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Massachusetts Land Court,
Department of the Trial Court,.
Plymouth County.

Richard SCOTT, Janet T. Scott, Susan Aukstikalnis and Norman Rossio, Plaintiffs,

v.

Mark KNOX, Barbara Mankovsky, Peter Conroy, Michelle MacEachern, and John Lynch, as they are the members of the Planning Board of the Town of Lakeville, and Derek Maksy and Rhino Capital Advisors, LLC, Defendants.

John Jenkins, Heather Bodwel, John Ayers, Ryan Eaton, Stephanie Eaton, and Andrew Virostek, Plaintiffs,

v.

Mark Knox, Barbara Mankovsky, Peter Conroy, Michelle MacEachern, and John Lynch, as they are the members of the Planning Board of the Town of Lakeville, and Rhino Capital Advisors, LLC, Defendants

No. 21 PS 000245 (HPS), No. 21 PS 000252 (HPS)
|
Dated: July 28, 2022

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Howard P. Speicher, Justice

***1** In these two cases, transferred to the Permit Session of the Land Court by Procedural Orders issued on July 30, 2021, and consolidated for the purposes of the pending summary judgment motions, two groups of Lakeville residents appealed the approval by the Lakeville Planning Board ("Planning Board") of a warehouse, in excess of 400,000 square feet in gross floor area, to be built on part of the site of the former Lakeville State Hospital. The proposed warehouse is planned to have 130 loading docks and is intended to be operated twenty-four hours a day, seven days a week. The plaintiffs, with one exception, live in a residential subdivision adjacent to the old Lakeville State Hospital site. In the cross-motions for summary judgment now pending before the court, the developer of the site, private defendant Rhino Capital Advisors, LLC ("Rhino") contends that the plaintiffs are not "persons aggrieved" with standing to challenge the approval of the warehouse project. The plaintiffs, aside from contesting the challenge to their standing, assert that the approval of the warehouse project fails as a matter of law because, they contend, the Lakeville State Hospital site has not been made part of the Development Opportunities Overlay District in which the Planning Board and the developer claim the site is located.

At the request of the parties, I took a view of the former Lakeville State Hospital site proposed for the new warehouse facility, and the plaintiffs' adjacent Rush Pond Road neighborhood on January 12, 2022. The motions for summary judgment were argued before me on May 17, 2022, at which time I took the motions under advisement. For the reasons stated below, the defendant Rhino Capital Advisors, LLC's motions for summary judgment in both cases are DENIED, (except with regard to plaintiff John Jenkins in 21 PS 000252) and the plaintiffs' motions in both cases are ALLOWED.

FACTS

The following material facts are found in the record for purposes of Mass. R. Civ. P. 56, and are undisputed for the purposes of the motions for summary judgment:[1]

1. The former Lakeville State Hospital site at 43 Main Street in Lakeville is a nearly 50-acre parcel with seven vacant buildings. The site has been unused since Lakeville State Hospital closed in 1992.[2]

2. By a decision filed with the town clerk on April 13, 2021, the Planning Board, acting as a special permit granting authority, issued a special permit and site plan review approval for the redevelopment of a portion of the Lakeville State Hospital site as a warehouse facility, to include a 402,500 square foot warehouse building, 130 loading docks, 298 parking spaces, with 206 additional parking spaces approved and to be added later as needed by the applicant, and 130 trailer storage spaces.[3] Access to

and egress from the site will be by way of its frontage on Main Street.

3. With one exception, the plaintiffs in these two cases are owners and residents of property on Rush Pond Road in Lakeville. Rush Pond Road is a dead-end street with a cul-de-sac, connecting in the north to Rhode Island Road (Route 79), with no direct access to Main Street. Several of the lots on the east side of Rush Pond Road abut the Lakeville State Hospital site.[4]

***2** 4. In Case No. 21 PS 000252, plaintiffs Stephanie Eaton and Ryan Eaton, of 8 Rush Pond Road, own and reside at property abutting an abutter of the site within 300 feet of the Lakeville State Hospital site. Plaintiff Andrew Virostek, of 10 Rush Pond Road, owns and resides at property abutting the Lakeville State Hospital site. The Eatons and Mr. Virostek are parties in interest as defined by G. L. c. 40A, § 11.[5]

5. Heather Bod well, of 13 Rush Pond Road, and John Ayers, of 21 Rush Pond Road, both own and reside at properties on the west side of Rush Pond Road. Mr. Ayers, whose property is Parcel No. 060-007-017 on the relevant Assessor's Map, is within 300 feet of the Lakeville State Hospital site, but is not an abutter to an abutter notwithstanding his proximity to the site because his property is separated from an abutter by Rush Pond Road. Ms. Bodwell is also not an abutter to an abutter; her property is located 420 feet from the boundary of the site. Neither Mr. Ayers nor Ms. Bodwell is a party in interest within the meaning of G. L. c, 40A, § 11, nor is plaintiff John Jenkins, who lives on Pickens Street, more than four miles from the Lakeville State Hospital site.[6]

6. In Case No. 21 PS 000245, plaintiff Norman Bossio owns and resides at property at 16 Rush Pond Road. Plaintiff Susan Aukstikalnis owns and resides at property at 20 Rush Pond Road. Both Mr. Bossio's and Ms. Aukstikalnis's properties directly abut the Lakeville State Hospital site. They are both parties in interest within the meaning of G. L. c. 40A, § 11.[7]

7. Plaintiffs Richard Scott and Janet Scott own and reside at property at 9 Rush Pond Road, Parcel No. 060-007-023. They are not abutters to an abutter within 300 feet of the Lakeville State Hospital site because they are separated from an abutter by Rush Pond Road. Their property is across the street from the Virostek property and is less than 300 feet from the Lakeville State Hospital site.[8] Notwithstanding the proximity of their property to the site, they are not parties in interest within the meaning of G. L. c. 40A, § 11.

8. The former site of the Lakeville State Hospital is located partly in a business zoning district, and partly in a residential zoning district, neither of which allows a warehouse use.[9]

9. However, "warehouses and wholesale distribution centers" are allowed by special permit in the Development Opportunities Overlay District, provided that, among other things, the total land area of the subject property is 25 acres or more.[10]

10. The Planning Board found in its Decision authorizing the proposed warehouse that the "Development Opportunities ('DO') zoning district is a designated overlay district in the Lakeville Zoning bylaw that applies to land within the Town consisting of a total land area, including streets, of twenty-five or more acres."[11]

11. Section 7.9.1 of the Bylaw, entitled "Purpose" [of the Development Opportunities District] provides in relevant part: "The Development Opportunities District is an overlay district superimposed over those underlying districts as shown on the zoning map of the Town of Lakeville."[12]

12. The Lakeville Zoning Map does not list the Development Opportunities Overlay District as an overlay district, nor does the Zoning Map show any district, overlay or otherwise, labelled as a Development Opportunities district. There is no notation on the Zoning Map of any application of the Development Opportunities district designation to parcels in excess of 25 acres.[13]

DISCUSSION

***3** Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See *Boazova v. Safety Ins. Co.*, 462 Mass. 346, 347 (2012); Mass. R. Civ. P. 56(c). "The party moving for summary judgment assumes the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue, even if he would have no burden on an issue if the case were to go to trial." *Pederson*

v. Time, Inc., 404 Mass. 14, 17 (1989). The substantive law at issue in the case determines whether a fact is material. See *Carey v. New England Organ Bank,* 446 Mass. 270, 278 (2006). Material facts bear on the outcome of the case. See *Jupin v. Kask,* 447 Mass. 141, 145-146 (2006). Bare assertions and conclusions regarding a party's understandings, beliefs and assumptions are not sufficient to withstand a well-pleaded motion for summary judgment. See *Key Capital Corp. v. M& S Liquidating Corp.,* 27 Mass. App. Ct. 721, 728 (1989). Once the moving party establishes the absence of a triable issue, the nonmoving party must respond and offer evidence of specific facts establishing the existence of a genuine issue of material fact in order to defeat the motion. *Pederson v. Time, Inc.,* supra, 404 Mass, at 17.

In reviewing the factual record presented as part of the motion, the court draws "all logically permissible inferences" from the facts in favor of the non-moving party. *Willitts v. Roman Catholic Archbishop of Boston,* 411 Mass. 202, 203 (1991). "Summary judgment is appropriate when, 'viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law.' " *Regis College v. Town of Weston,* 462 Mass. 280, 284 (2012), quoting *Augat, Inc. v. Liberty Mut. Ins. Co.,* 410 Mass. 117, 120 (1991).

"Summary judgment, when appropriate, may be rendered against the moving party." *Bourgeois White, LLP v. Sterling Lion, LLC*, 91 Mass. App. Ct. 114, 118-119 (2017), quoting Mass. R. Civ. Proc. 56(c) and Reporter's Notes to Rule 56(c) ("Because by definition the moving party is always asserting that the case contains no factual issues, the court should have the power, no matter who initiates the motion, to award judgment to the party legally entitled to prevail on the undisputed facts"), and cases cited.

"[A] party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates, by reference to material described in Mass. R. Civ. P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case. To be successful, a moving party need not submit affirmative evidence to negate one or more elements of the other party's claim ... The motion must be supported by one or more of the materials listed in rule 56 (c) and, although that supporting material need not negate, that is, disprove, an essential element of the claim of the party on whom the burden of proof at trial will rest, it must demonstrate that proof of that element at trial is unlikely to be forthcoming." *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 714 (1991).

STANDING

Rhino argues that the plaintiffs in both of the pending cases are not aggrieved by the Planning Board's decision, and therefore lack standing to proceed with their complaints. "Under the Zoning Act, G. L. c. 40A, only a 'person aggrieved' has standing to challenge a decision of a zoning board of appeals." *81 Spooner Road., LLC v. Zoning Bd. of Appeals of Brookline,* 461 Mass. 692, 700 (2012). "[A]butters, 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," are entitled to notice of zoning board hearings and "enjoy a rebuttable presumption [that] they are 'persons aggrieved' " by a decision concerning another property, G. L. c. 40A, § 11; *Marashlian v. Zoning Bd. of Appeals of Newburyport,* 421 Mass. 719, 721 (1996).

***4** While a plaintiff who is a party in interest has the benefit of the presumption of standing, and therefore does not have the initial burden of going forward with evidence to prove aggrievement, "it is always a plaintiff's burden to demonstrate her aggrievement." *Murrow v. Esh Circus Arts, LLC*, 93 Mass. App. Ct. 233, 238 (2018). For a plaintiff who "does not qualify as a party in interest and is not entitled to the presumption, the burden remained on [the plaintiff] to put forth credible facts of her specialized injury." *Id.* The "bald allegations in [a] complaint, which fail to set forth a particularized injury caused by" the proposed project, are not sufficient to meet the plaintiff's burden of showing aggrievement. *Id.*

Once the presumption of aggrievement has been rebutted, abutting property owners do not have "standing to challenge a dimensional zoning requirement without establishing particularized injury." *Murchison v. Zoning Bd. of Appeals of Sherborn*, 485 Mass. 209, 210 (2020). A plaintiff with no benefit from the presumption, like a plaintiff with the presumption after the presumption has been rebutted, must "prove standing by putting forth credible evidence to substantiate the allegations." *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline,* supra, 461 Mass, at 700. To do so, "[t]he plaintiff must 'establish—by direct facts and not by speculative personal opinion—that his injury is special and different from the concerns of the rest of the community.' " *Id.,* quoting *Standerwick v. Zoning Bd. of*

Appeals of Andover, 447 Mass. 20, 33 (2006). Furthermore, "[a]ggrievement requires a showing of more than minimal or slightly appreciable harm ... The adverse effect on a plaintiff must be substantial enough to constitute actual aggrievement such that there can be no question that the plaintiff should be afforded the opportunity to seek a remedy ... Put slightly differently, the analysis is whether the plaintiffs have put forth credible evidence to show that they will be injured or harmed by proposed changes to an abutting property, not whether they simply will be 'impacted' by such changes." *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 121-122 (2011).

Nonetheless, "a plaintiff is not required to prove by a preponderance of the evidence that his or her claims of particularized or special injury are true. 'Rather, the plaintiff must put forth credible evidence to substantiate his allegations.' " *Butler v. City of Waltham,* 63 Mass. App. Ct. 435, 441 (2005), quoting *Marashlian v. Zoning Bd. of Appeals of Newhuryport,* supra, 421 Mass. at 722. This "credible evidence" standard has both qualitative and quantitative components: "[q]uantitatively, the evidence must provide specific factual support for each of the claims of particularized injury the plaintiff has made. Qualitatively, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the board's action." *Butler v. Waltham*, supra, 63 Mass. App. Ct. at 441 (internal citation omitted). The facts offered by the plaintiff must be more than merely speculative. *Sweenie v. A.L. Prime Energy Consultants*, 451 Mass. 539, 543 (2008). Evidence of aggrievement must demonstrate " 'some infringement of [a plaintiff's] legal rights',,, must be more than 'minimal or slightly appreciable,' and the right or interest asserted must be 'one that G. L. c. 40A is intended to protect.' " *Murchison v. Zoning Bd. of Appeals of Sherborn*, supra, 485 Mass. at 213 (internal citations omitted).

As some of the plaintiffs are parties in interest, they enjoy a presumption that they are persons aggrieved. Others, either on the far side of Rush Pond Road, or, in the case of Mr. Jenkins, several miles away, enjoy no such presumption.

***5** In support of its motions for summary judgment, Rhino offers the plaintiffs' discovery responses, which, it argues, reveal claims of aggrievement that are either unrelated to a protected interest, are not supported by any competent evidence, or are speculative. The plaintiffs' claims of aggrievement are based, generally, on assertions that their properties will be impacted by harms from the operation of the proposed warehouse facility including noise, vibration, air pollution, water pollution by groundwater contamination, light pollution, and traffic.[14]

Generally, the Bylaw protects interests as follows:

> [The Bylaw] ... is hereby adopted for the purpose of promoting health, safety, convenience, morals and/or welfare of the inhabitants of the Town of Lakeville, for lessening the dangers of congestion and fire, to conserve the value of the land and buildings, to encourage the most appropriate use of land and for other purposes stated in Chapter 40A of the General Laws of the Commonwealth...[15]

Section 6.2 of the Bylaw provides as follows:

> Any use permitted by right or Special Permit in any district shall not be conducted in a manner as to emit any dangerous, noxious, injurious, or otherwise objectionable fire, explosion, radioactive or other hazard; noise or vibration, smoke, dust, odor or other form of environmental pollution,; electrical or other disturbance; glare, liquid or solid, refuse or wastes, conditions conducive to the breeding of insects, rodents, or substance, conditions, or element in an amount as to affect adversely the surrounding environment.

Accordingly, where, as here, a use is authorized by right or by special permit, the protections afforded by Section 6.2 apply. The plaintiffs argue that the warehouse use was not properly authorized by right or by special permit, based on their argument that the Development Opportunities Overlay District does not encompass the subject property. However, since the special permit was granted by the Planning Board, the protections afforded by Section 6.2 must be considered to be in effect for the purpose of assessing the plaintiffs' standing.

The private defendant Rhino's challenge to the plaintiffs' claims of aggrievement, and the plaintiffs' responses supporting these claims, are addressed as follows:

Noise. All of the plaintiffs identified expected noise from the proposed warehouse facility as a harm and impact on them in the use of their properties.[16] In support of its rebuttal of the presumption of aggrievement of those plaintiffs with the benefit of the presumption, as well as its contention that none of the other plaintiffs will suffer an injury or cognizable impact related to noise, Rhino submitted two

affidavits of its sound engineer Michael T. Lannan, and a sound study prepared by Tech Environmental under Mr. Lannan's supervision is also in the summary judgment record. The plaintiffs did not commission their own sound study but rely instead on what they consider to be admissions and flaws in the Tech Environmental sound study.

Tech Environmental utilized standard and accepted methodologies in putting together its sound study. It used what it termed conservative assumptions about the current daytime, evening and nighttime ambient sound levels and the projected ambient sound levels reasonably to be expected following the development of the proposed warehouse facility. It then compared the pre- and post-development conditions for measurement of the relative impact on the nearby Rush Pond Road neighborhood where most of the plaintiffs live. Conservative assumptions included assuming that trucks waiting to load or unload would idle for up to fifteen minutes instead of the maximum allowed five minutes, and assuming that in the evening and at night trucks would load and unload only on the western, or Rush Pond Road, side of the property. Following its initial report, Tech Environmental modified its report to take into account design modifications to an earthen berm and a sound fence, and the lowering of the elevation of the warehouse building, all changes designed to moderate the effect of sound on the neighbors along Rush Pond Road.

***6** Tech Environmental identified increases in ambient sound pressure levels of 3 decibels ("dB") as "just perceptible," increases of 5 dB as "noticeable" and increases of 10 dB as being perceived as twice as loud.[17] Tech Environmental notes that either an increase in "broadband sound pressure" of more than 10 dB, or a "pure tone" condition violates the MassDEP Noise Policy and would be considered "unnecessary emissions of noise" in violation of 310 CMR 7.10.[18]

Tech Environmental modelled the background existing condition ambient sound pressure levels to be 48 dB for the daytime, 42 dB for the evening, and 40 dB (all expressed as "dBA" for "ambient") for the nighttime.[19] With its conservative assumptions regarding traffic, idling, HVAC noise, and other factors in place, Tech Environmental originally modelled increases at the Rush Pond Road properties of 7 dBA for the daytime (6:00 A.M. - 5:59 P.M.), 8 dBA for the evening (6:00 P.M. - 10:59 P.M.), and 9 dBA for the nighttime (11:00 P.M. - 5:59 A.M.). When factoring in the changes in design of the building and changes to the proposed berm and sound fencing, the post-development modelled increase in ambient sound pressure levels at the Rush Pond Road properties is predicted by Tech Environmental to be 5 dBA for the daytime, 4 dBA for the evening hours, and 5 dBA for the nighttime.[20]

Thus, using Tech Environmental's own assumptions and its characterization of human perception of increases in sound pressure levels, the increase in noise at the Rush Pond Road properties once the proposed warehouse facility is in operation will be between "perceptible" and "noticeable" in the evenings, and will be "noticeable" to the Rush Pond Road residents in the daytime and at night. This level of sound, audible to the Rush Pond Road residents, will be persistent, and will be heard, according to Tech Environmental, consistently at all hours of the day and night, seven days a week as trucks enter and leave the facility, maneuver to enter and exit loading docks, and idle while waiting to do so.

In addition, a careful reading of Tech Environmental's report reveals that the level of sound conceded to impact the Rush Pond Road properties does not include all the sound that will impact the plaintiffs who live on Rush Pond Road. Notwithstanding its many "conservative" assumptions designed to take into account all of the noise that is likely to impact the nearby properties, in the case of the noise from back-up alarms on trucks, Tech Environmental, in the opposite of a conservative approach, assumed away a noise that apparently its study could not comfortably accommodate and still conclude that there will be little impact on the nearby property owners.

In response to comments by the Planning Board's peer review consultant, Tech Environmental conceded that for the purpose of its sound study, it assumed that trucks using the warehouse facility would utilize "low noise" back-up alarms, instead of standard, single-tone back-up alarms, which it acknowledged that, generating a "pure tone," are perceived as a louder sound than "white noise" or "low noise" back-up alarms.[21] "Tech assumed a 'low-noise' beeper to demonstrate the trucking flexibility provided."[22] Tech Environmental recommended several strategies to reduce the impact of standard back-up alarms, including restricting their use to the daytime, lowering their volume, encouraging the use of "white noise" back-up alarms, and encouraging the use of "no-noise, light flashing" back-up warning lights at night.[23] However, it conceded that the actual implementation of any of these mitigation measures

"will be dependent on the ultimate tenant's needs, and their ability to modify trucks accessing their facility."[24]

***7** In his affidavit, Mr. Lannan extolled the virtues of "white noise beepers" over standard back-up alarms, but also conceded that, "Unfortunately, not all areas allow these white noise beepers, so the default on most trucks are traditional back-up beepers."[25] Nevertheless, even after admitting that most trucks use standard back-up alarms, Mr. Lannan and Tech Environmental used "white noise" back-up alarms in conducting the sound study, as "the white noise beepers were determined to be representative of both types given this project's multiple levels of conservatism."[26] This was disingenuous at best, given Tech Environmental's admission to the peer reviewer that "standard back-up alarms provide a tonal sound typically in one or more tight octave bands,"[27] and its concession that the project proponent will not have the ability to require use of low noise or white noise back-up alarms.

Furthermore, the pure tonal sound of standard back-up alarms, concededly more audible above the ambient background, will not be a mere intermittent annoyance. Back-up alarms, "by design and by code, must be louder than other sounds at this proposed warehouse...."[28] The fact that back-up alarms are loud by design for safety reasons and are exempt from noise regulations for that reason does not mean they are exempt from being considered for purposes of determining impact or injury to abutters in a standing analysis for zoning purposes. Tech Environmental estimates that the warehouse facility will experience up to 30 "truck trip ends" per hour during the day, 8 truck trip ends per hour in the evening hours, and 4 truck trip ends per hour at night, resulting in "back-up beeper time ... assumed to occur for up to 30 minutes of each hour during the quieter hours and continuously during the daytime hours...."[29] This noise, conceded to be constant and audible to the plaintiffs along Rush Pond Road, is a cognizable injury for zoning purposes.

Accordingly, based on the undisputed facts as discussed above, Rhino has failed to rebut the presumption of aggrievement afforded to those plaintiffs who are parties in interest, and with respect to those plaintiffs who live on Rush Pond Road but are not parties in interest, the undisputed evidence establishes their standing as well.

Rhino argues, with no support, that increases in noise that do not reach 10 dBA above ambient levels are insufficient to constitute aggrievement because they may not violate DEP noise regulations.[30] On the contrary, noise levels that fail to be twice as loud (10 dBA above ambient) as the ambient background noise can still be sufficiently loud to constitute "credible evidence to show that [the plaintiffs] will be injured or harmed by proposed changes to an abutting property, not whether they simply will be 'impacted' by such changes." *Kenner v. Zoning Bd. of Appeals of Chatham*, supra, 459 Mass. at 121-122. That is the case here, where Rhino's expert concedes that additional noise from the proposed warehouse facility will be at least "noticeable" for many of the residents on Rush Pond Road for much of the day and night, seven days a week, and where even that estimate does not take into account the near constant noise from standard truck back-up alarms that will be added on top of the sound levels already modelled by and admitted to by Rhino's expert.

Traffic. Rhino submitted the affidavit of Robert J. Michaud, a registered professional engineer specializing in transportation, who analyzed the potential traffic impacts of the proposed warehouse facility.[31] The proposed warehouse facility will utilize Main Street (Route 105) for access, and traffic from the facility will generally travel along Main Street to and from Interstate 495, which is to the west of the Lakeville State Hospital site. Just west of the facility is the intersection of Rhode Island Road (Route 79). The intersection of Route 79 and Rush Pond Road is about a mile from the Route 79 intersection with Route 105. Rush Pond Road is a dead-end road ending in a cul-de-sac, and despite its proximity to the proposed warehouse facility, has no direct entrance or exit onto Route 105.

***8** As is standard for traffic studies of this kind, Mr. Michaud modelled present traffic conditions, and traffic conditions seven years out for both "build" (with the warehouse facility) and "no-build" conditions. The intersection of Routes 105 and 79 presently operates at a level of service ("LOS") of "D" (on a scale of A through F), and was modelled to operate at LOS D in both the build and no-build condition seven years out.[32] The left-turn from Route 105 onto Route 79 currently operates at LOS E, and is modelled to still be at LOS E seven years out after construction of the warehouse facility.[33] Impacts on the intersection of Route 79 and Rush Pond Road were modelled to be de minimis.[34]

Plaintiffs' anecdotal claims that traffic problems will be created by the proposed facility provide an insufficient basis for establishing a cognizable traffic impact. See *Barvenik*

v. Board of Alderman of Newton, 33 Mass. App. Ct. 129, 132-133 (1992). Furthermore, none of the plaintiffs' unsupported claims of increased traffic on Route 105, even if established, support a conclusion that any such increase in traffic will impact their own properties in any way other than by the same general impact that the increase will have on all other properties in the area. This kind of general impact shared by the community, even if established, is an insufficient basis for standing if no particularized injury to the plaintiffs' properties is proven. "Here, the plaintiff[s'] interest is not substantially different from that of all of the other members of the community who are frustrated and inconvenienced by heavy traffic ..." *Nickerson v. Zoning Bd. of Appeals of Raynham,* 53 Mass. App. Ct. 680, 683-684 (2002). Aggrievement is not established by such general non-particularized impact.

Rhino has successfully rebutted the presumption of standing on the issue of traffic for those plaintiffs who have the benefit of the presumption, and those plaintiffs, as well as the plaintiffs who do not have the benefit of the presumption, have failed to present credible evidence of a cognizable injury based on traffic.

Water pollution. In discovery responses, some plaintiffs expressed concerns that extensive site work required for the construction of the proposed warehouse facility will result in pollution of drinking water sources. In response, Rhino submitted the affidavit of Katherine E. Kudzma, a licensed site professional employed by Vanasse Hangen Brustlin, Inc. ("VHB")[35] Ms. Kudzma cited a study of groundwater and the landfill on the site in support of her opinion that (1) there was no negative impact on groundwater quality that can be attributed to the landfill on the Lakeville State Hospital site, and (2) groundwater flow is to the northeast, away from nearby drinking water supplies and the private residences on Rush Pond Road, to the west.[36]

Ms. Kudzma's affidavit successfully rebuts the concerns expressed by some of the plaintiffs, and the plaintiffs have offered nothing beyond speculation in support of their claims of harm resulting from groundwater pollution. See *Sweenie v. A.L. Prime Energy Consultants,* supra, 451 Mass, at 543 (abutters' concerns about groundwater pollution if gasoline tanks leaked were speculative, especially in light of evidence that groundwater flowed away from abutters' properties). The plaintiffs' assertions of injury, stated in the most conclusory fashion, without even a fig leaf of purported fact, are "just the type of 'uncorroborated speculations' sought to be avoided by the standing requirements of G. L. c. 40A, § 17." *Marashlian v. Zoning Bd of Appeals of Newburyport,* supra, 421 Mass, at 723 n.5 (citing holding that unsupported claim of increased headlight glare was speculation).

***9** *Air pollution.* The plaintiffs asserted concerns about air pollution from trucking activities at the proposed warehouse facility as another basis for their standing. The right to be free from injury due to increased air pollution is an interest protected by the Bylaw. Section 6.2 provides that special permit uses shall not be conducted in a such a manner so as "to emit any dangerous, noxious, injurious, or otherwise objectionable fire, explosion, radioactive or other hazard; noise or vibration, smoke, dust, odor or other form of environmental pollution ..." Section 7.9.6.B provides for the Planning Board to "evaluate dangerous or objectionable elements for ... sources of air pollution...."

The plaintiffs failed to support their concerns with any expert opinion or other competent evidence to support their claim of injury in this regard. However, as with the noise analysis, the plaintiffs may rely on Rhino's own expert's opinion in arguing that they will incur a cognizable injury in the form of increased air pollution in the vicinity of their homes.

Rhino submitted the affidavit of Heidi U. Richards, a qualified air quality engineer employed by VHB.[37] Acknowledging that volatile organic compounds ("VOC") and nitrogen oxides ("NOX") are required to be assessed as "criteria pollutants" under the "attainment" status of Plymouth County, VHB did an analysis of projected increases in these pollutants as a result of the proposed warehouse facility. VHB projected that the proposed warehouse facility "would result in increases in pollutant emissions, specifically 0.9 kg/day of VOC, 0.1 kg/day of NOX, and 151 tons per year of CO2 relative to a No Build scenario."[38] Ms. Richards opined that Rhino can reduce this projected additional air pollution by its commitment to (1) install at least 20 electric vehicle charging spaces, and (2) restrict truck idling to five minutes per vehicle in compliance with 310 CMR 7.11. VHB projects that the installation of electric charging stations will reduce VOC emissions by 0.02 kg/day, thus still resulting in an increase of VOC emissions of 0.88 kg/day; and a projected reduction of NOX emissions of 0.002 kg/day, thus still resulting in an increase of 0.098 kg/day in NOX emissions.[39]

Neither Rhino nor VHB offers any explanation as to how its projection that emissions can be reduced by even these decidedly negligible amounts is anything but speculative, as

neither offers any suggestion that the use of electric trucks in meaningful numbers will be required at the site or is likely to occur at any time in the near future. Furthermore, VHB's assertion that Rhino is willing to restrict truck idling to five minutes is flatly contradicted by the admission in the Tech Environmental sound study and the Michael Lannan affidavits that a conservative analysis requires a concession that Rhino will not be able to enforce a five-minute idling restriction, and that trucks are likely to idle for up to fifteen minutes.

Thus, as is the case with the noise analysis, Rhino's own expert has opined that the proposed facility will result in cognizable increases in air pollution, but offers only speculative suggestions that those increased levels can be mitigated, and further, has offered a suggestion of limitations with respect to truck idling that is contradicted by Rhino's own submissions. Under these circumstances, Rhino has failed to rebut the presumption of aggrievement afforded to those plaintiffs who are parties in interest, and with respect to those plaintiffs who live on Rush Pond Road but are not parties in interest, the undisputed evidence establishes their standing as well.

***10** *Light pollution.* To address the plaintiffs' stated concerns about light spillover from the proposed warehouse facility, Rhino submitted the affidavit of Daniel Moynagh, an electrical engineer who relied for his opinion on a photometric plan prepared by a lighting design consultant.[40] The photometric plan, an apparently reduced-size copy of which is attached as an exhibit to the affidavit, is so reduced in size as to make any figures on the plan itself, as well as any depictions of the locations of proposed lighting fixtures, illegible or invisible. Likewise, the table on the photometric plan uses undefined terms and ranges with no explanation or reference for context. Mr. Moynagh's affidavit offers no explanation of anything on the photometric plan, but instead states that the photometric plan was prepared in accordance with the guidelines of the Illuminating Engineering Society, without any explanation of what those guidelines are, and then offers the conclusory opinion that, "Accordingly, the plaintiffs should not suffer any harm from light pollution in the form of glare or overspill."[41]

The court is unable to conclude, for the purposes of the pending summary judgment motions, that Rhino has rebutted the presumption of standing of those plaintiffs with the benefit of the presumption, on the basis of the Moynagh affidavit. Those plaintiffs without the benefit of the presumption have failed to offer any credible evidence beyond mere speculation that they will suffer injury as a result of lighting or headlight glare at the proposed warehouse facility. See *Sweenie v. A.L. Prime Energy Consultants*, supra, 451 Mass. at 543,

Vibration. Another VHB engineer, Jason C. Ross, was asked by Rhino to address the plaintiffs' expressed concerns about feared excessive ground-borne vibration due to truck traffic at the proposed warehouse facility. In his affidavit, Mr. Ross explained that vibration is expressed in terms of decibels with the symbol "VdB," that the lowest level of such vibration perceived by humans is 65 VdB, and that inside the nearest house on Rush Pond Road, about 181 feet from the nearest travelled roadway on the Lakeville State Hospital site, the level of vibration from truck traffic at the proposed warehouse facility would be 47 VdB, well below the level of human perception.[42] The plaintiffs have failed to counter this credible evidence with any evidence, other than speculation, that the plaintiffs' homes would be subject to excessive or even perceptible vibration.

Accordingly, on the issue of vibration, Rhino has rebutted the presumption of standing for those plaintiffs with the benefit of the presumption, and the plaintiffs have failed to counter this evidence with any credible evidence of injury from vibration.

View. Finally, Rhino correctly points out that the Bylaw does not include view as a protected interest. Accordingly, the plaintiffs may not claim loss of views as a basis for standing. See *Monks v. Zoning Bd. of Appeals of Plymouth,* 37 Mass. App. Ct. 686, 688 (1994).

MERITS

Having concluded that Rhino has failed to rebut the presumption of standing for those plaintiffs with the benefit of the presumption with respect to at least some of their claimed injuries, and that other plaintiffs on Rush Pond Road have established their standing on at least some of their claimed injuries, the court now turns to the plaintiffs' motions for summary judgment on the merits of their claim.

The plaintiffs argue that the Planning Board exceeded its authority in issuing a special permit for the proposed warehouse facility because, they contend, the Lakeville State Hospital site is simply not in a Development Opportunities Overlay District as claimed by the Planning Board and Rhino. Rhino frames the issue before the court as a challenge by the plaintiffs to the facial validity of the Development

Opportunities Overlay District section of the Bylaw as enacted by the town. However, this is a mischaracterization of the plaintiffs' argument, as they do not challenge the validity of the Development Opportunities district provisions of the Bylaw as enacted by the 2012 Town Meeting. Rather, the plaintiffs challenge the decision of the Planning Board on the ground that the decision is legally untenable because, they contend, while the Bylaw properly contains provisions for a Development Opportunities Overlay District, no map amendment or other Bylaw provision has ever been adopted placing the Lakeville State Hospital site, or any other property, for that matter, in such a district. The plaintiffs are correct.

***11** As Rhino points out, the burden on a plaintiff seeking to invalidate a zoning enactment is a steep one. "[A] strong presumption of validity is to be afforded to [a] challenged bylaw or ordinance." *DiRico v. Kingston*, 458 Mass. 83, 95 (2010). This "presumption 'will not normally be undone unless the plaintiff can demonstrate "by a preponderance of the evidence that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety ... or general welfare." ' " *Id*., quoting *Durand v. IDC Bellingham, LLC,* 440 Mass. 45, 51 (2003). "If the reasonableness of a zoning bylaw is even 'fairly debatable, the judgment of the local legislative body responsible for the enactment must be sustained.' " *DiRico v. Kingston*, supra, quoting *Durand v. IDC Bellingham, LLC*, supra.

However, the present case is not, as Rhino tries to characterize it, a "facial challenge to a zoning amendment." The question here is not whether the Development Opportunities Overlay District provisions of the Bylaw were validly enacted. Rather, the question is whether the town adopted a map amendment designating the Lakeville State Hospital site, or any other part of town, as being within such a district. This is not a question of the validity of the Bylaw, but is simply a question whether the Planning Board exceeded its authority, issuing a legally untenable decision by considering the Lakeville State Hospital site to be in such a district when it was not. See *Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 73 (2003) (planning board or board of appeals decision is based on legally untenable grounds when premised "on a standard, criterion or consideration not permitted by the applicable statutes or by-laws").

Any exercise of a town's zoning power must adhere to the procedural requirements of G. L. c. 40A. *Rayco Inv. Corp. v. Bd. of Selectmen of Raynham*, 368 Mass. 385, 392 n.4 (1975). The adoption of provisions for a new district may be valid, but do not burden or benefit any particular land in a municipality until a map amendment or provision designating the land subject to the new zoning provision is adopted. Thus, in *Cerel v. Town of Natick*, the adoption of a "planned cluster development" district, with a provision that only parcels of a certain size could benefit from its provisions, did not benefit the plaintiff's land, despite the qualifying size of his parcel, without a corresponding map amendment placing his land in the district. The zoning amendment adopting the new cluster district "changed no boundaries of any existing district. It neither generated automatic rezoning of the petitioner's land nor designated any other land within the town as a PCD district." 2 Mass. App. Ct. 822 (1974). By adopting the new district designation without adopting a corresponding map amendment, "[t]he town simply intended to create a new type of district to which land could subsequently be assigned by amendment of the zoning map." *Id.* Similarly, where a town meeting adopted a new apartment house zoning district but the corresponding map amendment designating land to be in that district failed to pass, the district provisions were valid, but no land was subject to the provisions of the new district until a map amendment designating land as within the district was passed a year later. The adoption of the district without the map amendment did not create a "floating zone." Rather, "there is no requirement of law that, in order to be effective, there should always be examples of each class of zoning districts in a municipality." *Noonan v. Moulton*, 348 Mass. 633, 638-639 (1965).

Likewise, the adoption of the Development Opportunities Overlay District provisions as found in Section 7.9 of the Bylaw was a valid exercise of the town of Lakeville's zoning power, but, as in *Cerel* and *Noonan*, the enactment is not effective with respect to any particular land unless and until a zoning map amendment, or other zoning enactment designating land to be included in the district, is adopted. There is no dispute of fact regarding the lack of a map amendment. No map amendment was adopted designating the Lakeville State Hospital site or any other land in Lakeville as part of a Development Opportunities Overlay District.

***12** Rhino argues that no map amendment was necessary to implement the Development Opportunities Overlay District, and argues that instead, the language of the enactment should be construed to place the entire town within such an overlay zoning district. While an overlay district properly may be placed so as to encompass certain types of land in an entire town within the overlay district, the plain and unambiguous

language of the Development Opportunities Overlay District provisions of the Bylaw did no such thing.

The only mention of the potential location of any Development Opportunities Overlay District in the Bylaw is in the "purpose" section of the Development Opportunities section of the Bylaw, which states as follows: "The Development Opportunities District is an overlay district superimposed over those underlying districts as shown on the zoning map of the Town of Lakeville."[43] As is noted above, nothing on the town's zoning map shows any such district superimposed over any districts, nor is there any mention of the Development Opportunities Overlay District anywhere on the zoning map.

Rhino argues, essentially, that because the district is not shown to be anywhere, it must be everywhere. According to this argument, the district is superimposed over the entire town. This interpretation is not supported by the plain language of the enactment, and it is not even supported by the Planning Board's own interpretation in its decision granting the special permit. Rhino's argument, accomplished only by ignoring some of the words in the enactment, is that by providing for the district to be superimposed over "underlying districts" "shown on the zoning map,"[44] the Bylaw designated the district to be superimposed over all underlying districts. Rhino's interpretation violates the basic rule that statutory enactments must be read as a whole to determine their meaning. "The plain language of the statute, read as a whole, provides the primary insight into [the legislative body's] intent." *CommCan, Inc. v. Town of Mansfield*, 488 Mass. 291, 295 (2021), citing *Commonwealth v. Morgan*, 476 Mass. 768, 777 (2017). Further, by reading out the word "those" in order to make its argument work, Rhino violates another basic principle of statutory interpretation: "A general principle of statutory interpretation is that 'every word in a statute should be given meaning' ... and no word is considered superfluous." *Boone v. Commerce Ins. Co.,* 451 Mass. 192, 196 (2008) (internal citation omitted).

Rhino's argument is belied by the consideration of the sentence as a whole, which provides that the overlay district is "superimposed over *those* underlying districts *as shown* on the zoning map ..." (emphasis added). By using the word "those" to modify "underlying districts," as opposed to a word like "all," and by providing that the district was superimposed over "those" districts "as shown" on the zoning map, the enactment specified that the overlay district would be superimposed over certain districts, but not over all districts. "Those" is a reference to a specific number of things that is fewer than "all" of the things to which reference is being made, unless it is modified further by "all," as in "all those." Where the Bylaw calls for the overlay district to be superimposed over fewer than all the districts on the zoning map, and nothing on the map shows which districts those are, then there is no Development Opportunities Overlay District until a map amendment is adopted designating "those" districts over which the district is to be superimposed.

***13** Rhino points out in support of its argument the fact that there are other town-wide overlay districts, and that some are not shown on the zoning map. But contrary to Rhino's argument, the language used to adopt the town-wide overlay districts clearly and unambiguously imposes the districts over the entire town, and no tortured parsing of the language of the enactment is required. Section 7.1.5 of the Bylaw establishes a Flood Plain District "as an overlay district to *all* other districts," (emphasis added) and the district regulations are further imposed by explicit incorporation of federal "FIRM" flood plain maps. Similarly, the Water Resources Protection District is explicitly adopted so that "[t]hese regulations apply *throughout* the Town."[45] (emphasis added) Compare these explicit enactments for overlay districts to apply town-wide with the limiting provision in the Development Opportunities Overlay District that it is to be "superimposed over those underlying districts as shown on the zoning map."

The contrast between these three overlay district provisions demonstrates that the drafters of the Lakeville Zoning Bylaw know how to designate a town-wide overlay district, that they did so with respect to the Flood Plain District and the Water Resources Protection District, and that they chose not to do so in adopting the Development Opportunities Overlay District.

To the extent any deference is due to the Planning Board's own interpretation of an ambiguous section of its own bylaw, see *Coco Bella LLC v. Hopkinton Bd. of Appeals,* 92 Mass. App. Ct. 1102 (2017) (Rule 1:28 Unpublished Opinion), no such deference to the interpretation offered by Rhino is due here, because the Planning Board offered a different justification in its decision, one that neither Rhino nor the town argues is correct. In its decision, the Board opined that the Development Opportunities district "is a designated overlay district in the Lakeville Zoning Bylaw that applies to land within the Town consisting of a total land area, including streets, of twenty-five or more acres." Such an interpretation, if followed, would make the Development Opportunities Overlay District a "floating zone" in violation of G. L. c.

40A, § 3, sixth para.[46] Thus the Board's own interpretation is inconsistent with G. L. c. 40A and is therefore not due any deference. *Valcourt v. Zoning Bd. of Appeals of Swansea*, 48 Mass. App. Ct 124, 129 (1999).

The interpretation offered by Rhino, now supported by the Planning Board in its brief in support of Rhino's position, although inconsistent with its interpretation as set forth in the Planning Board's decision, is also due no deference as the language of the Bylaw is not ambiguous. Again, to the extent it may be considered ambiguous, the Planning Board's position, offered for the first time in this motion for summary judgment, is also due no deference because it is plainly inconsistent with the language of the Bylaw as discussed above. See *Pinecroft Development, Inc. v. Zoning Bd. of Appeals of West Boylston,* 101 Mass. App. Ct. 122 (2022) (no deference due to board of appeals where board's interpretation of split-lot provision of zoning bylaw plainly wrong).

CONCLUSION

For the foregoing reasons, I find and rule that those plaintiffs who are parties in interest and those other plaintiffs who reside on Rush Pond Road, are persons aggrieved within the meaning of G. L. c. 40A, § 17, and I further find and rule that the Planning Board's decision granting a special permit and site plan approval was legally untenable because the Lakeville State Hospital site at 43 Main Street in Lakeville is not in a Development Opportunities Overlay District under Section 7.9 of the Bylaw. Accordingly, the private defendant Rhino Capital Advisors LLC's motions for summary judgment are DENIED (except with respect to plaintiff John Jenkins, as to whom the motion in Case No. 21 PS 000252 is ALLOWED) and the motions for summary judgment of those plaintiffs who are parties in interest and those who reside on Rush Pond Road are ALLOWED.

***14** Judgment will enter accordingly annulling the decision of the Planning Board.

All Citations

Not Reported in N.E. Rptr., 2022 WL 3016220

Footnotes

1 Additional undisputed material facts are set forth in the Discussion section, *infra.*

2 Private Defendant's Statement of Facts and Plaintiffs' Response (21 PS 000252) ("SOF") 4: Private Defendant's Appendix, ("Defendant's App.") Exh. 1.

3 Private Defendant's App., Exh. 2, "Decision on Special Permit and Site Plan Review."

4 Plaintiffs' Appendix (21 PS 000252) ("Plaintiffs' App.") Exh. 20.

5 SOF ¶¶ 30, 31; Plaintiffs' App., Exhs. 2, 20.

6 SOF ¶ 29; Plaintiffs' App., Exhs. 2, 20.

7 Private Defendant's SOF (No. 21 PS 000245), ¶¶ 30, 31.

8 Plaintiffs' App., Exhs. 2, 20.

9 Defendant's App., Exh. 1, "Special Permit Petition for Hearing."

10 Defendant's App., Exh. 3, "Zoning By-law, Town of Lakeville," ("Bylaw") Sec. 7.9.2.1(c); 7.9.3.2.

11 Plaintiffs' App., Exh. 1.

12 Plaintiffs' App., Exh. 4.

13 Plaintiffs' App., Exh. 5.

14 SOF, ¶¶ 33-37.

15 Plaintiffs' App. Exh. 4, Bylaw, Sec. 1.1.

16 SOF, ¶ 33-37.

17 Plaintiffs App., Exh. 7(A), Tech Environmental letter dated December 28, 2020, p. 2.

18 Id., at p. 4.

19 Defendant's App., Exh. 8, Affidavit of Michael T. Lannan, ¶ 23.

20 Id., ¶¶ 24, 25.

21 Plaintiff's App., Exh. 7B, Tech Environmental letter dated December 28, 2020, p. 4 ("Yes, standard back-up beepers provide a tonal sound typically in one or more tight octave bands").

22 Id., at p. 5.

23 Id.

24 Id.

25 Defendant's App., Exh. 8, Lannan Affidavit, ¶ 22.

26 Id.

27 Plaintiff's App., Exh. 7B, p. 4.

28 Defendant's App., Exh. 8, Lannan Affidavit, ¶ 29.6.

29 Plaintiff's App., Exh. 7A, p. 6.

30 Second Affidavit of Michael Lannan, ¶ 10. ("Both the state and Lakeville's local rules and policies define the threshold for 'adverse impact' as 10 dBA above ambient conditions.").

31 Defendant's App., Exh. 9, Affidavit of Robert J. Michaud.

32 Id., at ¶ 16.

33 Id., at ¶ 18.

34 Id., at ¶ 24.

35 Defendant's App., Exh. 10, Affidavit of Katherine E. Kudzma.

36 Id., at ¶ 7.

37 Defendant's App., Exh. 11, Affidavit of Heidi U. Richards.

38 Id. at ¶ 11.

39 Id., at ¶ 12.

40 Defendant's App., Exh. 13, Affidavit of Daniel Moynagh, P.E.

41 Id., at ¶ 9.

42 Defendant's App., Exh. 12, Affidavit of Jason Ross, ¶¶ 8-10.

43 Bylaw, sec. 7.9.1.

44 Private Defendant's brief in opposition to plaintiff's motion for summary judgment, p. 4.

45 Bylaw, sec. 7.2.1.

46 G. L. c. 40A, § 3, para. 6, provides that, “No provision of a zoning ordinance or by-law shall be valid which sets apart districts by any boundary line which may be changed without adoption of an amendment to the zoning ordinance or by-law.” A bylaw that allowed parcels to become part of an overlay district by the assemblage of parcels of sufficient acreage would be such an invalid bylaw.

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