COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

DOCKET NO. 2021-P-0336

PAUL DALTON, et al.
Plaintiffs/Appellants

v.

PITTSFIELD CELLULAR TELEPHONE COMPANY
d/b/a VERIZON WIRELESS, et al.
Defendants/Appellees

ON APPEAL FROM A JUDGMENT OF THE BERKSHIRE SUPERIOR COURT, DOCKET NO. 2076CV00078

APPELLEES' BRIEF

Mark J. Esposito, BBO # 672638
Shatz, Schwartz and Fentin, P.C.
1441 Main Street, Suite 1100
Springfield, MA 01103
(413) 737-1131
(413) 736-0375 (fax)
mesposito@ssfpc.com

and

Buffy D. Lord, BBO # 662330
Donovan O'Connor & Dodig, LLP
1330 Mass MoCA Way
North Adams, MA 01247
(413) 663-3200
(413) 663-7970 (fax)
mail@docatty.com

Dated: July __, 2021

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Whether the statute of limitations set forth in G.L. c. 40A, § 17 should be enforced where the zoning authority complied with the statutory notice requirements, regardless of whether objecting abutters had actual notice of the granting of the special permit.

Whether the strict ninety-day limitations period set forth under G.L. c. 40A, § 17 can be tolled in the

absence of a total and complete failure of statutorily required notice.

Whether the court below was correct in finding that there existed a material dispute of fact as to whether the City of Pittsfield complied with the statutory directive to mail notices to Plaintiffs.

Statement of the Case

Plaintiffs appeal from a decision of the Berkshire Superior Court granting summary judgment in favor of Defendants on the ground that Plaintiffs' claim was not timely filed.

Statement of the Facts

Verizon filed a petition with the City of Pittsfield Zoning Board of Appeals (the "Board") seeking a special permit to install a cellular tower at 877 South Street in Pittsfield, Massachusetts. [025-026]. The City of Pittsfield (the "City") certified a list of abutters and abutters to abutters, published a notice of public hearing in the Berkshire Eagle, and posted a copy of the notice at City Hall and on the City's website. [026].[1]

[1] The City offered evidence that the required notices were mailed. [140-142]. Plaintiffs disputed that the notices were received. [103-120].

Following public hearing, at which one abutter was present, the Board granted the special permit on November 15, 2017 and filed that decision with the City Clerk on November 29, 2017. [026-027, 082]. No interested party filed an appeal within ninety days of the decision being filed with the City Clerk. [027]. An Associate Justice of the Superior Court granted summary judgment in favor of Defendants on the basis that the complaint that Plaintiffs ultimately filed was untimely. [334].

Argument

A. Because there was not a total and complete failure of notice, the strict ninety-day limitations period applies and the Superior Court properly found the complaint time-barred.

General Laws Chapter 40A, Section 17, provides, in pertinent part, that in cases where defective notice is alleged, any suit challenging the granting of a special permit must be brought "within ninety days after the decision has been filed in the office of the city . . . clerk[.]" G.L. c. 40A, § 17. In this case, the decision was filed on November 29, 2017. [026-027]. Plaintiffs did not bring their suit within 90 days of November 29, 2017. [027]. Thus, it is facially apparent that Plaintiffs' suit was not

brought within the applicable limitations period. By the plain text of the statute, their suit is time-barred.

In seeking to save their suit from the untimeliness of its initiation, Plaintiffs rely upon the case of *Kramer v. Zoning Bd. of Somerville*, 65 Mass. App. Ct. 186 (2005), for the proposition that

> at least where there has been a complete failure of notice of a public hearing in advance of the granting of a special permit, the ninety-day limitation in G.L. c. 40A, § 17, should not be deemed to run until the abutter has notice of the project to which he objects.

Kramer, 65 Mass. App. Ct. at 193-94. The proviso in the quoted language makes clear, however, that *Kramer* mandates the tolling of the limitations period only "where there has been a *complete failure* of notice of a public hearing in advance of the granting of a special permit[.]" *Kramer*, 65 Mass. App. Ct. at 193-94 (emphasis supplied).

In the case of *Robicheau v. Nissan Norwood Realty*, LLC, 72 Mass. App. Ct. 1118 (2008) (Rule 1:28 Decision), *further appellate review denied* 452 Mass. 1109 (2008), the Court noted that the time periods within which to challenge the issuance of a special permit "are 'policed in the strongest way' and

'failure to file the action . . . within the statutory period has fatal consequences.'" *Robicheau*, at *3, *quoting Pierce v. Bd. of Appeals of Carver*, 369 Mass. 804, 809-10 (1976). The Court explicitly held that *Kramer*-type tolling is limited "to cases where, unlike here, there has been a total and complete failure of notice." *Robicheau*, at *4. The distinctions that Plaintiffs attempt to draw between the facts of *Robicheau* and the facts here are unavailing; the controlling statute imposes a uniform notice process that does not vary depending on the specific circumstances of the special permit at issue.

While Plaintiffs claim that they did not receive actual notice of the decision in time to appeal the grant of the special permit, the undisputed record evidence establishes that there was anything but a total and complete failure of notice. There was, at a minimum, substantial compliance with the statute. It is undisputed that prior to the hearing on the special permit, the Board published a notice of public hearing in the Berkshire Eagle and posted a copy of the notice at City Hall and on the City's website. [026]. After the hearing, the Board filed the decision to grant the special permit with the City Clerk. [026-027].

Because there was not a total and complete failure of notice, the strict ninety-day limitations period applies. The judgment entered in favor of Defendants must be affirmed as Plaintiffs did not timely file their suit.

B. The statutory notice requirements were fully satisfied and the Court below should have granted judgment in favor of Defendants on that ground as well.

The Superior Court's grant of judgment in favor of Defendants may be affirmed on "any ground apparent on the record that supports the result reached in the lower court." *Gabiddon v. King*, 414 Mass. 685, 686 (1993).

The Court below held that "[t]here is a genuine dispute of fact as to whether the City mailed the statutorily required notices." [323]. That holding was in error.

By affidavit, Defendants established that the requisite statutory notice was, in fact, properly mailed. [141-142]. While Plaintiffs assert that the mailed notice was not received by them, they offer no evidence to dispute that the notice was actually sent. Accordingly, Plaintiffs have no "competent evidence to show a genuine issue for trial" on this point. *Green v. Zoning Bd. of Appeals of Southborough*, 96 Mass. App. Ct.

126, 132-33 (2019), *review denied* 483 Mass. 1106 (2019), *quoting Jenkins v. Bakst*, 95 Mass. App. Ct. 654, 660 n. 9 (2019) (emphasis in original). Indeed, the Supreme Judicial Court has held that "the requirements with respect to mailing the notice of the decision were completely satisfied[]" by evidence that a municipal employee mailed the notice, regardless of whether the notice was received. *Zuckerman v. Zoning Bd. of Appeals of Greenfield*, 394 Mass. 663, 668-69 & n.4 (1985). Put another way, evidence of non-receipt is not evidence of lack of mailing.

As a matter of law, Plaintiffs seek to read a requirement of actual receipt into Chapter 40A, but the statute clearly mandates only that "required notice shall be given . . . . In all cases where notice to individuals . . . is required, notice shall be sent by mail, postage prepaid." G.L. c. 40A, § 11. If the Legislature had intended to require proof of receipt of actual notice to each abutter or abutter to an abutter, it would have required service by sheriff or by certified mail, return-receipt requested. It did not.

In a case where, as here, there is undisputed evidence that notice was properly mailed, published, and posted, which is all that the statute requires, there is

no genuine dispute of material fact and summary judgment in favor of Defendants is warranted, regardless of whether the mail was actually received by Plaintiffs. *See Zuckerman v. Zoning Bd. of Appeals of Greenfield*, 394 Mass. 663, 669 (1985) (G.L. c. 40A, § 15 requires mailing to the parties in interest; where "[t]here is no suggestion . . . that the notice of the decision was improperly addressed, or that the clerk attached insufficient postage, or that the contents of the notice were defective[,] . . . the requirements with respect to mailing the notice of the decision were completely satisfied."). *See also Fifield v. Bd. of Zoning Appeal of Cambridge*, 450 Mass. 1001, 1002 (2007) (finding mailing requirement under G.L. c. 40A, § 17 satisfied by sending notice, without proof of receipt); *Co-Ray Realty Co., Inc. v. Bd. of Zoning Adjustment of Boston*, 328 Mass. 103, 108 (1951) (finding that judge did not err in ruling notice requirement met by mailing after making "reasonable efforts to ascertain the correct addresses of the owners to be notified[,]" although mail was not successfully delivered to the plaintiff).

Because there is undisputed evidence that the City complied with all statutory notice requirements, including the mailing of notice, summary judgment in

favor of Defendants was warranted on this basis as well and the judgment of the Superior Court must be affirmed.

Conclusion

For the foregoing reasons, the Superior Court's decision was entirely proper. The appeal must be denied and the judgment affirmed.

Respectfully submitted,
For the Defendant/Appellee,
PITTSFIELD CELLULAR TELEPHONE COMPANY d/b/a VERIZON WIRELESS,
By its attorney,

Mark J. Esposito, BBO # 672638
Shatz, Schwartz and Fentin, P.C.
1441 Main Street, Suite 1100
Springfield, MA 01103
(413) 737-1131
(413) 736-0375 (fax)
mesposito@ssfpc.com

and

For the Defendants/Appellees,
CITY OF PITTSFIELD ZONING BOARD OF APPEALS and ALBERT INGEGNI, III, THOMAS GOGGINS, JOHN FITZGERALD, MIRIAM MADURO, and ESTHER BOLEN IN THEIR CAPACITIES AS MEMBERS OF THE CITY OF PITTSFIELD ZONING BOARD OF APPEALS.
By their attorney,

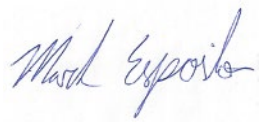
/s/ Buffy D. Lord by MJE w/authorization
Buffy D. Lord, BBO # 662330
Donovan O'Connor & Dodig, LLP
1330 Mass MoCA Way
North Adams, MA 01247
(413) 663-3200
(413) 663-7970 (fax)
mail@docatty.com

Certificate of Compliance

I hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16(a)(13) (addendum);
Mass. R. A. P. 16(e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12, 10 characters per inch, and contains 9 total non-excluded pages.



Mark J. Esposito

Dated: July 6, 2021

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I hereby certify that a true copy of the foregoing document has been served upon:

Patty DeJuneas
Sibbison, DeJuneas & Allen, LLP
One Commercial Wharf West
Boston, MA 02110
dejuneaslaw@gmail.com

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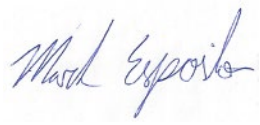

Mark J. Esposito

Addendum

Memorandum of Decision and Order on Joint Motion for Summary Judgment of Defendants Pittsfield Cellular Telephone Company D/B/A Verizon Wireless, City of Pittsfield Zoning Board of Appeals et al.

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2076CV00078

PAUL DALTON et al.[1],
Plaintiffs,
vs.

PITTSFIELD CELLULAR TELEPHONE COMPANY d/b/a VERIZON WIRELESS et al.,[2]
Defendants.

MEMORANDUM OF DECISION AND ORDER ON JOINT MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS PITTSFIELD CELLULAR TELEPHONE COMPANY D/B/A VERIZON WIRELESS, CITY OF PITTSFIELD ZONING BOARD OF APPEALS et al.

The complaint in this case challenges a decision dated November 29, 2017 ("Decision") of the City of Pittsfield Zoning Board of Appeals ("Board") granting zoning relief to Pittsfield Cellular Telephone Company d/b/a Verizon Wireless ("Verizon") for a proposed cell site ("Project") at 877 South Street, Pittsfield, Massachusetts ("Property"). The plaintiffs, Mark Dalton, Diana Wallett Dalton, Mark Markham, Angelika Markham, Aimee Erskine, William Coe, Todd Storti, Russell Holmes, Susan Holmes, Alison Ambrose, Dennis Desnoyers and Michael Goodrich ("Plaintiffs") are abutters or interested persons concerning the Property. For present purposes, the relevant defendants are Verizon, and City of Pittsfield Zoning Board of Appeals and Albert Ingegni III,

[1] Diana Wallett Dalton, Mark Markham, Angelika Markham, Aimee Erskine, William Coe, Todd Storti, Russell Holmes, Susan Holmes, Alison Ambrose, Dennis Desnoyers and Michael Goodrich.
[2] Farley White South St, LLC and City of Pittsfield Zoning Board of Appeals and Albert Ingegni III, Thomas Goggins, John Fitzgerald, Miriam Maduro and Esther Bolen in their Capacities as members of the City of Pittsfield Zoning Board of Appeals.

Thomas Goggins, John Fitzgerald, Miriam Maduro and Esther Bolen in their Capacities as members of the City of Pittsfield Zoning Board of Appeals ("Defendants"). Farley White South St, LLC is also a defendant.

Verizon and the Board have filed a "Joint Motion for Summary Judgment of Defendants Pittsfield Cellular Telephone Company d/b/a Verizon Wireless, City of Pittsfield Zoning Board of Appeals and Albert Ingegni III, Thomas Goggins, John Fitzgerald, Miriam Maduro and Esther Bolen in their Capacities as members of the City of Pittsfield Zoning Board of Appeals " ("Motion") on the ground that the plaintiffs did not file this lawsuit within the time prescribed by G. L. c. 40A, § 17. The Plaintiffs have opposed the Motion. After hearing on August 11, 2020 and upon review of the parties' written submissions, the Court **DENIES** the Motion.

BACKGROUND

The parties' Rule 9A(b)(5) statement and response establishes the following facts (and disputes) for purposes of summary judgment only.

Verizon filed a petition with the Board on or about September 22, 2017, seeking a Special Permit to install a 115-foot cellular tower and related equipment at the Property. On or about October 4, 2017, the City of Pittsfield certified a list of persons consisting of abutters and the owners of land next to and adjoining the land of the abutters to the Property ("Interested Persons"). The plaintiffs are twelve people who are on that list as abutters or abutters to abutters within 300 feet of the Property.

The Board published a notice of public hearing in the Berkshire Eagle and posted a copy of the notice at City Hall and on the City's website.

The Defendants assert, with affidavit support, that the Board mailed the notice of public hearing to each Interested Person by first-class mail on or about October 30, 2017. The Plaintiffs' affidavits assert that they did not receive any written notice by mail regarding the special permit hearing or decision and do not accept an inference that the post office was responsible. For purposes of summary judgment, the court must draw all inferences favorable to the opposing party, and therefore must assume - from the large number of Interested Persons who did not receive notice and the plaintiffs' motivation to oppose the Project if they had received notice -- that the Board did not in fact mail notice of the public hearing to the plaintiffs.

Plaintiffs did not receive or otherwise learn of the notices published in the Berkshire Eagle or at City Hall informing the general public of the Public Hearing.

The Board held the public hearing for the Special Permit on November 15, 2017. The plaintiffs did not attend the public hearing only because they did not know about it. At the November 15, 2017, the Board considered the petition and granted the Special Permit.

The Board filed the decision to grant the Special Permit on November 29, 2017. It has submitted an affidavit that it provided notice of the decision to the Interested Persons by first-class mail on or about December 4, 2017. The plaintiffs' affidavits state that they did not receive the decision, which, again, requires the court to draw the inference solely for summary judgment purposes that the Board did not in fact mail the decision to them.

The Board did publish notice of the Special Permit Decision in the newspaper and posted it in the city hall. Plaintiffs did not receive or otherwise learn about those notices.

None of the Interested Persons filed an appeal of the decision within 90 days of the decision being filed with the City Clerk. They did not do so only because they did not know about the decision. The Plaintiffs did not learn of the Special Permit hearing or Decision until on or about March 18, 2020, when a neighbor witnessed construction trucks driving through her neighborhood on their way to what because the construction site. Upon learning of the construction and prior issuance of a Special Permit during the pandemic, Plaintiffs moved immediately to hire counsel and file suit. Plaintiffs filed suit on April 18, 2020.

DISCUSSION

On summary judgment, the moving party must demonstrate that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law. Foley v. Boston Hous. Auth., 407 Mass. 640, 643 (1990). "[T]he court does not pass upon the credibility of witnesses or the weight of the evidence [or] make [its] own decision of facts." Shawmut Worcester County Bank, N.A. v. Miller, 398 Mass. 273, 281 (1986). Rather, "[a]ll reasonable inferences drawn from the material accompanying a motion for summary judgment 'must be viewed in the light most favorable to the party opposing the motion.'" Ellis v. Safety Ins. Co., 41 Mass. App. Ct. 630, 632 (1996) (citations omitted). See Parent v. Stone & Webster Engr. Corp., 408 Mass. 108, 112-113 (1990). The movant may meet its burden by showing that the plaintiff has no reasonable expectation of producing evidence on a necessary element of his case. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). Once the moving party meets the burden, the opposing party must advance specific facts that establish a genuine dispute of material fact. Id.

Applying these principles, the court first analyzes whether there are genuine disputes of fact, and then determines whether the disputes are material.

I.

There is a genuine dispute of fact as to whether the City mailed the statutorily required notices. For special permits, G.L. c. 40A, § 9 provides, in relevant part: "The special permit granting authority shall hold a public hearing, for which notice has been given as provided in section eleven, for a special permit . . .." Section 9 also requires that "notice of the decision shall be mailed forthwith to . . . the parties interest designated in section eleven . . .." G.L. c. 40A, § 11 provides, in relevant part:

> In all cases where notice to individuals or specific boards or other agencies is required, **notice shall be sent by mail, postage prepaid**. "Parties in interest" as used in this chapter shall mean the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list, notwithstanding that the land of any such owner is located in another city or town, the planning board of the city or town, and the planning board of every abutting city or town. The assessors maintaining any applicable tax list shall certify to the permit granting authority or special permit granting authority the names and addresses of parties in interest and such certification shall be conclusive for all purposes. [Emphasis added].

The Plaintiffs have submitted affidavits from owners of nine different properties entitled to notice, stating that they did not receive notice of the Special Permit public hearing. The statute does not, however, require that persons entitled to notice actually receive notice; it only requires the special permit granting authority to mail notice to all interested persons, first class postage prepaid. G.L. c. 40A, §§9, 11; Zuckerman v. Zoning Board of Appeals of Greenfield, 394 Mass. 663, 669 (1985).

The Defendants have submitted an affidavit attesting to the mailing of the notice and the decision to each Interested Person in accordance with c. 40A. There is no direct evidence from a witness with personal knowledge to contradict this affidavit. Moreover,

the record includes some corroboration for the City's testimony: the City did obtain an abutter's list (a copy of which is in the record), at least one citizen must have received some kind of notice, as she appeared to oppose the Project at the Public Hearing, and two mailings were returned as undeliverable on December 9, 2017 and November 14, 2017. Based on this direct evidence, the Defendants claim that there is no evidence of failure to mail notice.

The law and Rule 56, however, squarely allow proof by circumstantial evidence. E.g. Commonwealth v. Corriveau, 396 Mass. 319, 339 (1985) (there is no difference in probative value between direct and circumstantial evidence). See Burns v. McDonald's Corporation, 81 Mass. App. Ct. 908, 909 (2012) (rescript) (requiring a "basis upon which a trier of fact could infer, without impermissible speculation, that the offending object originated in the cheeseburger that McDonald's sold to him"). Moreover, if circumstantial evidence supporting a contrary conclusion exists, the court cannot simply accept the City's affidavit as true at this point, because that would require a credibility determination after trial.

Here, the Plaintiffs' circumstantial evidence consists of (1) nine affidavits attesting that the owners of nine properties did not receive notice of the hearing even though they were Interested Persons, (2) statements in the same affidavits that the owners oppose the Project and would have appeared to speak against the Project at a public hearing if notified (3) statements that the same nine owners did not receive notice of the decision, (4) an abutters list containing 32 property owners (excluding duplicates), including five listings for the City of Pittsfield itself, (5) the fact that, apparently, only one person attended a public hearing in opposition to a proposal for a new cell tower,

where land use "within the immediate vicinity" consists of "a mix of undeveloped, wooded land with residential communities located to the south and east" and proximity to an historical site (according to the Berkshire Historical Society, writing on Arrowhead stationery). A fact-finder might (or might not) infer from this pattern that there was a mistake in sending out the mailings to large numbers of Interested Parties. There may be other explanations for the pattern, but no such explanation appears to be so clear that the court must accept it at this stage.

It is, for instance, possible that the City mailed the notices and the post office failed to deliver them. That is not a foregone conclusion. On summary judgment, the court must accept the plaintiffs' evidence that many Interested Persons did not receive the notice, the same persons also did not receive notice of the decision, and the nine affidavits attached to the complaint account for almost one-third of the non-City properties on the abutters list. The plaintiffs are within their rights to contest the inference that, by coincidence, the post office twice bungled completely separate mailings to at least 1/3 of the individuals on the same abutters list.

The case law probably does not compel the court to assume that the problem lies with the post office -- or that the plaintiffs are mistaken or lack credibility -- but the matter is not free from doubt. The Supreme Judicial Court faced a similar fact pattern in Zuckerman, 394 Mass. at 668-669. In that case, the parties stipulated that "the building inspector 'would testify' that the decision was mailed to the applicant on December 3, 1982, the same day the decision was filed. The applicant stipulated that he 'would testify' that he never received it . ..." Id. 394 Mass. at 668. On this record, the court concluded that "the board fully complied with the requirement that notice 'be mailed . ..'"

Id., 394 Mass. at 669. If mailing were contested, that holding may imply that lack of receipt does not supply sufficient circumstantial evidence to call into question affirmative testimony that items were mailed. The issue in that case, however, appeared to be whether the defendants had to prove receipt of the notice. It does not appear that the applicant contested the building inspector's testimony about mailing. Nor does it appear that the court ruled that evidence of non-receipt failed to create an issue of fact regarding mailing. Even had it done so, the evidence in that case fell short of the pattern in this case, namely non-receipt by nine or more Interested Persons of two separate mailings, amounting to about 1/3 of all legally required mailings to non-City parties. This court therefore does not read Zuckerman to foreclose factual inquiry in this case.

The Defendants also press a procedural point. They argue that the Plaintiffs failed to comply with Superior Court Rule 9A(b)(5) and therefore failed to controvert the statement (supported by the Joyner affidavit, ¶ 5) that the Board mailed notice of the public hearing and decision to all Interested Parties. They rely upon the principles and authority summarized in Green v. Southborough Zoning Board of Appeals, 132-133 ():

> Green disputed DePietri's affidavit in the sense that he responded "Disputed" to Park Central's statement, pursuant to Rule 9A of the Rules of the Superior Court (2017), of material fact setting forth the expenditures, and claimed that no further response was required because the allegations were conclusions of law. This, however, falls far short of creating a genuine issue of material fact sufficient to survive summary judgment. Green offered no information -- let alone admissible evidence -- on summary judgment to counter DePietri's affidavit, whether by way of affidavit or otherwise. See Mass. R. Civ. P. 56 (e), 365 Mass. 824 (1974) ("an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial"); Barron Chiropractic & Rehabilitation, P.C. v. Norfolk & Dedham Group, 469 Mass. 800, 804 (2014). "[M]erely responding 'disputed' to a proposed statement of fact does not establish a genuine dispute over a material fact. Rather, the party opposing summary judgment must adduce competent evidence sufficient to show a genuine issue for trial." Jenkins v. Bakst, 95 Mass. App. Ct. 654, 660 n.9 (2019). "While a judge

> should view the evidence with an indulgence in the [opposing party's] favor, . . . the opposing party cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment" (quotations omitted). LaLonde v. Eissner, 405 Mass. 207, 209 (1989).

Important as those principles are, they do not apply here. For one thing, when the plaintiffs refer to their complaint in this case, they actually are referring not just to bare allegations, but to actual affidavits regarding non-receipt of notice by residents in the "Schacktown" neighborhood on Holmes Road and Interested Persons of the South Street side of the Project. Those affidavits are exhibits to the complaint. For another thing, in denying the allegation of mailing in Defendants' to the 9A(b)(5) statement, the Plaintiff's response actually does refer to each plaintiff's "affidavit" (see e.g. Response to § 4) and their memorandum in opposition specifically alleges the additional fact of non-receipt, as support by affidavit.

It follows that, for purposes of summary judgment only, the court must assume that the City failed to mail the statutorily required notice of the public hearing and of the decision to the plaintiffs, in violation of G.L. c. 40A, §§ 9, 11. The court must also assume that the failure prejudiced the plaintiffs' ability to be heard at the public hearing and to appeal from the Decision.

II.

Even if there are genuine disputes of fact, the court should still grant the Motion if those disputes are not "material" to the issues in this case. Mass. R. Civ. P. 56(c). See Hogan v. Riemer, 35 Mass. App. Ct. 360, 364 (1993) ("For purposes of judging whether summary judgment ought to have been granted, the existence of disputed facts is consequential only if those facts have a material bearing on disposition of the case . . .

The substantive law will identify whether a fact, in the context of the case, is material.") (citations omitted).

The Defendants argue that failure to mail notice to the plaintiffs is not material, because, in cases challenging defective notice of a hearing, the lawsuit challenging the grant of a special permit must be brought "within ninety days after the decision has been filed in the office of the city . . . clerk[.]" G.L. c. 40A, § 17. The complaint in this case challenges a permit granted on November 29, 2017, but was not brought until 2019. The Plaintiffs counter that the ninety day deadline does not apply because the Board failed to mail notice to them as required by G.L. c. 40A, §§ 9, 11.

The lead authority is Kramer v. Zoning Board of Somerville , 65 Mass. App. Ct. 186 (2005). That appeal arose from a dismissal under Rule 12(b)(6) and therefore leaves open some questions that arise in this case. The Appeals Court held "that, at least where there has been a complete failure of notice of a public hearing in advance of the granting of a special permit, the ninety-day limitation in G.L. c. 40A, § 17, should not be deemed to run until the abutter has notice of the project to which he objects." Id., 65 Mass. App. Ct. at 193-194. The court added:

> The reasoning and spirit of the case law buttress our conclusion that where no notice has been provided under G. L. c. 40 A, § 17, the ninety-day statute of limitations does not begin to run until the aggrieved party becomes aware of the project to which he objects. Kramer has alleged that he was provided with no notice of any kind. The city and board appear to concede this point on appeal. [Footnote 9 omitted] The record before us is not sufficiently developed, however, as to whether the city and board failed to provide Kramer not only with mailed notice, but also notice by publication and posting. Not every decision of an administrative board need be invalidated for the board's failure to comply precisely with the statutory notice requirements of G. L. c. 40A, § 17. Chiuccariello [v. Building Commr. of Boston, 29 Mass. App. Ct. 482, 486 (1990)], quoting from Kasper, [v. Board of Appeals of Watertown, 3 Mass. App. Ct. 251, 256 (1975)]. A more flexible rule has been applied in situations where a municipal body failed to deliver notice precisely as required by statute, but still

> provided notice adequate to allow abutters to attend the hearing. See Kasper, supra at 256; Chiuccariello, supra at 486. Accordingly, **on remand the Superior Court judge should determine whether the board provided any other form of statutory notice. If no notice sufficient to meet the statutory requirements was provided, the board must hold a new hearing.**

Kramer, 65 Mass. App. Ct. at 195-196 (emphasis added).

Here, the Board did provide some "other form of statutory notice," namely publication in the Berkshire Eagle and posting at City Hall. The Kramer decision did not reach the question whether such forms of statutory notice were "sufficient to meet the statutory requirements." On the one hand, the statute specifically requires notice in the "form" of newspaper publication and posting at City Hall. On the other, the "statutory requirements" specifically include mailing to Interested Persons, without which, strictly speaking, notice is not "sufficient to meet the statutory requirements." On top of those uncertainties, the court must assume the truth of the Plaintiff's affidavits that they did not see that publication or posting and did not become aware of the hearing or decision until 2019. One possible reading of Kramer is that, in the absence of mailing, an "other form of statutory notice" is "sufficient to meet the statutory requirements" if it accomplishes the statutory purpose of notifying the Interested Parties.

The Defendants stress the language in Kramer, 65 Mass. App. Ct. at 193-194 describing the facts in that case as "a complete failure of notice of a public hearing in advance of the granting of a special permit," As plaintiffs note, that is not necessarily the limit of the applicable principle, because Kramer prefaced this language by saying: "at least where there has been" a complete failure to notice. Id. Nevertheless, in a non-binding Rule 1:28 (now Rule 23.0) decision, the Appeals Court held that tolling under Kramer is limited "to cases where, unlike here, there has been a total and complete failure of notice." Robicheau v. Nissan Norwood Realty, LLC, 72 Mass. App. Ct. 1118 (2008),

further appellate review denied, 452 Mass. 1109 (2008). The stipulated facts in Robicheau established that the town failed to mail notice to the plaintiff, but did publish and post the notice. There were some defects in the published and posted notice actually given, but the court ruled that these errors did not detract from the efficacy of the notice. To be sure, unlike that case, the applicant in Robicheau did post notice on the property, which was commercial in nature, making the notice more likely to achieve actual notice. Robicheau is not binding authority, and does not definitively answer the questions left open by Kramer, but is persuasive here.

The Plaintiffs argue forcefully that, if newspaper publication plus posting at City Hall is sufficient, then the requirement to mail notice to Interested Persons would effectively become a nullity The cases on defective notice focus "on whether a party's rights had been affected in a meaningful way by the manner in which the agency exercised ... jurisdiction" in the absence of statutorily required notice. Gordon v. State Building Code Appeals Board, 70 Mass. App. Ct. 12, 18-19 (2007). That concern led the court in Kramer, 65 Mass. App. Ct. at 193, to accept an argument based upon a complete failure "to give, in any form, the statutory notice" that municipalities "are obliged to provide, and upon which the public hearing process fundamentally depends." Id.[3] As

[3] The court said:

> Such an interpretation would effectively nullify the requirement to notify abutters of public hearings because a failure to comply with it would entail no consequences, as long as the abutters remained unaware of the issuance of the permit until the expiration of the appeal period. Such an interpretation, moreover, would produce the nonsensical result that an abutter provided with less than perfect notice of a hearing would have access to judicial review, at least within ninety days, while one who suffered the more grievous injury of total absence of notice would be foreclosed from obtaining judicial review. See Cappuccio, 398 Mass. at 309 (statute should be construed to avoid absurd result). Any such interpretation of the statutory appeals provisions would be "unreasonable." See Chiuccariello v. Building Commr. of Boston, 29 Mass. App. Ct. 482, 487 (1990) (Chiuccariello). See also Rinaldi v. State Bldg. Code Appeals Bd., 56 Mass. App. Ct. 668, 673-674 (2002) (lack of any notice fails test of "reasonable notice" under G. L. c. 30A, § 11).

stated in part I, above, these concerns are present here, where the court must assume both a failure to provide statutorily required notice and prejudice to the Plaintiff's rights.

Important as they are, the rights of Interested Persons are not the only consideration. A review of the statutory language shows legislative concern for the rights of all parties to a special permit process. The statute reflects significant legislative concern not to delay or impair applicants' ability to rely on and act under the special permits once an appeals period has run without an appeal. The Legislature thus struck a balance. It required a very prompt appeal from a zoning decision "within twenty days after the decision has been filed in the office of the city of town clerk." G.L. c. 40A, § 17, first paragraph. "To avoid delay," it required notice "by delivery or certified mail to all defendants . . . within twenty-one days after the entry of the complaint . . .," upon pain of dismissal. Id., second paragraph. For the same reason, it dispensed with the requirement of an answer. It granted "precedence over all other civil actions and proceedings." Id., last paragraph.

The Legislature specifically addressed the possibility of defective notice. Weighing the competing interests, the Legislature expressly resolved the competing interests in such cases:

> The foregoing remedy shall be exclusive, notwithstanding any defect of procedure or of notice other than notice by publication, mailing **or** posting as required by this chapter, and the validity of any action shall not be questioned for matters relating to **defects** in procedure or **of notice** in other proceedings except with respect to such publication, **mailing or** posting and then **only by a proceeding commenced within ninety days after the decision has been filed in the office of the city or town clerk** . . ..

Id., second paragraph (emphasis added). By these words, the Legislature declined to make the appeal period commence on the date of receipt of a decision, even though

it has done so in other contexts. See, e.g. G.L. c. 30A, § 14. By using the disjunctive, "or," the statute expressly applies the 90-day deadline to cases like this one, involving failure to provide notice by mail, but compliance with publication and posting requirements. The court must follow the statute's clear directive.[4]

While the result may seem harsh to abutters, the opposite rule may be harsh to applicants, who may invest time, effort and money in acting under a permit in the honest belief that no one intended to contest or appeal from the permit. This case illustrates the point. Verizon did not learn of this appeal until more than a year after expiration of the appeals period, during which time, according to the complaint, it mobilized resources to commence construction. If the Plaintiffs are right, then it now must await resolution of this lawsuit and, possibly, restart the public hearing process before the Board, with the prospect of another appeal even if it is successful on remand. These problems are not limited to this case. Moreover, in many cases (though perhaps not this one), there is a real danger that claims about lack of notice will reflect the kind of innocent assumptions and errors we all make in dealing with our mail: a simple loss of memory about what mail we received months ago; assumptions that notices were "junk mail" to be ignored and discarded; or setting mail aside for a later review that never occurs. The Plaintiffs' rule would subject the process to these uncertainties. It would delay the private benefits of any project as well as any public benefits the project may provide. The case law affirms the statutory scheme to prevent these delays. To provide finality and to avoid

[4] As the quoted passage demonstrates, Kramer's "complete failure of notice" test has a statutory basis: the legislature did not expressly dictate the result upon a failure of all three methods of notice: publication, mailing **and** posting, as alleged in that case. In such a case, the court would have to read "or" to mean "and." That is not an impossible reading, but the allegations in Kramer involved a degree of statutory ambiguity and incongruity that prompted the court to apply the rule against non-sensical interpretations and avoidance of constitutional due process questions. Kramer, 65 Mass. at 193.

protracted delay, the time limit for appealing zoning decisions under c. 40A, § 17 is "a requirement [the Supreme Judicial Court] has policed in the strongest way." Kramer, 65 Mass. App. Ct. at 194, quoting Cappuccio, 398 Mass. at 312, quoting from Pierce v. Board of Appeals of Carver, 369 Mass. 804, 808 (1976).

Moreover, the Legislature sometimes accepts a degree of harshness to achieve a greater goal, such as finality. The 90-day rule in c. 40A, § 17 is no harsher than many other statutes that provide finality, such as a statute of repose[5] or the rule in other administrative contexts that bars an appeal after a fixed time period regardless of actual receipt of a decision.[6] Where the responsibility for notice falls not upon the applicant, but upon the City, the Legislature had to decide which party must bear the burden of a municipal error. It chose not to visit a municipal failure upon the applicant once the extended, 90-day appeals period expires.

In short, the dispute over whether the City mailed notice to the Plaintiffs is not material. On the undisputed facts, the failure to provide notice by mail, while providing published and posted notice does not amount to a "complete failure of notice of a public hearing in advance of the granting of a special permit . . .." Kramer, 65 Mass. App. Ct. at 193-194. Recognizing that Kramer used the phrase "at least," the court applies the 90-day deadline for the reasons stated above. It concludes that the Plaintiffs did not bring this case in timely fashion and, therefore, the court must dismiss the complaint.

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[5] See, e.g. G.L. c. 260, § 2B. Sullivan v. Iantosca, 409 Mass. 796, 798 (1991) (statute of repose is not extended by any "discovery rule."); Klein v. Catalano, 386 Mass. 701, 702 (1982).

[6] See, e.g. G.L. c. 249, § 4 (A certiorari claim "shall be commenced within sixty days next after the proceeding complained of."). Committee for Public Counsel Services v. Lookner, 47 Mass. App. Ct. 833, 835 (1999) ("The term 'proceeding complained of' refers to 'the last administrative action' taken by an agency.").

ORDER

For the above reasons:

1. The Joint Motion for Summary Judgment of Defendants Pittsfield Cellular Telephone Company d/b/a Verizon Wireless, City of Pittsfield Zoning Board of Appeals and Albert Ingegni III, Thomas Goggins, John Fitzgerald, Miriam Maduro and Esther Bolen in their Capacities as members of the City of Pittsfield Zoning Board of Appeals is ALLOWED.
2. Final Judgment shall enter for all defendants against all plaintiffs, dismissing the complaint as untimely under G.L. c. 40A, § 17.

Dated: August 13, 2020

Douglas H. Wilkins
Associate Justice, Superior Court

ENTERED
THE COMMONWEALTH OF MASSACHUSETTS
BERKSHIRE S.S. SUPERIOR COURT
AUG 13 2020

G.L. c. 40A, § 11

ALM GL ch. 40A, § 11

Current through Chapter 14 of the 2021 Legislative Session of the 192nd General Court.

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT (Chs. 1 - 182) > TITLE VII CITIES, TOWNS AND DISTRICTS (Chs. 39 - 49A) > TITLE VII CITIES, TOWNS AND DISTRICTS (Chs. 39 — 49A) > Chapter 40A Zoning (§§ 1 — 17)

§ 11. Notice and Publication; Review of Special Permit Applications; Certificate of Special Permit or Variance.

In all cases where notice of a public hearing is required notice shall be given by publication in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of the hearing and by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of such hearing. In all cases where notice to individuals or specific boards or other agencies is required, notice shall be sent by mail, postage prepaid. “Parties in interest” as used in this chapter shall mean the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list, notwithstanding that the land of any such owner is located in another city or town, the planning board of the city or town, and the planning board of every abutting city or town. The assessors maintaining any applicable tax list shall certify to the permit granting authority or special permit granting authority the names and addresses of parties in interest and such certification shall be conclusive for all purposes. The permit granting authority or special permit granting authority may accept a waiver of notice from, or an affidavit of actual notice to any party in interest or, in his stead, any successor owner of record who may not have received a notice by mail, and may order special notice to any such person, giving not less than five nor more than ten additional days to reply.

Publications and notices required by this section shall contain the name of the petitioner, a description of the area or premises, street address, if any, or other adequate identification of the location, of the area or premises which is the subject of the petition, the date, time and place of the public hearing, the subject matter of the hearing, and the nature of action or relief requested if any. No such hearing shall be held on any day on which a state or municipal election, caucus or primary is held in such city or town.

Zoning ordinances or by-laws may provide that petitions for special permits shall be submitted to and reviewed by one or more of the following and may further provide that such reviews may be held jointly:— the board of health, the planning board or department, the city or town engineer, the conservation commission or any other town agency or board. Any such board or agency to which petitions are referred for review shall make such recommendations as they deem appropriate and shall send copies thereof to the special permit granting authority and to the applicant; provided, however, that failure of any such board or agency to make recommendations within thirty-five days of receipt by such board or agency of the petition shall be deemed lack of opposition thereto.

When a planning board or department is also the special permit granting authority for a special permit applicable to a subdivision plan, the planning board or department may hold the special permit public hearing together with a public hearing required by *sections 81K* to *81GG inclusive of chapter 41* and allow for the publication of a single advertisement giving notice of the consolidated hearing.

Upon the granting of a variance or special permit, or any extension, modification or renewal thereof, the permit granting authority or special permit granting authority shall issue to the owner and to the applicant if other than the owner a copy of its decision, certified by the permit granting authority or special permit

granting authority, containing the name and address of the owner, identifying the land affected, setting forth compliance with the statutory requirements for the issuance of such variance or permit and certifying that copies of the decision and all plans referred to in the decision have been filed with the planning board and city or town clerk.

No variance, or any extension, modification or renewal thereof, shall take effect until a copy of the decision bearing the certification of the city or town clerk that twenty days have elapsed after the decision has been filed in the office of the city or town clerk and no appeal has been filed, or that if such appeal has been filed, that it has been dismissed or denied, or that if it is a variance which has been approved by reason of the failure of the permit granting authority or special permit granting authority to act thereon within the time prescribed, a copy of the petition for the variance accompanied by the certification of the city or town clerk stating the fact that the permit granting authority failed to act within the time prescribed, and no appeal has been filed, and that the grant of the petition resulting from such failure to act has become final, or that if such appeal has been filed, that it has been dismissed or denied, is recorded in the registry of deeds for the county and district in which the land is located and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title.

A special permit, or any extension, modification or renewal thereof, shall not take effect until a copy of the decision bearing the certification of the city or town clerk that 20 days have elapsed after the decision has been filed in the office of the city or town clerk and either that no appeal has been filed or the appeal has been filed within such time, or if it is a special permit which has been approved by reason of the failure of the permit granting authority or special permit granting authority to act thereon within the time prescribed, a copy of the application for the special permit-accompanied by the certification of the city or town clerk stating the fact that the permit granting authority or special permit granting authority failed to act within the time prescribed, and whether or not an appeal has been filed within that time, and that the grant of the application resulting from the failure to act has become final, is recorded in the registry of deeds for the county and district in which the land is located and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title. The person exercising rights under a duly appealed special permit does so at risk that a court will reverse the permit and that any construction performed under the permit may be ordered undone. This section shall in no event terminate or shorten the tolling, during the pendency of any appeals, of the 6 month periods provided under the second paragraph of section 6. The fee for recording or registering shall be paid by the owner or applicant.

History

1975, 808, § 3; 1977, 829, §§ 4C–4F; 1979, 117; 1987, 498, § 2; *2006, 205, § 9*; *2008, 239, § 1*.

End of Document

G.L. c. 40A, § 15

ALM GL ch. 40A, § 15

Current through Chapter 14 of the 2021 Legislative Session of the 192nd General Court.

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT (Chs. 1 - 182) > TITLE VII CITIES, TOWNS AND DISTRICTS (Chs. 39 - 49A) > TITLE VII CITIES, TOWNS AND DISTRICTS (Chs. 39 — 49A) > Chapter 40A Zoning (§§ 1 — 17)

§ 15. Appellate Procedure.

Any appeal under section eight to a permit granting authority shall be taken within thirty days from the date of the order or decision which is being appealed. The petitioner shall file a notice of appeal specifying the grounds thereof, with the city or town clerk, and a copy of said notice, including the date and time of filing certified by the town clerk, shall be filed forthwith by the petitioner with the officer or board whose order or decision is being appealed, and to the permit granting authority, specifying in the notice grounds for such appeal. Such officer or board shall forthwith transmit to the board of appeals or zoning administrator all documents and papers constituting the record of the case in which the appeal is taken.

Any appeal to a board of appeals from the order or decision of a zoning administrator, if any, appointed in accordance with section thirteen shall be taken within thirty days of the date of such order or decision or within thirty days from the date on which the appeal, application or petition in question shall have been deemed denied in accordance with said section thirteen, as the case may be, by having the petitioner file a notice of appeal, specifying the grounds thereof with the city or town clerk and a copy of said notice including the date and time of filing certified by the city or town clerk shall be filed forthwith in the office of the zoning administrator and in the case of an appeal under section eight with the officer whose decision was the subject of the initial appeal to said zoning administrator. The zoning administrator shall forthwith transmit to the board of appeals all documents and papers constituting the record of the case in which the appeal is taken. An application for a special permit or petition for variance over which the board of appeals or the zoning administrator as the case may be, exercise original jurisdiction shall be filed by the petitioner with the city or town clerk, and a copy of said appeal, application or petition, including the date and time of filing, certified by the city or town clerk, shall be transmitted forthwith by the petitioner to the board of appeals or to said zoning administrator.

Meetings of the board shall be held at the call of the chairman or when called in such other manner as the board shall determine in its rules. The board of appeals shall hold a hearing on any appeal, application or petition within sixty-five days from the receipt of notice by the board of such appeal, application or petition. The board shall cause notice of such hearing to be published and sent to parties in interest as provided in section eleven. The chairman, or in his absence the acting chairman, may administer oaths, summon witnesses, and call for the production of papers.

The concurring vote of all members of the board of appeals consisting of three members, and a concurring vote of four members of a board consisting of five members, shall be necessary to reverse any order or decision of any administrative official under this chapter or to effect any variance in the application of any ordinance or by-law.

All hearings of the board of appeals shall be open to the public. The decision of the board shall be made within one hundred days after the date of the filing of an appeal, application or petition, except in regard to special permits, as provided for in section nine. The required time limits for a public hearing and said action, may be extended by written agreement between the applicant and the board of appeals. A copy of such agreement shall be filed in the office of the city or town clerk. Failure by the board to act within said one hundred days or extended time, if applicable, shall be deemed to be the grant of the appeal, application or petition. The petitioner who seeks such approval by reason of the failure of the board to act within the time

prescribed shall notify the city or town clerk, in writing, within fourteen days from the expiration of said one hundred days or extended time, if applicable, of such approval and that notice has been sent by the petitioner to parties in interest. The petitioner shall send such notice to parties in interest, by mail and each notice shall specify that appeals, if any, shall be made pursuant to section seventeen and shall be filed within twenty days after the date the city or town clerk received such written notice from the petitioner that the board failed to act within the time prescribed. After the expiration of twenty days without notice of appeal pursuant to section seventeen, or, if appeal has been taken, after receipt of certified records of the court in which such appeal is adjudicated, indicating that such approval has become final, the city or town clerk shall issue a certificate stating the date of approval, the fact that the board failed to take final action and that the approval resulting from such failure has become final, and such certificate shall be forwarded to the petitioner. The board shall cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and setting forth clearly the reason for its decision and of its official actions, copies of all of which shall be filed within fourteen days in the office of the city or town clerk and shall be a public record, and notice of the decision shall be mailed forthwith to the petitioner, applicant or appellant, to the parties in interest designated in section eleven, and to every person present at the hearing who requested that notice be sent to him and stated the address to which such notice was to be sent. Each notice shall specify that appeals, if any, shall be made pursuant to section seventeen and shall be filed within twenty days after the date of filing of such notice in the office of the city or town clerk.

History

1987, 498, § 3; 1989, 341, § 23.

End of Document

G.L. c. 40A, § 17

ALM GL ch. 40A, § 17

Current through Chapter 14 of the 2021 Legislative Session of the 192nd General Court.

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT (Chs. 1 - 182) > TITLE VII CITIES, TOWNS AND DISTRICTS (Chs. 39 - 49A) > TITLE VII CITIES, TOWNS AND DISTRICTS (Chs. 39 — 49A) > Chapter 40A Zoning (§§ 1 — 17)

§ 17. Judicial Review; Requirements of Complaint; Appointment of Counsel; Taxing of Costs; Preferences.

Any 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 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 to the land court department, the superior court department in which the land concerned is situated or, if the land is situated in Hampden county, either to said land court or, superior court department or to the division of the housing court department for said county, or if the land is situated in a county, region or area served by a division of the housing court department either to said land court or superior court department or to the division of said housing court department for said county, region or area, or to the division of the district court department within whose jurisdiction the land is situated except in Hampden county, by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk. If said appeal is made to said division of the district court department, any party shall have the right to file a claim for trial of said appeal in the superior court department within twenty-five days after service on the appeal is completed, subject to such rules as the supreme judicial court may prescribe. Notice of the action with a copy of the complaint shall be given to such city or town clerk so as to be received within such twenty days. The complaint shall allege that the decision exceeds the authority of the board or authority, and any facts pertinent to the issue, and shall contain a prayer that the decision be annulled. There shall be attached to the complaint a copy of the decision appealed from, bearing the date of filing thereof, certified by the city or town clerk with whom the decision was filed.

If the complaint is filed by someone other than the original applicant, appellant or petitioner, such original applicant, appellant, or petitioner and all members of the board of appeals or special permit granting authority shall be named as parties defendant with their addresses. To avoid delay in the proceedings, instead of the usual service of process, the plaintiff shall within fourteen days after the filing of the complaint, send written notice thereof, with a copy of the complaint, by delivery or certified mail to all defendants, including the members of the board of appeals or special permit granting authority and shall within twenty-one days after the entry of the complaint file with the clerk of the court an affidavit that such notice has been given. If no such affidavit is filed within such time the complaint shall be dismissed. No answer shall be required but an answer may be filed and notice of such filing with a copy of the answer and an affidavit of such notice given to all parties as provided above within seven days after the filing of the answer. Other persons may be permitted to intervene, upon motion. The clerk of the court shall give notice of the hearing as in other cases without jury, to all parties whether or not they have appeared. The court shall hear all evidence pertinent to the authority of the board or special permit granting authority and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board or special permit granting authority or make such other decree as justice and equity may require. The foregoing remedy shall be exclusive, notwithstanding any defect of procedure or of notice other than notice by publication, mailing or posting as required by this chapter, and the validity of any action shall not be questioned for matters relating to defects in procedure or of notice in any other proceedings

except with respect to such publication, mailing or posting and then only by a proceeding commenced within ninety days after the decision has been filed in the office of the city or town clerk, but the parties shall have all rights of appeal and exception as in other equity cases.

The court, in its discretion, may require a plaintiff in an action under this section appealing a decision to approve a special permit, variance or site plan to post a surety or cash bond in an amount of not more than $50,000 to secure the payment of costs if the court finds that the harm to the defendant or to the public interest resulting from delays caused by the appeal outweighs the financial burden of the surety or cash bond on the plaintiffs. The court shall consider the relative merits of the appeal and the relative financial means of the plaintiff and the defendant.

A city or town may provide any officer or board of such city or town with independent legal counsel for appealing, as provided in this section, a decision of a board of appeals or special permit granting authority and for taking such other subsequent action as parties are authorized to take.

Costs shall not be allowed against the board or special permit granting authority unless it shall appear to the court that the board or special permit granting authority in making the decision appealed from acted with gross negligence, in bad faith or with malice.

Costs shall not be allowed against the party appealing from the decision of the board or special permit granting authority unless it shall appear to the court that said appellant or appellants acted in bad faith or with malice in making the appeal to the court.

The court shall require nonmunicipal plaintiffs to post a surety or cash bond in a sum of not less than two thousand nor more than fifteen thousand dollars to secure the payment of such costs in appeals of decisions approving subdivision plans.

All issues in any proceeding under this section shall have precedence over all other civil actions and proceedings.

History

1975, 808, § 3; 1978, 478, § 32; 1982, 533, § 1; 1985, 492, § 1; 1987, 498, § 4; 1989, 649, § 2; *2002, 393, § 2*; *2020, 358, § 25*, effective January 14, 2021.

End of Document

Robicheau v. Nissan Norwood Realty, LLC, 72 Mass. App. Ct. 1118 (2008) (Rule 1:28 Decision), *further appellate review denied* 452 Mass. 1109 (2008).

72 Mass.App.Ct. 1118
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

Joseph A. ROBICHEAU & another [1]
v.
NISSAN NORWOOD REALTY, LLC., & another. [2]

No. 07–P–1514.
|
Sept. 30, 2008.

By the Court (RAPOZA, CJ., ARMSTRONG & LENK, JJ.).

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

***1** More than eight months after defendant planning board of the town of Norwood (board) approved an application by defendant Nissan Norwood Realty, LLC (Nissan), for a major project special permit, the plaintiffs, Joseph A. Robicheau and Dorothy J. Robicheau, filed suit in the Superior Court to challenge the validity of the board's action. On cross motions for summary judgment, the judge granted judgment as matter of law in favor of the defendants, concluding that the plaintiffs had no standing to maintain their challenge, which they had in any event filed beyond the strict statute of limitations. See G.L. c. 40A, § 17.

Background. We recite the undisputed facts of record in the light most favorable to the plaintiffs, reserving some for our later discussion of the issues. Nissan sought to construct a car dealership in Norwood, consisting of a 45,000 square-foot building and at least 200 parking spaces, on five acres of land at and around 525 Boston–Providence Highway, also known as Route 1. The plaintiffs own a plot of land nearby, to the northwest of the Nissan's site, at 429 Neponset Street, on which they planned to construct a multifamily condominium complex. Nissan's five acres consisted of two separate plots; one plot measured 1.67 acres (plot one), while the second measured 3.5 acres (plot two).

To initiate its application for the necessary major project special permit it needed to build the dealership, Nissan requested a list of parties in interest [3] from the Norwood board of assessors (assessors) on April 25, 2005. Nissan omitted plot two from this request, which had the effect of limiting the produced list to abutters to, and abutters to abutters within 300 feet of, plot one only. The respective locations of plots one and two are such that the relevant property line of the plaintiffs' Neponset Street land is within approximately 130 feet of plot two, but over 300 feet from plot one. The plaintiffs' Neponset Street address was thus not included on the list of parties in interest. [4]

Pursuant to its duties set forth by statute and local rules, see G.L. c. 40A, § 11, and Norwood planning board major project special permit rules, art. II, § 2(A)(4), the board undertook to provide notice of the required public hearing on Nissan's special permit application. Notice of the hearing was posted on the proposed site at 525 Boston–Providence Highway, and at the Norwood town hall. Similar notice was also twice published in the local newspaper, the Daily News Transcript, on June 22 and 29, 2005. [5] The board also sent notice by first class mail to all of the parties in interest included on the aforementioned list of abutters.

The noticed hearing was held on July 18, 2005, and the board granted Nissan's special permit application following the continued public hearing that was held on August 15, 2005. The plaintiffs did not attend either hearing.

It was not until April 25, 2006, approximately 250 days after the grant of Nissan's special permit, that the plaintiffs filed suit in the Superior Court alleging certain violations of the zoning law and seeking declaratory and injunctive relief, as well as money damages, fees, and costs. Preliminary injunctive relief to prevent Nissan from further construction, which was then well underway, was denied by a Superior Court judge, and was also denied after review by a single justice of this court pursuant to G.L. c. 231, § 118.

***2** The parties then filed cross motions for summary judgment in January of 2007, on which judgment later entered in favor of the defendants. The plaintiffs appeal, arguing, first, that they have standing to maintain a substantive appeal of the board's action, see *Standerwick v. Zoning Bd. of Appeals of Andover,* 447 Mass. 20, 27, 34 (2006), second, that the ninety-day period of limitation pursuant to G.L. c. 40A, § 17, should be tolled because there was an alleged total failure of notice of the subject public hearing, see *Kramer v. Zoning Bd. of Appeals of Somerville,* 65 Mass.App.Ct. 186, 193–194 (2005), and, finally, that reversal is in order because of alleged bias by the motion judge. Nissan cross appeals,

contending that the judge erred in dismissing, sua sponte, its counterclaims.

Discussion. The grant of summary judgment will be upheld if "all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co.,* 410 Mass. 117, 120 (1991). "We consider the facts ... and all reasonable inferences drawn therefrom, in the[ ] light most favorable to ... the nonmoving party." *Scott v. NG U.S. 1, Inc.,* 450 Mass. 760, 763 (2008). "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat [the motion]." *Pederson v. Time, Inc.,* 404 Mass. 14, 17 (1989).

1. *Standing.* Judicial review of challenges to local zoning decisions on the merits may only be undertaken if the challenging party is a "person aggrieved."[6] "A 'person aggrieved' is one who 'suffers some infringement of his legal rights.' ... The injury must be more than speculative, and plaintiffs 'must put forth credible evidence to substantiate claims of injury to their legal rights.' " *Sweenie v. A.L. Prime Energy Consultants,* 451 Mass. 539, 543 (2008), quoting from *Marashlian v. Zoning Bd. of Newburyport,* 421 Mass. 719, 721, 723 (1996). A plaintiff must do so by way of "direct facts and not by speculative personal opinion." *Standerwick, supra* at 33, quoting from *Barvenik v. Alderman of Newton,* 33 Mass.App.Ct. 129, 132 (1992). "Conjecture, personal opinion, and hypothesis are ... insufficient." *Butler v. Waltham,* 63 Mass.App.Ct. 435, 441 (2005).

In their opposition to summary judgment, the plaintiffs contend that, because their injuries are distinct from those suffered by the general public, see *id.* at 440, the grant of the special permit will cause them to suffer a direct harm from: "1) damage to wetlands directly abutting [their] property; 2) erosion problems; 3) compromised road safety; 4) increased noise disturbances due to close proximity of cars and delivery trucks; 5) inadequate landscaping; 6) density; 7) storage of hazardous materials; and 8) inadequate drainage." Yet the only support in the summary judgment record for these assertions of injury takes the form of unsubstantiated deposition testimony by Joseph Robicheau.

***3** Joseph stated that he had "problems" with certain aspects of Nissan's project, and after listing his "concerns" about the same, stated, "That's how I feel I'm going to be hurt by this." Joseph further acknowledged that he was "unclear" about details of the project, stating, with regard to landscaping and possible impact on nearby wetlands, that "I have no idea what's going to be there." When given the opportunity by Nissan's attorney to specify further how the plaintiffs might be damaged by the project, Joseph demurred, but stated that "I may come up with something."

In light of the fact that the plaintiffs offered no other evidence, in the form of expert testimony, specific affidavits, or the like, to buttress any of the "concerns" cited by Joseph, it is clear that the plaintiffs' allegations of harm are based entirely on the sort of "speculative personal opinion" that is insufficient to establish standing. *Standerwick,* 447 Mass. at 33. The plaintiffs have not offered credible evidence to show that they are aggrieved by the subject board action. Hence, they do not have standing to maintain a substantive challenge.[7]

2. *Statute of limitation and notice.* Apart from requiring that parties be "aggrieved" in order to maintain substantive challenges of a board's action on a special permit, G.L. c. 40A, § 17, establishes a twenty-day window within which such a challenge must be filed. However, if an appeal is grounded in a defect of notice as required by G.L. c. 40A, § 11,[8] litigants enjoy an expanded filing period of ninety days. G.L. c. 40A, § 17. These time periods are "policed in the strongest way" and "failure to file the action ... within the statutory period has fatal consequences." *Pierce v. Board of Appeals of Carver,* 369 Mass. 804, 809–810 (1976). Nissan points out, and the plaintiffs concede, that the instant suit was not filed until almost five months after the ninety-day limitation period expired. The plaintiffs rely, however, on our decision in *Kramer,* 65 Mass.App.Ct. at 193–194, to support their view that this action was nonetheless timely filed.

We held in *Kramer, supra,* that, where there has been a "*total*" and "*complete* failure of notice of a public hearing in advance of the granting of a special permit, the [ninety-day time limit] should not be deemed to run until the abutter has notice of the project to which he objects" (emphasis supplied). The plaintiffs argue that the undisputed failure of notice by mail to them, taken with the deficiencies in the posted and published forms of notice,[9] are the functional equivalent of no notice at all. We disagree.

To be sure, the posted and published notice here was not perfect, but it contained an accurate street address and fully described the scope and nature of the project. Notice in this context need only be "reasonable," *Rousseau v. Building Inspector of Framingham,* 349 Mass. 31, 36–37 (1965), and

"not every decision of [a board] ... need be invalidated for ... failure to comply precisely" with the notice requirements. *Kasper v. Board of Appeals of Watertown,* 3 Mass.App.Ct. 251, 256 (1975). The notice provided in this case served adequately to inform the plaintiffs, and those in the general public, that the planning board would consider the described major project special permit application in a public forum on the listed date.

***4** "The statutes of limitation for judicial review of special permit decisions ... exist to promote finality and to preclude attacks indefinitely on decisions which have already been tested in the hearing process." *Kramer, supra* at 192–193. Just as this statutory premium on finality causes the ninety-day limitation period for filing a challenge of a board's action to be "policed in the strongest way," *Pierce, supra* at 808, so too must it limit the exception established in *Kramer* to cases where, unlike here, there been a total and complete failure of notice.

3. *Personal bias of motion judge.* The plaintiffs also challenge the impartiality of the motion judge, arguing that his alleged bias requires reversal. However, the question whether a judge should recuse himself when his impartiality has been challenged is left to the sound discretion of that judge. *Clark v.. Clark,* 47 Mass.App.Ct. 737, 739 (1999). See *Demoulas v. Demoulas Super Mkts., Inc.,* 428 Mass. 543, 546 & n. 5 (1998). There is no indication that the plaintiffs asked the motion judge to consider their allegation of partiality, and the issue, not having been raised below, is not properly before us. See *Palmer v.. Murphy,* 42 Mass.App.Ct. 334, 338 (1997). In any event, because we have independently confirmed that summary judgment in favor of the defendants was correct as matter of law, the judge's conduct was, at worst, harmless error. See *Fidelity Mgmt. & Research Co. v. Ostrander,* 40 Mass.App.Ct. 195, 203 (1996).

4. *The defendant's cross appeal.* Nissan alone cross appeals, contending that the judge erred in dismissing its counterclaims. The plaintiffs agree that these counterclaims, not having been raised by either party in the summary judgment motions, were not properly before the judge.

Conclusion. To the extent that the judgment dismissed Nissan's counterclaims, it is reversed, and the counterclaims are remanded to the Superior Court for further proceedings. The

judgment is otherwise affirmed.

So ordered.

All Citations

72 Mass.App.Ct. 1118, 893 N.E.2d 1286 (Table), 2008 WL 4388809

Footnotes

1 Dorothy J. Robicheau.

2 Planning board of the town of Norwood.

3 "Parties in interest" are abutters and abutters to abutters within 300 feet of the property line of the applicant for a special permit. See G.L. c. 40A, § 11. A list of all parties in interest must be requested from the assessors and attached to the application for a major project special permit. See Norwood planning board major project special permit rules, art. I § 2(A)(4),(5).

4 Plot one was joined with plot two on August 31, 2005, after the board approved Nissan's application. Nissan had signed a purchase and sale agreement for plot two before it began the application process for the subject special permit, and had described the arrangement to the board at some point before the public hearings occurred. Although the reason for this sequence of events is left unexplained in the record, it is immaterial to our resolution of this appeal.

5 Like the request for an abutters list, the posted and published forms of notice omitted plot two, describing the proposed location of the project as "Assessor's Map 18, Sheet *4,* Lot 3" (emphasis supplied). Plot one actually consisted of assessor's maps 18–*14*–3, 18–14–4, and 18–14–35 through 18–14–46; plot two was identified as assessor's map 18–9–83. The posted and published notices did correctly state the project's street address as well as the scope and nature of the project.

6 "Any person aggrieved by a decision of the board of appeals or any special permit granting authority ... may appeal to ... the superior court...." G.L. c. 40A, § 17, as amended by St.1989, c. 649, § 2.

7 The plaintiffs erroneously contend that requiring a showing of actual or credible evidence improperly shifts to them the burden of proving standing because they are presumptively aggrieved as "parties in interest." While the plaintiffs

did initially enjoy a rebuttable presumption that they possessed standing, see *Marashlian, supra* at 721, Nissan was permitted to, and did, rebut this presumption by simply "seeking to discover ... the actual basis of [the plaintiffs'] claims of aggrievement." *Standerwick, supra* at 37. It is always the plaintiff's burden to prove standing. *Id.* at 34 & n. 20.

8 Section 11 of G.L. c. 40A, requires that notice of public hearings be provided in three forms: (1) publication in a newspaper; (2) posting in a conspicuous place in the town hall; and (3) by mail to parties in interest. "Parties in interest" are defined as "abutters, owners of land directly opposite on any private street or way, and abutters to abutters within three-hundred (300) feet of the property line of the petitioner." *Ibid.*

9 See note 5, *supra.*