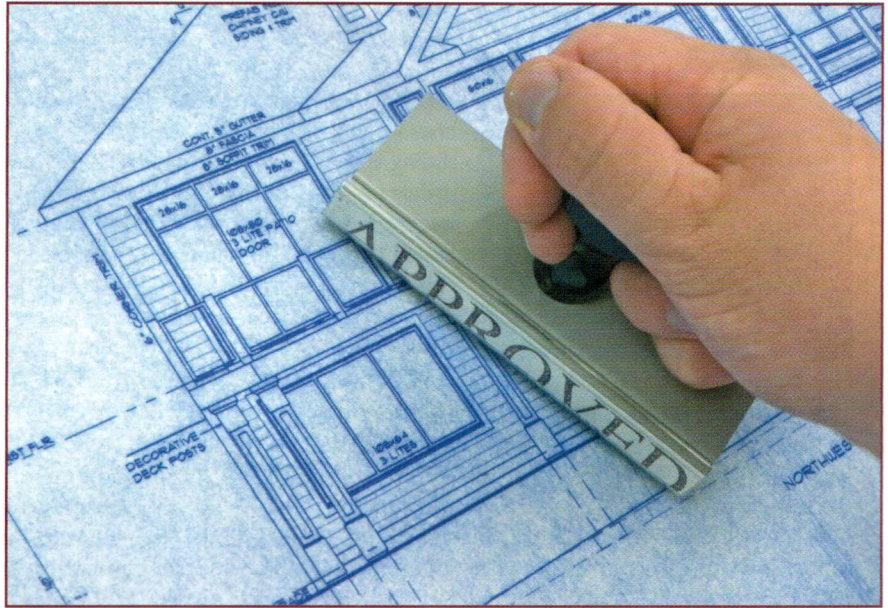


CASE PROVIDES RELIEF VALVE TO BUILDERS TROUBLED BY ABUTTER APPEALS

Builders and developers often complain about the burdensome regulations that apply to land development in Massachusetts. Numerous permits and approvals are needed from different boards and committees, and reviews are usually required on multiple levels, including local, state, and federal. The burden is exacerbated when a permit or approval, once issued, is appealed by an abutter. The time and expense associated with litigation can have severe consequences for any project, often shutting down a project before an ultimate judge or jury decision is rendered. In response to these concerns, the Home Builders Association of Massachusetts (HBAM) has been successful in advocating legislative and regulatory changes that streamline permitting procedures and establish better rules with respect to permit appeals. The situation has improved yet again as a result of a recent decision by the Supreme Judicial Court (SJC) in *Kenner v. Zoning Board of Appeals of Chatham*, 459 Mass. 115 (2011), regarding issues of standing in a zoning appeal case.

In *Kenner*, a landowner in Chatham, MA, sought and obtained a Special Permit under the local zoning bylaw to raze an existing house and construct a new house on the same building footprint. The new house was proposed at a height seven feet taller than the existing house. A Special Permit was necessary, given that the lot was undersized under current lot dimensional criteria. When the Zoning Board issued the Special Permit for new construction, the abutting neighbor appealed. The neighbor argued that the new house would block light and ocean breezes to the neighbor's property and would cause traffic problems in the neighborhood. The neighbor appealed the permit decision to Land Court.

Under the Zoning Enabling Act (M.G.L.



c.40A, Section 17), any person aggrieved by the issuance of a zoning permit may appeal that permit by filing a complaint within 20 days after the permit decision has been filed with the town clerk. A person aggrieved is further defined in case law as someone who suffers infringement of his or her legal rights. In legal jargon, this person is considered to have "standing" in the case. Chapter 40A takes this a step further by creating a rebuttable presumption of a person aggrieved (or standing), if that person is a "party in interest" entitled to public hearing notice of the permit proceeding. Under c.40A, Section 11, a party in interest is defined as an abutter, or an abutter to an abutter within 300 feet of the property under permit review. This framework is often problematic to a builder or developer under a permit proceeding, resulting in the potential windfall of litigation discussed above, as it often affords a significant number of people with an opportunity to appeal a permit decision.

The *Kenner* court reminds us, however, that while the court doors are initially left wide open to abutters, the presumption created under c.40A is rebuttable. Recent cases, notably *Standerwick v. Zoning Board of Appeals of Andover*, 447 Mass. 20 (2006) and now *Kenner*, have provided a more clear direction on what one must do to rebut the presumption of standing, and then, once rebutted, how the abutter (or appealing party) must then articulate aggrievement in order to continue to prosecute his or her appeal. When the presumption is overcome, the burden shifts to the abutter to prove particularized harm. Moreover, the harm must be grounded in a private right, private property interest, or private legal interest, and must be a right or interest that is properly within the protected scope of c.40A and local ordinances or bylaws. It is insufficient for an abutter to speculate about harm, or attempt to voice concerns that are general public concerns rather than personal concerns. Lastly, the harm must

be more than just minimal or slightly appreciable. The harm must be substantial enough to cause actual aggrievement. It must be objective, true, and measurable. These are powerful provisions that a builder or developer can use in defense of a zoning appeal.

In the *Kenner* case, the property owner seeking to build a new house provided uncontroverted testimony from an architect and an engineer that the new house had been designed to cause a minimal increase in height at the roof line, with insignificant impact to views, light, and air to abutting properties. In response, the abutter provided only personal opinion about views and vistas, and offered poorly constructed photographs taken by a non-expert, which attempted to show a rendering of the newly proposed home based upon estimated measurements. The Land Court Judge ruled that any harm to views, light, or air stemming from the new house would be de minimis. The Land Court Judge also ruled that claims related to loss of property value and traffic concerns were also de minimis and speculative. On such findings, the Land Court Judge ruled that the abutter had no standing to bring the permit appeal, and dismissed the case. This decision, initially overturned in an unpublished decision by the Appeals Court, was supported by the SJC on all counts.

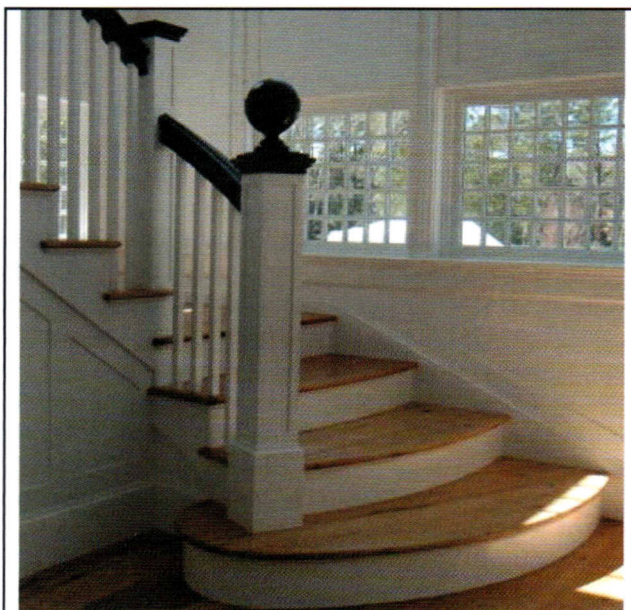
The SJC also noted that the test of measuring standing, or the degree of harm presented in any particular case, is one that is highly factual and properly left to the trial judge. The trial judge has the firsthand benefit of reviewing hearing testimony, reviewing documents, and viewing the subject property. In so doing, the trial judge is uniquely able to weigh the evidence, to determine what is credible, and to make findings on what is speculative. The role of the appeals court, once such decisions have been made, is solely to determine whether the trial judge's findings were clearly erroneous. These guidelines provide a potentially powerful change in the administration of zoning appeals going forward. Based upon *Kenner*, it will be much easier for trial courts to determine issues of standing and dispense with questionable cases in quicker fashion, without cases lingering on appeal.

Kenner provides a valuable relief valve to those builders and

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developers who are troubled by abutter appeals. The decision is also helpful in providing support for recent legislation authored by HBAM and currently pending before the State Legislature. The HBAM proposal would remove the presumption of standing under c.40A. In addition, under the proposed legislation, abutters would be required to set forth the specific harm to his or her property, identify persons with knowledge of said harm, and provide documents that support the allegations made in any appeal. If the abutter identifies harm from traffic, drainage, and other impacts of a technical nature, he or she must include an affidavit from an engineer or other qualified expert who can testify as to the impact of the alleged harm on the plaintiff's property interest. This proposed legislation, if successful, will further discourage abutters from bringing spurious appeals. ■



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