

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

ESSEX, ss

MISCELLANEOUS CASE
NO. 19 MISC 000328 (RBF)

CHARLES D. BONANNO and ALLISON C.
BONANNO, in their capacities as the Trustees of
The Ozone Realty Trust,

Plaintiffs,

v.

CITY OF GLOUCESTER ZONING BOARD OF
APPEALS, including members, DAVID B.
GARDNER, JOSEPH PARISI III, MICHAEL C.
NIMON, ADRIA PRATT, MICHELE
HOLOVAK HARRISON, and CATHERINE
A. SCHLICHTE;

WILLIAM SANBORN, Building Commissioner
for the City of Gloucester;

JOSEPH and GLORIA DISTEFANO, Individually
and in their capacities as Trustees of the Joseph
DiStefano Revocable Trust dated March 6, 2019
and the Gloria L. DiStefano Revocable Trust
dated March 6, 2019;

Defendants,

and

GERARD and SHEILA MCGOVERN, as
Necessary Parties.

JOSEPH and GLORIA DISTEFANO, Individually
and in their capacities as Trustees of the Joseph
DiStefano Revocable Trust dated March 6, 2019
and the Gloria L. DiStefano Revocable Trust
dated March 6, 2019;

MISCELLANEOUS CASE
NO. 19 MISC 000604 (RBF)

)
Plaintiffs,)
)
v.)
)
CHARLES D. BONANNO and ALLISON C.)
BONANNO, in their capacities as the Trustees of)
The Ozone Realty Trust,)
)
Defendants,)
)
and)
)
GERARD and SHEILA MCGOVERN, as)
Necessary Parties.)
_____)

DECISION

Introduction

In the first of these companion cases, case no. 19 MISC 000328, the plaintiffs Charles D. Bonanno and Allison C. Bonanno, Trustees of the Ozone Realty Trust (the Bonannos), appeal the denial of their appeal to the City of Gloucester Zoning Board of Appeals. The Bonannos seek to establish that the properties owned by the defendants Joseph and Gloria DiStefano, individually and in their capacities as Trustees of the Joseph DiStefano Revocable Trust dated March 6, 2019 and the Gloria L. DiStefano Revocable Trust dated March 6, 2019 (the DiStefanos), and the abutting property owned by necessary parties Gerard and Sheila McGovern have merged for zoning purposes, and therefore the DiStefanos cannot build on their property under the Gloucester zoning ordinance. The second case, case no. 19 MISC 000604, brought by the DiStefanos against the Bonannos, seeks a declaration that the Bonannos’ claim of merger is barred by laches. After the denial of a motion for summary judgment, the court agreed to bifurcate trial on the zoning appeal, and try the issue of the Bonannos’ standing first. The parties agreed that if the court were to find that the Bonannos lacked standing, both cases would be

dismissed. The case was tried to me, and, as set forth in the findings and rulings below, I find that any harm to the Bonannos from the DiStefanos' proposed house is de minimis, and cannot form the basis for aggrievement. The Bonannos do not have standing to bring their appeal, and both cases will be dismissed.

Procedural History

The Bonannos filed the Complaint in case no. 19 MISC 000328 (the 328 action) on July 2, 2019 (original 328 complaint) naming as defendants the City of Gloucester Zoning Board of Appeals, and its members David B. Gardner, Joseph Parisi III, Michael C. Nimon, Adria Pratt, Michele Holovak Harrison, and Catherine A. Schlichte (the ZBA), William Sanborn, the Building Commissioner for the City of Gloucester (the Building Commissioner), and the DiStefanos. The original 328 complaint had two counts. Count I was an appeal, pursuant to G.L. c. 40A, § 17, of the ZBA's June 13, 2019, decision denying the Bonannos' appeal of the determination of the Building Commissioner that the property owned by the DiStefanos at 13 Sleepy Hollow Road, Gloucester, Massachusetts (DiStefano property), is a buildable lot (ZBA decision). Count II sought a declaratory judgment pursuant to G.L. c. 231A, §§ 1-2, that the properties known as 15 Sleepy Hollow Road, Gloucester, Essex County, Massachusetts (15 Sleepy Hollow), owned by Gerard and Sheila McGovern (the McGoverns), and the DiStefano property merged for zoning purposes. The DiStefanos filed a Partial Motion to Dismiss and a Memorandum of Law in Support of the Partial Motion to Dismiss on July 26, 2019. The ZBA and the Building Commissioner each filed their answer to the 328 action on July 29, 2019. The Bonannos filed Plaintiffs' Opposition to the DiStefano's Partial Motion to Dismiss on August 30, 2019. The case management conference in the 328 action was held on September 11, 2019, at

which the Partial Motion to Dismiss was allowed and Count II of the 328 complaint was dismissed without prejudice.

The DiStefanos filed the Complaint in case no. 19 MISC 000604 (the 604 action) on December 17, 2019 (604 complaint), naming as defendants the Bonannos and the McGoverns. The 604 complaint seeks a declaration pursuant to G.L. c. 231A, § 1 et. seq., that the Bonannos' claim that 15 Sleepy Hollow and the DiStefano property merged for zoning purposes is barred by the doctrine of laches. The Bonannos filed their answer to the 604 complaint on January 27, 2020. The case management conference in the 604 action was held on March 10, 2020, and the 328 action and the 604 action were deemed companion cases.

On May 4, 2020, the DiStefanos filed Defendant Joseph and Gloria DiStefano's Motion to Compel the Plaintiffs to Add Indispensable Parties; the Plaintiffs' Response to Defendants Joseph and Gloria DiStefano's Motion to Compel the Plaintiffs to Add Indispensable Parties was filed May 18, 2020. The court allowed the motion without a hearing on June 12, 2020. The Bonannos filed their Amended Complaint for Judicial Review and Declaratory Judgment (amended 328 complaint) on July 1, 2020, reinstating Count II of the original 328 complaint for declaratory judgment and adding the McGoverns as party defendants. The ZBA and the Building Commissioner filed their answers to the amended 328 complaint on July 28, 2020; the DiStefanos and the McGoverns filed their respective answers on August 6, 2020.

On June 8, 2022, the DiStefanos filed their Motion for Summary Judgment, Memorandum in Support of the Summary Judgment Motion, Statement of Material Facts Not in Dispute and Appendix, and Defendant Joseph DiStefano's Affidavit in Support of the Motion for Summary Judgment in the 328 action only. The Bonannos filed the Plaintiffs' Opposition to the Summary Judgment Motion, the Plaintiffs' Response to the DiStefanos' Statement of Material

Facts and Statement of Additional Material Facts, and the Plaintiffs' Appendix in Connection with Their Opposition to the Summary Judgment Motion on July 18, 2022. The DiStefanos filed DiStefano's Reply to the Plaintiffs' Statement of Additional Material Facts on August 5, 2022. The Summary Judgment Motion was heard on August 24, 2022. The Memorandum and Order Denying Motion for Summary Judgment was issued on March 31, 2023. *Bonanno v. City of Gloucester Zoning Bd. of Appeals*, 31 LCR 217 (2023) (Misc. Case No. 19 MISC 000328 (Foster, J.) (*Bonanno*)).

At a status conference on April 19, 2023, the court bifurcated the trial. The initial trial was to address the limited issue of standing, and trial of the merits of the ZBA decision and the laches issue in the 328 action and the 604 action would be reserved for trial if the Bonannos were found to have standing. At the same conference, the DiStefanos agreed that if the complaint in the 328 action is dismissed for lack of standing, the complaint in the 604 action is moot and will be dismissed.

The Joint Pre-Trial Memorandum was filed on November 1, 2023, and a pre-trial conference was held on November 7, 2023. On November 30, 2023, the DiStefanos filed their Motion in Limine. On December 7, 2023, the Bonannos filed the Plaintiffs' Opposition to the DiStefano's Motion in Limine.

A view was held on December 11, 2023. That same day, the court heard and denied the DiStefanos' Motion in Limine. Trial was held on December 11, 2023, December 12, 2023, and January 26, 2024. Exhibits 1-17 were admitted. Exhibit A was marked for identification, and chalks A through E were marked. Testimony was heard from Charles D. Bonanno, Robert J. Michaud, Joseph DiStefano, and Keri Pyke. On December 12, 2023, defendants made a motion for mandatory dismissal, which was stayed for consideration at closing argument.

Defendants' Post-Trial Memo and Plaintiff's Post-Trial Brief were filed on March 21, 2024. Closing arguments were heard on March 27, 2024, and this case was taken under advisement. This decision follows.

Findings of Fact

Based on the testimony and exhibits at trial and the view,¹ I find the following facts, after drawing appropriate inferences:

The Neighborhood, Parties, and Properties

1. All of Sleepy Hollow Road and certain of its surrounding streets are part of the private Hawks section of Wingersheek Beach in Gloucester, Massachusetts. Exhs. 1, 10.
2. Sleepy Hollow Road is the first road in the section that leads directly to the beach, and it is a private road with predominantly summer residences. Tr. I: 33-34.²
3. The summer is the busiest season, and the Hawks section puts up wooden horses at the end of the street to try to restrict vehicular travel. Tr. I: 33-34.
4. The neighborhood is dense with narrow streets and front and rear house lots. The lots in the neighborhood are of similar size. View; Exh. 1.
5. The Bonannos are the owners of the property located at 11R Sleepy Hollow Road, Gloucester (the Bonanno property). Exhs. 1, 3; Tr. I: 23.
6. The DiStefanos are the owners of 13 Sleepy Hollow Road (the DiStefano property), a historically natural vacant lot. Exhs. 1, 6, 8; Tr. I:39.
7. The northeast corner of the Bonanno property directly abuts the southwest corner of the DiStefano property. View; Exhs. 1, 10.
8. The Bonanno property is a landlocked "rear" parcel that has access to Sleepy Hollow Road solely by way of a 20-foot-wide easement, ten feet on the easternmost portion of the abutting 11 Sleepy Hollow Road, and the remaining ten feet on the westernmost portions of the DiStefano property and 13R Sleepy Hollow Road. View; Exhs. 1-3, 10.

¹ A view "inevitably has the effect of evidence, and information properly acquired upon a view may properly be treated as evidence in the case." *Talmo v. Zoning Bd. of Appeals of Framingham*, 93 Mass. App. Ct. 626, 629 n.5 (2018) (internal citations and quotations omitted); see also *Martha's Vineyard Land Bank Comm'n v. Taylor*, No. 17-P-1277 (Mass. App. Ct. June 22, 2018) (unpublished decision); Mass. G. Evid. § 1109(c) (2024).

² Citations to the trial transcripts are in the form "Tr. [Vol.]: [Page(s)]."

9. The Bonannos and the owners of 13R Sleepy Hollow Road, the abutting rear lot, share this driveway easement for the sole access to their properties. View; Exhs. 2-4, 6, 10; Tr. I: 40-41; Tr. II: 63-64.
10. The DiStefanos are aware that they cannot use their property in any way that interferes with the easement. Tr. II at 63.
11. A plan entitled “Plan of Land Located at 13, Sleepy Hollow Road in Gloucester, MA Prepared for Joseph & Gloria DiStefano Assessor Map Reference: Map 257, Lot 44 Title Reference: Bk 36996 Pg 177” prepared by County Land Surveys, Inc. and dated November 13, 2018, marked as Exhibit 9 (the Plan of Land), with certain additional markings showing the parties’ properties, is attached as Appendix A.

The DiStefanos’ Proposal

12. The DiStefano property is located in the R-20 zoning district under the City of Gloucester Zoning Ordinance (ordinance). Exhs. 1, 15.
13. The DiStefano property has approximately 12,624 square feet of land with 100 feet of frontage on Sleepy Hollow Road. Exhs. 1, 12.
14. In March 1999, an amendment to the ordinance increased the lot area requirement for the property to 20,000 square feet, rendering the 12,624 square foot property nonconforming as to minimum lot size. Exhs. 1, 15.
15. The DiStefanos propose to construct a new two-story house on the DiStefano property and submitted the Plan of Land to the City showing the proposed location of the house. Exhs. 1, 9; Tr. II: 82.
16. The DiStefanos wish to build the house for their children. The DiStefanos themselves bought a home on the next street over in about 2020 and are not planning to live at the DiStefano property. Tr. II: 51.
17. The DiStefanos wish to put the foundation for their new structure as close to Sleepy Hollow Road and the Bonannos’ shared driveway easement as possible, using superseding setbacks to have ocean views. Exh. 7, 9; Tr. I: 48; Tr. II: 77.
18. The inland side of the proposed structure is four feet off the driveway easement and 14 feet from the property line. Exhs. 7, 9; Tr. II: 76.
19. The DiStefanos plan to build a deck close to the intersection of Sleepy Hollow Road and the driveway easement. They do not plan to sit on the deck and plan to keep the deck open. Exhs. 7, 9; Tr. II at 57.

20. The DiStefanos' contractor installed a temporary chain link construction fence around the property in about 2018-2019. They plan to remove the fence post-construction. View; Tr. II: 55, 101.
21. Post-construction, the DiStefanos do not plan to have any bushes or landscaping in front of the property. Tr. II: 55-56.
22. The DiStefanos also submitted a foundation plan to the City showing a front-facing two-car garage on the other side of the property, opposite the Bonannos' driveway easement, which will be accessed by a 20.5-foot-long driveway. Exh. 7; Tr. II: 82-83.
23. The DiStefanos have not submitted any construction management plan to the City for this project. Tr. II: 95.

The Bonannos' Appeals

24. On November 27, 2018, the Building Commissioner— in response to an enforcement request from the Bonannos challenging the issuance of a building permit— determined that the DiStefano property is entitled to a level of protection that predates applicable zoning restrictions under G.L. c. 40A, § 6, i.e., is a lawful nonconforming lot, and denied the Bonannos' enforcement request. Exh. 11.
25. In 2019, the Bonannos timely and properly appealed the decision of the Building Commissioner to the ZBA, on the basis that the property merged with 15 Sleepy Hollow Road and was therefore not entitled to its status as a buildable lot. Exh. 12.
26. On June 13, 2019, the ZBA issued the ZBA decision affirming the Building Commissioner's determination. Exh. 12.
27. The Bonannos timely and properly appealed the ZBA decision to this court pursuant to G.L. c. 40A, § 17. The Bonannos also seek a declaration under G.L. c. 231A, §§ 1-2, that the DiStefano property is not a buildable lot. Exh. 1.
28. On March 31, 2023, the court issued the Memorandum and Order Denying [the DiStefanos'] Motion for Summary Judgment, ruling that the Bonannos' "claim of interference with the use of their easement is . . . a concern about density sufficient, if credited, to confer standing" and is "a harm specific to them that is different from any of the general harms alleged by the owners of Sleepy Hollow Road." *Bonanno*, 31 LCR at 220-221. Thus, the Bonannos are entitled to a presumption of standing, and the DiStefanos rebutted that presumption. This created a dispute of material fact as to the Bonannos' standing.
29. On April 13, 2023, the court bifurcated the trial with the "initial trial [to] be held on the limited issue of [the Bonannos'] standing."

30. The initial trial occurred over three days on December 11 and 12, 2023, and January 26, 2024.

The Bonannos' Use of the Driveway Easement

31. Charles Bonanno Jr., the son and brother of the Bonannos (Mr. Bonanno), testified at trial individually and as the Rule 30(b)(6) designee of the Ozone Realty Trust. Tr. I: 20, 23.

32. The Bonannos currently use the Bonanno property, purchased in 1969, as a summer home. Exhibit 3; Tr. I: 23-25, 30.

33. There is a cement patio in front of the Bonanno property, which existed when the Bonannos purchased the home. View; Tr. I: 41.

34. During the summer months, the Bonannos place lawn furniture and a grill on the cement patio. They also set up a picnic table and chairs beyond the patio area. Tr. I: 41-42, 61-62.

35. The summer home is mainly utilized by Mr. Bonanno's brother, who is reliant on family members, his personal aide, or taxi cabs to get in and out of the property. From the end of May until the beginning of September, roughly 40 trips from Gloucester taxi go in and out of the property each season, with 118 trips over the last three seasons. Tr. I: 22, 30-31.

36. The Bonannos and their invitees use a variety of passenger vehicles to access the property, including a Toyota Highlander, taxicabs, and other cars belonging to family and friends. Tr. I: 44-46.

37. Other contractors service the property seasonally using larger-sized vehicles. Services include air conditioning, landscaping, plowing, plumbing, and other maintenance needs. Tr. I: 24.

38. The landscaper drives a Ford F350 dump truck and F250 super-cab, which tows a 20-foot-long box trailer to transport lawnmowers and equipment. Tr. I: 46.

39. The Bonannos do not know whether the landscaper generally enters the easement driving forward or backing into the property. Tr. I: 116.

40. The Bonannos keep a boat at the marina and use a boat trailer to drive up and down the driveway easement. When exiting the driveway easement, the Bonannos either drive forward or back up onto Sleepy Hollow Road. Tr. I: 46-47, 81-82.

41. All of the vehicles drive over the easement to access and exit the Bonanno property. Tr. I: 24, 44-47, 81-82.

42. Normally, the Bonannos and their invitees drive their passenger vehicles forward into the easement from Sleepy Hollow Road. It is possible for vehicles to do a multi-point turn in

front of the Bonanno property to exit the easement driving forward. The feasibility of the multi-point turn depends on various factors, including the type of vehicle, how many cars are parked in front of the property, and activity on the abutting property at 13R Sleepy Hollow Road. Tr. I: 42, 100.

43. The abutting rear lot owners at 13R Sleepy Hollow Road installed a stone loop driveway in the shape of a “J” in front of their property. View; Exh. 16; Tr. I: 43, 60-61, 105.

The Bonannos’ Claimed Interference with the Use of Their Driveway Easement

44. The Bonannos previously experienced access problems with their use of the driveway easement when the abutting rear lot owners constructed their home and needed to break the concrete for plumbing purposes. Tr. I: 51.
45. Due to the current construction fencing in place at the DiStefano property, the Bonannos have to “look through two sides” of the fence when exiting the driveway easement. The fencing does not impair sight lines to Sleepy Hollow Road from the driveway easement. In the four to five years the fence has been up, the Bonannos have been able to successfully negotiate getting in and out of the driveway. View; Tr. I: 52, 110.
46. The DiStefanos are not aware of any complaints from either the Bonannos or the abutting rear lot owners about the fence, and the DiStefanos have not heard anything from the Bonannos or the abutting rear lot owners suggesting that the presence of the fence interferes with their ability to get in and out of the driveway. Tr. II: 56-57.
47. Two traffic engineers, Robert J. Michaud, P.E. (Michaud) for the Bonannos, and Keri Pyke, P.E., PTOE (Pyke) for the DiStefanos, conducted field reviews, analyzed relevant plans, used modeling software to render vehicular movements and sight lines, and testified at trial. Based on their experience and qualifications, I qualify Michaud and Pyke as experts. Exhs. 13-14; Tr. I: 128-129, 132; Tr. II: 106-113.
48. Sight Line Restrictions: Michaud used AutoTurn modeling software to model the vehicular path of various vehicle types—including passenger vehicles, vehicles with trailers, and delivery and service type vehicles with unibody box trucks—as they exit the driveway easement. The modeling accounted for roadway and driveway conditions in place at the time of Michaud’s field observations on June 6, 2023, as well as the proposed placement of the DiStefanos’ property per the Plan of Land. Michaud opined that the DiStefanos’ proposed development, four feet from the shared driveway, will “materially impair sight lines from a backing maneuver by various vehicle types,” particularly larger vehicles. Michaud later stated: “In a backing maneuver, a passenger vehicle would have the ability before entering the travel way of seeing beyond the fixed structure.” The location of the proposed structure would only impact the sight lines of non-passenger vehicles, including service vehicles or vehicles with trailer in tow. Michaud did not analyze the frequency of any of the vehicles driving up and down the right of way. I credit Michaud’s testimony and find that passenger vehicles and smaller trucks that are either driving forward or backing up onto Sleepy Hollow Road can see beyond the

DiStefanos' proposed development and will not have their sight lines impaired. Exh. 13; Tr. I: 145, 174, 194, 204-205.

49. Likewise, Pyke used AutoTurn modeling software to model the vehicular path of various vehicle types—including a large passenger car, large passenger car with a trailer, panel truck, and a SU-30—as they exit the driveway easement. Pyke also conducted an Intersection Sight Distance (ISD) analysis.³ Pyke opined that the placement of the DiStefanos' proposed development would not create issues for the users of the shared driveway, including passenger and non-passenger vehicles, regardless of whether they are entering Sleepy Hollow Road facing forwards or backing out. I credit Pyke's testimony and find that the DiStefanos' proposed development will not obstruct the sight lines of the passenger and non-passenger vehicles that are expected to utilize the driveway easement. Exh. 14; Tr. II: 140-145.
50. In reviewing Pyke's report, Michaud agreed that ISD is relevant for a backing vehicle to see, react to, and reasonably select a gap in traffic on Sleepy Hollow Road before proceeding to back out of the easement. Michaud pointed out that Pyke's sight distance analysis "expressly assumes that there's no visual obstruction within" the ISD triangle—a "big caveat" because of the likely presence of parked vehicles, landscaping, or other features within the ISD triangle. On cross-examination, Pyke stated that the ISD analysis focuses on motorized vehicles; it is not designed to account for pedestrian traffic or bicycles, or other features that could be within the ISD triangle. However, Michaud and Pyke agree that state law would require a vehicle to stop further up at the driveway intersection before entering Sleepy Hollow Road. Pyke further stated that, in practice, drivers do pull all the way up to the intersection. In those instances, the sight lines onto Sleepy Hollow Road would extend even further beyond the AASHTO requirements, and the chances of visual obstructions within the ISD triangle are decreased. I credit Pyke's testimony and find that the field-measured ISD satisfies the minimum AASHTO requirements, and that vehicles that pull all the way up to the intersection would have an expanded sight line. Exh. 14; Tr. I:167; Tr. II: 148-149.
51. Michaud directed the court to § 3.17 of the ordinance, which prohibits visual obstructions within the area of a triangle formed at the intersection of a street and common driveway serving more than two lots (§ 3.17 triangle). Using the 25-foot intersection sight line requirements under § 3.17 of the ordinance, Michaud concluded that the DiStefanos' proposed development—specifically, the deck—would encroach into the sight line by roughly .4 feet, which is about 6 inches. Michaud further stated that it is possible that plantings, furniture, or other structural elements could be placed atop the deck, further

³ ISD is the distance necessary for a vehicle on a minor approach to pull out into traffic without impacting the travel speed of a vehicle on the major roadway. The American Association of State Highway and Transportation Officials (AASHTO) sets the minimum ISD. Here, the minimum recommended ISD for a vehicle exiting the driveway and turning left onto Sleepy Hollow Road is approximately 170 feet. ISD is not a safety requirement and relates only to the comfort of motorists traveling through an intersection. Pyke also conducted a Stopping Sight Distance (SSD) analysis. SSD is the distance required by a vehicle traveling at the design speed of a roadway, on wet pavement, to stop prior to striking an obstacle in its path of travel. Both Michaud and Pyke agree that SSD is focused on a driver on Sleepy Hollow Road, while ISD is focused on the perspective of a driver using the driveway easement. I find that Pyke's SSD analysis is less relevant to the analysis than ISD and, as such, focus on the ISD analysis. See Exh. 14.

impeding vehicular visibility. Pyke also plotted the § 3.17 triangle and noted that the edge of the deck could encroach into the sight line triangle by “6 inches plus or minus.” I credit both their testimonies and find that the proposed deck would encroach 6 inches into the § 3.17 triangle. Exhs. 13-15; Tr. II: 140-141. Tr. I: 149-163, 194.

52. Maneuverability at the Bonanno property: Both Michaud and Pyke used AutoTurn modeling software to show the maneuvers of a passenger vehicle within the approximately 30-foot-wide area between the house on the Bonanno property and the abutting rear lot. The experts agreed that passenger vehicles can conduct a multi-point turn to exit the easement driving forward, even though patio furniture or other parked cars can make maneuverability more difficult. Both experts opined that larger vehicles—including vehicles with trailers, and delivery and service type vehicles with unibody box trucks—cannot do multi-point turns in front of the Bonanno property. Michaud also opined that: “The building location and paved surface and features of the Bonannos’ property are such that it does not afford them the same flexibility of use as the [owners of 13R Sleepy Hollow Road].” I credit both experts’ testimony and find that passenger vehicles can conduct a multi-point turn and exit the easement driving forward. I credit both experts’ testimony that larger vehicles that enter the easement driving forward cannot conduct a multi-point turn and will need to back out of the easement onto Sleepy Hollow Road. I further credit Michaud’s testimony and find that the owners of 13R Sleepy Hollow Road, who installed a “J” shaped driveway, have more flexibility to turn around in front of their property than the Bonannos do. Exhs. 13-14; Tr. I: 132; 136-137, 198; Tr. II: 127-129; Tr. III: 13.
53. Construction Fence: The experts also disagreed on whether the construction fencing is a visual impediment at the intersection. Michaud opined that, based on his June 6, 2023, field review of the subject property, the construction fence and approximately two-foot-high vegetation along the fence “does partly impede or impact” a vehicle’s sight line triangle. Michaud later qualified that “it’s not an entirely opaque fence, and there is some ability to see a vehicle, to conduct maneuvers, but it’s certainly impaired to some degree by the presence of existing conditions.” Exh. 13; Tr. I:156-157; Tr. II: 14.
54. On the other hand, Pyke opined that her sight distance analysis, which accounted for the construction fence, exceeded the minimum ISD requirements. Pyke’s associate conducted an on-site sight distance analysis on June 30, 2023. Using AASHTO prescribed distances to determine a driver’s ISD, Pyke’s associate placed a cone 200 feet away on the north side of Sleepy Hollow Road. From her car’s location 14.5 feet back on the easement, she was able to see the cone through both sections of the construction fence. I credit Pyke’s testimony and find that a driver exiting the easement onto Sleepy Hollow Road can see through both sides of the fence. Exh. 14; Tr. III: 43-46.
55. Future Construction: Michaud testified that the potential impact of construction period operations, including the stockpiling of materials and the placement of construction-related vehicles, could pose issues with sight visibility and use of the shared driveway. Michaud based these opinions on his firm’s experience in construction administration services and his own personal experiences of building two homes himself. Michaud has

not seen a construction management plan for the DiStefano's proposed development. Exh. 13; Tr. I: 155-156, 207; Tr. II: 43.

Ordinance

56. Section 1.2, Purpose, Interpretation, Conflict, Definitions, of the ordinance provides the "objectives" of the ordinance:

To lessen congestion in the streets; to conserve health; to secure safety from fire, flood, panic, and other dangers; to provide adequate light and air; to prevent overcrowding of land; to avoid undue concentration of population; to encourage housing for persons of all income levels; to facilitate the adequate provision of transportation, water, water supply, drainage, sewerage, schools, parks, open space and other public requirements; to conserve the value of land and buildings, including the conservation of natural resources and the prevention of blight and pollution of the environment; to encourage the most appropriate use of land throughout the city, including consideration of the recommendations of the comprehensive plan adopted by the Planning Board, and the comprehensive plan, if any, of the Metropolitan Area Planning Council; and to preserve and increase amenities by the promulgation of regulations to fulfill said objectives.

Exh. 15.

57. Section 3.17, Visibility at Intersections, of the ordinance provides:

On a corner lot, as defined at Section 3.1.8, or on a lot which is located at the intersection of a street and a common driveway serving more than two lots, no visual obstruction between 2 ½ and eight feet above the lowest elevation at the curb line shall be permitted within the area of a triangle formed on two sides by the intersecting ways and on the third side by a line drawn between points on each of said intersecting ways 25 feet from the corner. For the purpose of this section, the word "visual obstruction" shall mean any shrub, tree, wall, fence, sign, temporary building, pile of material, terrace or retaining wall, but shall not include permanent buildings or structures otherwise in compliance with this ordinance.

Exh. 15.

58. Section 3.1.7, Definitions of Terms used in Section III, of the ordinance defines "Corner Lot" as "[a] lot which fronts on two or more streets at their intersection(s)." Exh. 15.

Discussion

The sole issue at this first trial is whether the Bonannos have standing to pursue their appeal of the ZBA's decision as "persons aggrieved" within the meaning of G.L. c. 40A, § 17.⁴ If the Bonannos are not "persons aggrieved," the Bonannos' complaint in the 328 action will be dismissed for lack of standing, and the DiStefano's complaint in the 604 action is moot and will be dismissed.

To have standing to challenge a decision of a board of appeals, a plaintiff must be a "person aggrieved" by the decision. G.L. c. 40A, § 17; *Murchison v. Zoning Bd. of Appeals of Sherborn*, 485 Mass. 209, 212 (2020) (*Murchison*); *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 700 (2012) (*81 Spooner Road, LLC*). Standing is a matter of subject matter jurisdiction. See *Butler v. Waltham*, 63 Mass. App. Ct. 435, 441 (2005) (*Butler*) ("Standing is the gateway through which one must pass en route to an inquiry on the merits."); *Denneny v. Zoning Bd. of Appeals of Seekonk*, 59 Mass. App. Ct. 208, 211 (2003); *Cohen v. Zoning Bd. of Appeals of Plymouth*, 35 Mass. App. Ct. 619, 620 (1993). Standing as an "aggrieved" person requires evidence of an injury particular to the plaintiffs, as opposed to the neighborhood in general. The injury must be causally related to violation of zoning laws, and it must be more than de minimis. *Murchison*, 485 Mass. at 214. Abutters to the subject property are entitled to a rebuttable presumption of aggrievement within the meaning of G.L. c. 40A, § 17. *81 Spooner Road, LLC*, 461 Mass. at 700; *Murrow v. Esh Circus Arts, LLC*, 93 Mass. App. Ct. 233, 235 (2018); *Harvard Square Defense Fund, Inc.*, 27 Mass. App. Ct., 491, 495 n.7 (1989) (*Harvard Sq. Def. Fund, Inc.*); G.L. c. 40A, § 11. If standing is challenged, and evidence is

⁴ Because this case was tried and briefed before the effective date of the recent amendments to G.L. c. 40A, § 17, on August 6, 2024, I apply the standard for determining standing applicable before the amendments. See *J.D. Raymond Transport, Inc. v. Farm Ave. Two Lots, LLC*, 32 LCR 500, 504-505 (2024) (Misc. Case Nos. 22 MISC 000681 and 23 MISC 000115) (Foster, J.).

offered in support of such challenge, the burden rests with the plaintiff to “put forth credible evidence to substantiate [their] allegations” of aggrievement. *Murchison*, 485 Mass. at 215, quoting *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 721 (1996) (*Marashlian*). This court ruled in its Memorandum and Order Denying Motion for Summary Judgment that “the DiStefanos have rebutted the Bonannos’ presumption of standing with respect to the Bonannos’ alleged harm to their use of the driveway easement,” and “[put] the burden on the Bonannos to substantiate their allegations of aggrievement.” *Bonanno*, 31 LCR at 221.

Standing is now decided on “all the evidence with no benefit to the plaintiffs from the presumption.” *Marashlian*, 421 Mass. at 721. “A review of standing based on ‘all the evidence’ does not require that the factfinder ultimately find a plaintiff’s allegations meritorious. To do so would be to deny standing, after the fact, to any unsuccessful plaintiff. Rather, the plaintiff must ‘put forth credible evidence to substantiate [their] allegations’ of aggrievement, both from a qualitative and quantitative perspective.” *Murchison*, 485 Mass. at 215, quoting *Marashlian*, 421 Mass. at 721. “Quantitatively, the evidence must provide specific factual support for each of the claims of particularized injury,” and “[q]ualitatively, 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.” *Id.*, quoting *Butler*, 63 Mass. App. Ct. at 441; see *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 118 (2011) (*Kenner*). Although the court does not view claims of aggrievement narrowly, *Marashlian*, 421 Mass. at 722, neither conjecture nor speculative personal opinion substitutes for proof. *Murchison*, 485 Mass. at 215; see *Kenner*, 459 Mass. at 121. Standing essentially becomes a question of fact for the judge. See *Marashlian*, 421 Mass. at 721. “[W]hether a party is ‘aggrieved’ is a matter of degree ... and the variety of circumstances

which may arise seems to call for the exercise of discretion rather than the imposition of an inflexible rule.” *Paulding v. Bruins*, 18 Mass. App. Ct. 707, 709 (1984), quoting *Rafferty v. Sancta Maria Hosp.*, 5 Mass. App. Ct. 624, 629 (1977).

The Bonannos contend that the proposed development on the DiStefano property will harm their use of the driveway easement, because the permitted foundation will obstruct the Bonannos’ view of Sleepy Hollow Road as they back out of the driveway. The Bonannos add that their visibility is currently constrained by the construction fencing in place and will continue to be impaired during construction. The Bonannos assert that the harm to their use of the driveway easement is particular to them, separate from the general concerns of the neighborhood. As such, the Bonannos claim they are “persons aggrieved” and have standing to challenge the ZBA’s decision.

I find, reiterating my conclusion in *Bonanno*, 31 LCR at 220, that the Bonannos’ claim of aggrievement is within the interests protected by the ordinance. While the Bonannos provided credible evidence of a harm particular to them that is different from the general concerns shared by the rest of the neighborhood, I find that, based on all the evidence, their injury is de minimis and speculative. The Bonannos are not “persons aggrieved” within the meaning of G.L. c. 40A, § 17, and do not have standing.

I. The Bonannos’ claim of aggrievement is within the interests protected by the ordinance.

Standing to challenge a zoning decision is conferred on those whose claims of aggrievement are within the interests protected by the applicable zoning scheme. *Murchison*, 485 Mass. at 214, citing *Picard v. Zoning Bd. of Appeals of Westminster*, 474 Mass. 570, 574 (2016); see *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 30 (2006). At summary judgment, I established that the Bonannos’ claim of interference with the use of their driveway

easement relates to density and transportation, both of which fall within the objectives of § 1.2 of the ordinance “to prevent overcrowding of land,” “to avoid undue concentration of population,” and “to facilitate the adequate provision of transportation.” *Bonanno*, 31 LCR at 220. While the Bonannos’ claim of aggrievement is within the interests protected by the ordinance, “establishing standing requires a plaintiff to do more than merely allege a zoning violation.” *Murchison*, 485 Mass. at 214. “The language of a bylaw cannot be sufficient in itself to confer standing: the creation of a protected interest (by statute, ordinance, bylaw, or otherwise) cannot be conflated with the additional, individualized requirements that establish standing.” *Id.*, quoting *Sweenie v. A.L. Prime Energy Consultants*, 451 Mass. 539, 545 (2008).⁵

II. The Bonannos’ alleged harm is special and different from the concerns shared by the rest of the neighborhood.

Plaintiffs are required to “establish—by direct facts and not by speculative personal opinion—that [their] injury is special and different from the concerns of the rest of the community.” *Murchison*, 485 Mass. at 215, quoting *81 Spooner Rd., LLC*, 461 Mass. at 701; see *Nickerson v. Zoning Bd. of Appeals of Raynham*, 53 Mass. App. Ct. 680, 683 (2002) (“[P]laintiff’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 on Route 44.”); *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 37 Mass. App. Ct. 931, 933 (1994), *aff’d*, 421 Mass. 719 (1996) (“[P]laintiff’s fears—because of [their] high stress occupations—of the loss of tranquility in the neighborhood” due to hotel’s additional parking are subjective, unspecific fears

⁵ The parties analyze whether the DiStefanos’ proposed development and current construction fencing violates § 3.17 of the ordinance. Section 3.17 of the ordinance requires that intersections be free of “visual obstructions” within a certain triangular area. Visual obstructions include fences, shrubs, signs, piles of materials, or terraces, but do not include permanent structures otherwise in compliance with the ordinance. The parties disagree on whether the DiStefanos’ proposed deck, which encroaches six inches into the § 3.17 triangle, is a terrace—thus constituting a visual obstruction—or part of a permanent structure that does not violate the ordinance. Regardless of whether the construction fence or deck constitutes a violation of § 3.17, I have already established that, for the purposes of determining standing, the Bonannos’ interests are protected by the ordinance.

about neighborhood feelings which provide no basis for aggrievement); *Harvard Sq. Def. Fund, Inc.*, 27 Mass. App. Ct. 491 at 493 (“[P]laintiffs' concerns about diminished open space, incompatible architectural styles, the belittling of historical buildings, and the diminished enjoyment of the ‘village feeling’ of Harvard Square express matters of general public concern.”). Here, the question is whether the claimed harm to the Bonannos’ use of their driveway easement is special and different from the concerns shared by the Hawks section of the association and the abutting rear lot owners at 13R Sleepy Hollow Road, with whom the Bonannos share the driveway easement. I find that the Bonannos have provided credible evidence to substantiate their particularized harm.

First, the Bonannos’ claim of interference with the use of their driveway easement is not shared by the rest of the neighborhood. The Bonanno property is a landlocked rear parcel that has access to Sleepy Hollow Road solely by way of a 20-foot-wide easement. No one else in the neighborhood, except for the abutting rear lot owners, has the right to use the driveway easement. The DiStefanos, as a result of the placement of their neighbor’s home at 15 Sleepy Hollow Road, wish to put the foundation for their new structure as close to Sleepy Hollow Road and the Bonannos’ shared driveway easement as possible in order to have ocean views. Only the Bonannos and the abutting rear lot owners have the exclusive right to use the driveway easement, and any impact from the location of the proposed development, a mere four feet from the driveway easement, is unique to the rear lot owners. See *Gale v. Zoning Bd. of Appeals of Gloucester*, 80 Mass. App. Ct. 331, 335 (2011) (owner’s plan to construct year-round residence would have particularized impact on use of right of way over plaintiff’s property). Through the agreed upon facts, Exhibit 9, and Mr. DiStefano’s testimony, the Bonannos have provided

credible evidence to establish that the proposed visual obstruction is specific to them and different from any of the general concerns shared by the rest of the neighborhood.

That the Bonannos might share this harm with the abutting rear lot owners who also use the easement does not necessarily render their harm not unique. Nevertheless, the Bonannos have provided credible evidence that the claimed interference with their use of the driveway easement is different from that of the abutting rear lot owners. Normally, the Bonannos drive their passenger vehicles forward into the easement from Sleepy Hollow Road. While passenger vehicles can conduct a multi-point turn in front of the Bonanno property to exit the easement driving forward, non-passenger vehicles cannot do so. The Bonannos assert that their limited ability to turn around is distinct from the owners at 13R Sleepy Hollow Road, who installed a stone loop driveway in the shape of a “J” in front of their property. As a result, the abutting owners have the flexibility to drive passenger and non-passenger vehicles around the “J” driveway and exit onto Sleepy Hollow Road facing forward, regardless of the direction they entered the easement. While the Bonannos have a boat trailer and, as experienced boaters, have driven both forward and backwards into the driveway from Sleepy Hollow Road over many years, the testimony of both Mr. Bonanno and Michaud established that the “building location and paved surface and features of the Bonannos’ property are such that it does not afford them the same flexibility of use as the [owners of 13R Sleepy Hollow Road].” Tr. I at 198. “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 provide factual support and qualitative evidence on which a reasonable person could rely to conclude that the claimed injury will likely occur. *Butler*, 63 Mass. App. Ct. at 441. Through the agreed upon facts, Plan of Land, aerial photos of the properties, the view, and the testimonies of Mr. Bonanno and Michaud, the

Bonannos have satisfied their burden that they would suffer a particularized injury that is different from the abutting rear lot owners.

III. The Bonannos' alleged aggrievement is de minimis and speculative.

Even if plaintiffs provide credible evidence that the claimed injury is an interest protected by the applicable zoning scheme and particular to the plaintiffs, the injury must still “be more than de minimis.” *Murchison*, 485 Mass. at 214. Aggrievement requires a showing of more than minimal or slightly appreciable harm. *Kenner*, 459 Mass. at 121 (holding that height of new structure will have a “de minimis impact” on plaintiffs’ ocean view). 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. *Id.* at 122. To conclude otherwise would choke the courts with litigation over myriad zoning board decisions where individual plaintiffs have not been, objectively speaking, truly and measurably harmed. *Id.* 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. *Id.* The Bonannos claim that the DiStefanos’ proposed development impairs the visibility of: (1) passenger vehicles either driving forward or backing out of the driveway onto Sleepy Hollow Road; and (2) non-passenger vehicles backing out of the driveway easement. The Bonannos introduced evidence in the form of testimony from Mr. Bonanno and Michaud. The DiStefanos offered as evidence the testimony of Mr. DiStefano, the owner of 13 Sleepy Hollow Road, and Pyke.

Based on all the evidence, I find the Bonannos’ claimed aggrievement with respect to passenger vehicles and smaller trucks is de minimis and the claimed aggrievement with respect to non-passenger vehicles is speculative, and as such, is insufficient to confer standing on the Bonannos.

- a. The Bonannos' claimed harm from the impact on passenger vehicles and smaller trucks using the driveway easement is de minimis.

I turn first to the alleged visual impairments that the DiStefanos' proposed development, current construction fencing, and future construction will have on passenger vehicles and smaller trucks at the intersection of the driveway easement and Sleepy Hollow Road.

I find that the DiStefanos' proposed development poses a minimal harm to the Bonannos' use of the driveway easement. First, both Michaud and Pike established that passenger vehicles can see beyond the DiStefanos' proposed development and will not have their sight lines impaired, regardless of whether the passenger vehicles are exiting the easement onto Sleepy Hollow Road facing forwards or backing out. Both experts agreed that state law requires vehicles to stop further up the driveway at the intersection before entering Sleepy Hollow Road, and in practice, drivers do pull up to the intersection. Based on the experts' testimony and drawing reasonable inferences from the common practices of vehicular drivers, I find that pulling up to an intersection expands a vehicle's sight lines onto Sleepy Hollow Road beyond Pyke's ISD analysis, which already exceeded the AASHTO minimum standards. I find that this common driving practice decreases concerns about any potential visual obstructions within the ISD triangle.

Second, after conducting site visits and using AutoTurn modeling software to map out the § 3.17 triangle based on the proposed structure's dimensions, both experts concluded that the DiStefanos' proposed front deck will potentially encroach 0.4 feet—approximately six inches—into the § 3.17 triangle. Michaud later stated that the house theoretically “could be shifted in a number of ways to avoid that.” Tr. I at 195. Pyke also opined that the home's placement can be done consistent with the visibility restrictions outlined in § 3.17 of the ordinance. The DiStefanos do not plan to place any structures on the deck or have any bushes or landscaping in the area of

the § 3.17 triangle. I find that a six-inch encroachment into the § 3.17 triangle, to the extent it will exist, is a “minimal or slightly appreciable harm,” that is not substantial enough such that there is no question the Bonannos “should be afforded the opportunity to seek a remedy.” *Kenner*, 459 Mass. at 121-122.

The Bonannos also claim that the current construction fence surrounding the DiStefano property obstructs visibility at the Sleepy Hollow intersection and interferes with the use of their driveway easement. The DiStefanos installed the construction fence around 2018-2019. While Mr. Bonanno testified that the fence doesn’t “help” when getting in and out of the driveway because he has to “look through two sides of” the fence, Mr. Bonanno has been able to successfully negotiate getting in and out of the driveway in the four to five years the fence has been up. Tr. I at 110. The Bonannos and the abutting rear lot owners never notified the DiStefanos that the fence interferes with their ability to get in and out of the driveway. Additionally, Pyke testified that her associate conducted a site visit during the summer, when beach traffic and vegetation are at their peak. From her passenger vehicle in the driveway, Pyke’s associate was able to see a cone set two hundred feet away on the north side of Sleepy Hollow Road through both sections of the construction fence. At the view, I observed that the fence did not impair sight lines to Sleepy Hollow Road. In light of all the evidence, I find that any impaired visibility as a result of the current construction fence is de minimis.

The Bonannos also claim that future construction of the DiStefano’s proposed development will impact the Bonannos’ use of their driveway easement. Mr. Bonanno testified that the past construction of the abutting rear lot owner’s home led to access problems on the driveway. This led Mr. Bonanno to state, “[y]ou never know what’s going to happen with construction,” and “[a] lot of activity can happen during construction.” Tr. I at 51-52. Mr.

Bonanno's concerns, based on his own anecdotal recounting of an admittedly "different situation," are entirely speculative. Tr. I at 51. Michaud also testified that the potential for additional visual obstructions during construction, including the stockpiling of materials and the placement of construction-related vehicles, could pose issues with sight visibility and use of the shared driveway. While Michaud based these opinions on his firm's experience in construction administration services and his own personal experiences of building two homes himself, I find that Michaud's concerns are mere speculation. Michaud has not seen a construction management plan for the proposed development and could not speak to the DiStefanos' future construction operations or placement of materials. Additionally, the DiStefanos are aware that they cannot use their property in any way that interferes with the easement. The DiStefanos could store any construction materials on the driveway located on the other side of the DiStefano's property, which would not impact the sightlines of vehicles exiting the driveway easement at issue. Subjective and unspecific fears about the possible impairment of interests are insufficient bases for aggrievement. See *Murchison*, 485 Mass. at 215. The Bonannos' concerns about the impact that future construction would have on passenger vehicles' use of the driveway easement is speculative.

- b. The Bonannos' claimed harm from the impact on larger non-passenger vehicles using the driveway easement is speculative or de minimis.

I now turn to the Bonannos' claim that the proposed development impairs the visibility of larger non-passenger vehicles backing out of the driveway easement. These larger non-passenger vehicles include landscaping trucks, trucks towing trailers or boat trailers, or other oversized panel trucks. The Bonannos provided no evidence, either from Mr. Bonanno or the drivers, as to the frequency that non-passenger vehicles access the easement. Furthermore, there was no evidence on how often these service-type, non-passenger vehicles back out onto Sleepy Hollow

Road. The Bonannos did not provide testimony from these drivers stating that they had difficulty viewing oncoming traffic on Sleepy Hollow Road. Mr. Bonanno himself would enter the easement with his boat trailer driving forward or in reverse. Using computer software, Michaud opined that the proposed structure will materially impair the sight lines of larger vehicles backing out of the easement, but he did not analyze the frequency of any of those vehicles up and down the driveway. I find that a six-inch encroachment into a larger non-passenger vehicle's sight line is not a material impairment. I find that the Bonannos failed to establish through direct facts that any non-passenger vehicles are harmed by the proposed development, current fencing, or future construction. The Bonannos' alleged concern that non-passenger vehicles would have their views obstructed by the proposed development when reversing onto Sleepy Hollow Road is speculative.

For the aforementioned reasons, I find that the Bonannos have not met their burden in putting forth credible evidence to substantiate claims of injury to their legal rights. The Bonannos are not "persons aggrieved" within the meaning of G.L. c. 40A, § 17, and lack standing to bring their zoning challenge. As such, based on the agreement of the parties, I do not reach the merits of the amended 328 complaint. See *Butler*, 63 Mass. App. Ct. at 441. By agreement of the DiStefanos, the 604 case will be dismissed.

Conclusion

For the foregoing reasons, the Bonannos' complaint in the 328 action will be DISMISSED WITH PREJUDICE for lack of standing, and the DiStefanos' complaint in the 604 action is moot and will be DISMISSED WITHOUT PREJUDICE. Judgment shall enter accordingly.

/s/ Robert B. Foster

Robert B. Foster
Justice

Dated: November 14, 2024

Appendix A

