcrowding as a result of the development's alleged violation of the lot-width bylaw provisions. Although the plaintiffs introduced no evidence that the development was already more dense than allowed, the Court found that they didn't need to. Instead it found that "neither this court nor the Supreme Judicial Court has ever held that being in an already-overcrowded neighborhood is a prerequisite for a density-based harm sufficient to confer standing."

It went on to note that "[n]or would a rule requiring an already-overcrowded neighborhood make sense. There is no reason the first neighbor to violate a density regulation should have a free bite at the apple if that violation causes particularized harm to another property owner. The question for standing purposes is whether there is a particularized non-de minimis harm resulting from the unlawful overcrowding. Such harm can be caused by a first violation as well as a second or subsequent one."

The Court also cautioned however that "to conclude that a plaintiff can derive standing to challenge the issuance of a special permit from the language of a relevant bylaw, without more, eliminates the requirement that a plaintiff 'plausibly demonstrate' a cognizable interest in order to establish that he is 'aggrieved'". To establish this the Court noted that "the fact of the placement of the house on the lot across the street from the plaintiffs that demonstrates particularized harm to the plaintiffs, not the mere violation standing alone".

"There is no platonic ideal of overcrowding against which the plaintiffs' claim is to be measured. Although the distance between the houses might not amount to overcrowding in an urban area, absent some constitutional concern, which the defendants do not argue exists in this case, cities and towns are free to make legislative judgments about what level of density constitutes harm in various zoning districts and to codify those judgments in bylaws. It does not matter whether we, or a trial judge, or the defendants, or their counsel, would consider the district "overcrowded." What matters is what the town has determined".

For more information on this case or the law regarding same, contact Attorney Kimberly M. Saillant.

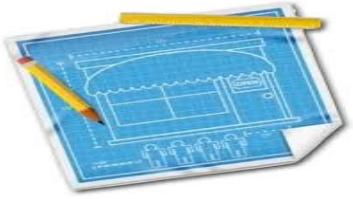
Meet John GF Ruggieri-Lam, BD Law's Real Estate Practice Coordinator

John GF Ruggieri-Lam joined BD Law in the Spring of 2019; he was recently appointed a Principal of the Firm. John brings over 28 years of real estate and transactional practice to enhance the firm's services to its Municipal Law clients.

Initially a native of Rhode Island, John came to Massachusetts to attend Boston University, and thereafter Suffolk University Law. After obtaining his law degree in 1990, John began his career first in general practice, and thereafter concentrated in Real Estate development and conveyancing work.

John's skillset is "anything and everything that touches real estate", and he has been beneficial in handling scores of matters for municipalities, including: land grants and sales to and from cities and towns, land easements restrictions and covenants related to municipal lands and buildings, negotiations with real estate developers and landowners with municipal agencies and officials, land agreements and transactions with municipal residents, agreements and matters concerning environmental matters.

In conjunction with BD Law's other counsel that are proficient in municipal concerns, employment, procurement, litigation and other aspects of municipal law and governance, John noted, "the firm's capability to handle just about any municipal matter that is brought up is clearly evident." John is a welcome and valued member of our team.



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Brooks & DeRensis, P.C. is a Boston law firm offering sophisticated legal capabilities and personal service at reasonable rates. The Firm's attorneys have an unusual concentration of experience in many disciplines—from municipal to corporate law, from real estate to litigation, from labor to immigration. As a group, we work together to serve our clients' needs effectively across those disciplines.

By focusing intently on each client's goals and priorities, we are able to provide consistent, targeted advice and representation. Without layers of junior attorneys, the Firm renders efficient as well as effective legal service.

The clients of Brooks & DeRensis range from large corporations and closely-held businesses to state and local government and schools, and from insurance carriers to non-profit corporations and individuals. Each of our clients receives personalized legal service from a team of committed attorneys and legal assistants.

We look forward to building our professional relationship with you. Call us anytime; or check us out at www.bdboston.com.

MUNICIPAL

TOWN COUNSEL SERVICES/LITIGATION/REAL ESTATE/LAND USE

Brooks & DeRensis, P.C. represents cities and towns throughout Massachusetts. The consistent growth in our municipal law practice reflects an effective problem solving approach to advising and representing elected and appointed officials. We are experienced in assisting in the day-to-day decision making, planning and problem solving faced by mayors, licensing boards, county commissioners and treasurers, sheriffs, board of selectmen, registrars of deeds, planning boards, police departments, board of appeals, building inspectors, special permit granting authorities, historic district commissions, boards of accessors, conservations commissions, and local study committees.

We are known for our cost-effective work and our aptitude for problem prevention.

Municipal law services include: Town Counsel Services; Collective bargaining and labor relations; Civil rights; Competitive bidding and procurement; State ethics laws; Contracts; Finance; Taxation; Litigation; Public liability; Intergovernmental relations; Legislation; Land use, real estate, historic preservation, eminent domain; and Environmental issues, waste disposal, wetland protection.