



COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

ESSEX, s

MISCELLANEOUS CASE
NO. 19 MISC 000187 (RBF)

MICHAEL SILVERIO,)
)
Plaintiff,)
)
v.)
)
TOWN OF NORTH ANDOVER,)
)
PLANNING BOARD OF NORTH)
)
ANDOVER, and PETER BOYNTON,)
)
LORI CRANE, EITAN GOLDBERG,)
)
AARON PRESTON, and JOHN SIMONS,)
)
Members of the NORTH ANDOVER)
)
PLANNING BOARD,)
)
Defendants.)

MEMORANDUM AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS

Procedural History

The Complaint (Complaint or Compl.) was filed on April 19, 2019. The Motion to Dismiss and Defendants' Memorandum in Support of Motion to Dismiss were filed on May 20, 2019. The Plaintiff's Opposition & Supporting Memorandum in Opposition to Defendants' Motion to Dismiss was filed on June 3, 2019. The Motion to Dismiss was heard on June 17, 2019, and taken under advisement. Also on June 17, 2019, the Plaintiff was ordered to file an amended complaint by June 27, 2019. The Plaintiff's Amended Complaint was filed on June 27,

2019. The Defendant Town of North Andover's Answer to Plaintiff's Amended Complaint was filed on July 22, 2019. This Memorandum and Order follows.

Standard on Motion to Dismiss

The Motion to Dismiss is in the form of a motion to dismiss brought pursuant to Mass. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction. A motion to dismiss for lack of subject jurisdiction unsupported by affidavit presents a "facial attack" based solely on the allegations of the complaint, which are taken as true for purposes of resolving the complaint. *Hiles v. Episcopal Diocese of Massachusetts*, 437 Mass. 505, 516 n.13 (2002). The court may, however, consider affidavits and other materials outside the pleadings when ruling on a motion to dismiss for lack of subject matter jurisdiction, at which point the burden falls to the plaintiff to prove the jurisdictional facts. *Id.* at 515-516. If a party presents material outside the pleadings, the court may treat a motion to dismiss for lack of subject matter jurisdiction as a motion for summary judgment, shifting the burden to the defendant to show that there is no genuine issue of material fact. *Williams v. Episcopal Diocese of Massachusetts*, 436 Mass. 574, 577 n.7 (2002). "Dismissals for lack of subject matter jurisdiction are ordinarily without prejudice because dismissal for lack of jurisdiction is typically not an adjudication on the merits." *Abate v. Fremont Inv. & Loan*, 470 Mass. 821, 836 (2015), citing *Bevilacqua v. Rodriguez*, 460 Mass. 762, 780 (2011).

Factual Allegations

1. Michael Silverio (Silverio) owns real property situated at 34 Hemlock Street, North Andover, Massachusetts (Silverio property), by a deed dated May 20, 1999, and recorded with the Northern Essex Registry of Deeds (registry) at Book 5448, Page 27. Compl. ¶¶ 6, 8 & Exh. 2.

2. In a decision dated April 2, 2019, and filed with the town clerk on April 9, 2019 (Decision), the North Andover Planning Board (Board) granted a Site Plan Review Special Permit for the redevelopment of real property situated at 495 Main Street, North Andover, Massachusetts (the site). Compl. ¶¶ 10-11, 17 & Exh. 1.

3. The rear lot line of the Silverio property directly abuts the site. Compl. ¶ 9.

4. The proposed redevelopment of the site includes “the renovation/reconstruction of the Site by constructing one (1) softball field, one (1) 90’ baseball field, two (2) multipurpose fields, two (2) bocce courts, two (2) shuffle ball courts, two (2) half-court basketball courts, and two (2) children’s playgrounds, two (2) multipurpose courts, two (2) picnic areas, an amphitheater, a concession stand, storage buildings, a concession stand, storage buildings, bathroom facilities, 160 additional parking spaces, and associated paved walkways/emergency/maintenance paths, stormwater management systems, and other amenities as referenced in the Plans.” Compl. ¶ 17 & Exh. 1.

Discussion

The Defendants seek to have the Complaint dismissed on the grounds that (1) Silverio is not aggrieved and the court lacks standing; (2) Silverio failed to name the members of the Board by their residential addresses; (3) Silverio failed to serve the Board members at their residential addresses; and (4) the Complaint fails to comply with the pleading requirements of the Massachusetts Rules of Civil Procedure.

The Defendants argue that Silverio’s bases for aggrievement are not individualized harms and therefore cannot be the basis for standing under G.L. c. 40A, § 17. The Defendants are correct that to have standing Silverio’s alleged injury must be “special and different from the concerns of the rest of the community.” *Standerwick v. Zoning Bd. of Appeals of Andover*, 447

Mass. 20, 33 (2006), quoting *Barvenik v. Aldermen of Newton*, 33 Mass. App. Ct. 129, 132 (1992). As an initial matter Silverio has pled that he is a direct abutter to the project site. Compl. ¶¶ 6-9. As a direct abutter Silverio is presumed to be aggrieved by the Decision pursuant to G.L. c. 40A, §17. This presumption may be rebutted by a showing that the abutter's alleged harms are not interests protected by the local zoning bylaws, that based on affirmative evidence the abutter's alleged harms are unfounded or de minimis, or that the abutter has no reasonable expectation of proving a legally cognizable injury. *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 702-703 (2012). If, as the Defendants argue, Silverio has not pled a particularized harm, the Complaint would be subject to dismissal as he could not prove a legally cognizable injury. The Defendants argue that the Complaint limits Silverio's alleged harms to injuries to public health relating to lighting and that proposed turf athletic fields will injure the users of those fields. To the contrary, the Complaint sets forth a highly detailed account of the harms Silverio, as an abutter, alleges he will suffer from the project. These harms include loss of stormwater recharge, Compl. p. 15; increased congestion relating to parking and traffic on the street where Silverio resides, Compl. pp. 16-17; effects of the heat island effect created by proposed turf athletic fields, Compl. p. 18; noise and dust, Compl. pp. 22-23; loss of privacy, Compl. pp. 24-25; and injuries relating to the lighting of the project, Compl. pp. 29-30. At least some of these alleged harms are to interests protected by the North Andover zoning bylaw or G.L. c. 40A. While all of these alleged harms could be characterized as harms to the general community using the site, Silverio has adequately alleged that these harms are particularized to him because of his proximity to the site. The Defendants have not in their

motion rebutted Silverio's presumption of standing and the Complaint is not subject to dismissal for lack of standing at this time.¹

The Defendants further argue that the Complaint should be dismissed on the grounds that Silverio failed to comply with the requirements of G.L. c. 40A, § 17, by not pleading the residential addresses of the members of the Board or serving those members at their residential addresses. The relevant portion of G.L. c. 40A, § 17, provides:

Any person aggrieved by a decision of the board of appeals or any special permit granting authority...may appeal...by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk....Notice of the action with a copy of the complaint shall be given to such city or town clerk so as to be received within such twenty days.

If the complaint is filed by someone other than the original applicant, appellant or petitioner, such original applicant, appellant, or petitioner and all members of the board of appeals or special permit granting authority shall be named as parties defendant with their addresses. To avoid delay in the proceedings, instead of the usual service of process, the plaintiff shall within fourteen days after the filing of the complaint, send written notice thereof, with a copy of the complaint, by delivery or certified mail to all defendants, including the members of the board of appeals or special permit granting authority and shall within twenty-one days after the entry of the complaint file with the clerk of the court an affidavit that such notice has been given. If no such affidavit is filed within such time the complaint shall be dismissed.

Id. The Defendants do not dispute that the Complaint was filed and notice was given to the town clerk within 20 days. “[R]eceipt of notice by the town clerk is a jurisdictional prerequisite for an action under G. L. c. 40A, § 17, which the courts have ‘policed in the strongest way’ and given ‘strict enforcement.’” *Konover Mgmt. Corp. v. Planning Bd. of Auburn*, 32 Mass. App. Ct. 319, 322–323 (1992), quoting *Pierce v. Board of Appeals of Carver*, 369 Mass. 804, 808 (1976) and *O’Blenes v. Zoning Bd. of Appeals of Lynn*, 397 Mass. 555, 558 (1986) (internal citation omitted). “The purpose of notice to the town clerk is to provide ‘notice to interested persons that

¹ Nothing in this Memorandum and Order bars or precludes the Defendants from seeking to rebut Silverio's presumption of standing and challenging his standing as this case develops.

the decision of the board of appeals has been challenged and may be overturned.” *Hickey v. Zoning Bd. of Appeals of Dennis*, 93 Mass. App. Ct. 390, 392 (2018), quoting *Pierce*, 369 Mass. at 808. “However, ‘[s]trict compliance with all the details of the notice provision is not required, so long as notice adequate to serve the purpose of the provision is given within the period limited.” *Hickey*, 93 Mass. App. Ct. at 392-393, quoting *Costello v. Board of Appeals of Lexington*, 3 Mass. App. Ct. 441, 443 (1975). “The statutory purpose is [] served” where “interested third parties [can] be forewarned [by the clerk] that the zoning status of the land is still in question.” *Konover Mgmt. Corp.*, 32 Mass. App. Ct. at 325, quoting *Carr v. Board of Appeals of Saugus*, 361 Mass. 361, 363 (1972):

It is not disputed that the Complaint was timely filed and that the town clerk received the required notice to be able to alert all interested parties, including the members of the Board, that the Decision was being appealed. That the Defendants appeared seeking dismissal within 31 days of the filing of the Complaint is sufficient evidence that there has been no prejudice to the rights of the Defendants by the failure of the Complaint to identify the residential addresses of the members of the Board or the failure of Silverio to serve the members of the Board at those addresses. The notice of the filing of the Complaint was adequate and dismissal on the grounds argues by the Defendants is not warranted.

The Defendants further argue that the Complaint should be dismissed for failure to comply with Mass. R. Civ. P. 8(a) & (e), and 10(b), because some paragraphs are unnumbered and others take the form of argument, such that the Defendants cannot respond in the form of an answer or understand Silverio’s claims. While the presence of unnumbered paragraphs does make it reasonable for the Defendants to have concerns with the form a filed answer should take, the Complaint sets forth the bases upon which Silverio intends to challenge the Decision with far

more particularity than is common, but not so much that it is verbose or confusing, as the Defendants argue. Dismissal of the Complaint is unwarranted. The appropriate remedy in this case is, as has already been done, for Silverio to file an amended complaint properly numbering the paragraphs so that the Defendants may respond.

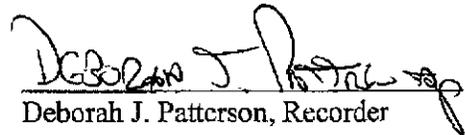
Conclusion

For the foregoing reasons, the Motion to Dismiss is **DENIED**. A telephone status conference is set down for September 5, 2019 at 10:45 am.

 **SO ORDERED**

By the Court (Foster, J.)

Attest:


Deborah J. Patterson, Recorder

Dated: August 29, 2019