COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-708

DAVID EPSTEIN & another[1]

vs.

ZONING BOARD OF APPEALS OF FALMOUTH & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiffs, David Epstein and Sari Friedman, commenced this action pursuant to G. L. c. 40A, § 17, after the town of Falmouth Zoning Board of Appeals (the board) granted a special permit to Woods Hole Partners, LLC (WHP), authorizing the construction of up to eight multifamily condominium units per acre on property located at 533-539 Woods Hole Road in Falmouth (the WHP property). The plaintiffs own abutting property and claim they have standing to challenge the issuance of the special permit because the new construction will increase density and have a negative impact on their view and the visual character of the neighborhood.[3] On cross motions for summary

[1] Sari Friedman.

[2] Woods Hole Partners, LLC.

[3] The complaint identifies four additional alleged harms, but none of them are at issue in this appeal.

judgment, a judge of the Superior Court concluded otherwise and entered judgment in favor of WHP. We affirm.[4]

Background. The following facts are not in dispute. On April 16, 2015, Epstein and Friedman obtained title to a single-family home located at 15 Fern Lane in Falmouth. The property (hereinafter the "Friedman property") was subsequently transferred to Friedman in her individual capacity on October 6, 2018. Epstein and Friedman primarily reside in Connecticut and rent out the Friedman property for most of the year.

WHP obtained title to its property on December 22, 2016. The WHP property consists of approximately 5.4 acres of land and is located within Falmouth's Business Redevelopment Zoning District (the BR District). The WHP property is abutted by hotels to the east and west and by the Friedman property along a portion of its northern boundary.

On June 14, 2019, the board granted a special permit to WHP under § 240-240(G)(1)(b) of the Falmouth zoning code authorizing WHP to develop the property for multifamily use of up to eight units per acre, which is two more units per acre than allowed by

[4] We acknowledge the amicus brief submitted by Robert A. Kaplan, Kimberly J. Sabo, Karen A. Toner, David Klein, Daniel and Jean Johnston, Mark Koide, Elizabeth Egloff, and Michael Goldring. To the extent the amicus brief contains and relies on material that was not included in the summary judgment record, we do not consider it. We are limited to the summary judgment record.

right under the applicable zoning code.[5] Specifically, the permit allows WHP to (1) construct forty-three condominiums comprised of thirty-nine age restricted units and four affordable family units, (2) demolish an existing but now defunct fifty-four room hotel and an abandoned 170-seat restaurant, and (3) restore the Buckminster Fuller geodesic dome located on the WHP property.[6] The residential complex will consist of five two-and-a-half-story buildings and two three-story buildings not to exceed thirty-five feet in height and will increase lot coverage by structures from seven percent to nineteen percent.

Other than the units per acre requirement, the project satisfied all dimensional and other requirements applicable in the BR district at the time the permit was granted. The closest building to the Friedman property, referred to as Building A, will be set back eighty-five feet whereas the applicable zoning code requires only a ten-foot set back. Trees will be removed from the portion of the northern boundary where the Freidman

[5] Section 240-240(G)(1)(b) states, in pertinent part, that multifamily use greater than six units per acre, up to eight units per acre, is allowed in a BR district on special permit from the board if it finds that "the public good will be served; that the business zoned area would not be adversely affected; and that the uses permitted in the zone would not be noxious to a multifamily use."

[6] The Buckminster Fuller geodesic dome is a not-for-profit arts center.

property is located and will be replaced with a vegetative buffer.

Discussion. Where, as here, "both parties have moved for summary judgment, the evidence is viewed in the light most favorable to the party against whom judgment [entered]." Albahari v. Zoning Bd. of Appeals of Brewster, 76 Mass. App. Ct. 245, 248 n.4 (2010). The question before us is whether "there is no genuine issue as to any material fact and . . . [WHP] is entitled to a judgment as a matter of law based on the undisputed facts" (quotation and citation omitted). Premier Capital, LLC v. KMZ, Inc., 464 Mass. 467, 474 (2013).

Under the Zoning Act, G. L. c. 40A, only a "person aggrieved" has standing to challenge a decision of a zoning board of appeals. G. L. c. 40A, § 17. See Sheppard v. Zoning Bd. of Appeal of Boston, 74 Mass. App. Ct. 8, 11 (2009). To be aggrieved, a person "must assert a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest" (quotation and citation omitted). Kenner v. Zoning Bd. of Appeals of Chatham, 459 Mass. 115, 120 (2011). "The injury must be more than speculative, but the term 'person aggrieved' should not be read narrowly" (citations omitted). Marashlian v. Zoning Bd. of Appeals of Newburyport, 421 Mass. 719, 721 (1996).

Abutters, like the plaintiffs, "are entitled to a rebuttable presumption that they are 'aggrieved' persons under the Zoning Act and, therefore, have 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), citing G. L. c. 40A, § 11 (presumption of standing conferred on "parties in interest," who include "abutters"). However, once WHP challenged the plaintiffs' standing, and offered evidence to support the challenge, the plaintiffs "were required to present credible evidence to substantiate their particularized claims of harm to their legal rights." Kenner, 459 Mass. at 116. Evidence is credible for these purposes only when it is both quantitatively and qualitatively sufficient. See Butler v. Waltham, 63 Mass. App. Ct. 435, 441 (2005) ("Quantitatively, 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. Conjecture, personal opinion, and hypothesis are therefore insufficient." [citations omitted]).

The plaintiffs argue, as they did before the motion judge, that they have standing as "aggrieved" persons within the meaning of G. L. c. 40A, § 17, because they will be injured by

the project's density and its negative impact on their view and the neighborhood's visual character. Although our review is de novo, we agree with the reasoning of the motion judge who concluded that the plaintiffs' claims rely on "personal opinion" and "speculation," and, as such, are not sufficient to confer standing.

In support of their argument that they are aggrieved by density-related issues, the plaintiffs rely on two undisputed facts: (1) a density of eight units per acre is more than what is allowed by right under the zoning code; and (2) the project will increase lot coverage by structures from seven percent to nineteen percent. We recognize that density-related concerns are protected under c. 40A, see Murchison v. Zoning Bd. of Appeals of Sherborn, 485 Mass. 209, 214 (2020); however, "establishing standing requires a plaintiff to do more than merely allege a zoning violation." Id. The plaintiffs' claim regarding density, like any other claim of harm, must be supported by credible evidence. See id. at 215. Here, the plaintiffs offered no evidence beyond their own opinions that that they will be harmed due to an increase in density. In Epstein's deposition, he states, among other things, that the individualized harm that he will suffer as a result of the project "has to do with a development out of character with the harmony of the surrounding neighborhood with a density that is

unprecedented." He also referred to his answer to interrogatory number five, which states that "[t]he decision allows a dramatic increase in density that is not present anywhere else in the vicinity, and which we believe is unlawful." In Friedman's deposition, she stated that the project is "[c]ompletely different from a seasonal-use motel and a restaurant," so much so that it will cause a "dramatic increase in residential density." These suppositions are not sufficient to establish a "harm specific to [the Friedman] property." Schiffenhaus v. Kline, 79 Mass. App. Ct. 600, 603 (2011). There is no evidence, for example, that the defendants' project, would "shut[ ] off a view," 81 Spooner Rd., LLC, 461 Mass. at 704; materially affect the plaintiffs' privacy in relation to their home, Dwyer v. Gallo, 73 Mass. App. Ct. 292, 296-297 (2008); or significantly reduce light or air, McGee v. Board of Appeal of Boston, 62 Mass. App. Ct. 930, 930-931 (2004). Accordingly, the plaintiffs lack standing based on density-related considerations.

Next, the plaintiffs argue they are aggrieved because the project will have a detrimental impact on their view and the visual character of the neighborhood. We acknowledge that under Section 240-216(D), the board should take into consideration "[i]mpact on neighborhood visual character, including views and vistas," and this protected interest may impart standing. However, the plaintiffs have failed to show that the project

will result in a particularized harm to their property or a detrimental impact on the neighborhood's visual character.

As they did with regard to their claim of density-related harm, the plaintiffs only speculate that their view will be impaired and offer nothing but generalized statements regarding the development's impact on the neighborhood. Freidman testified that she "suspect[ed]" she would be able to see the new buildings from her property, and Epstein testified it is "without question" that Building A will be visible from the Friedman property, which he based on "common sense, and the mathematics of elevation and addition." While it is true, as the plaintiffs contend, that Building A will be thirty-five feet tall and will be situated on top of a hill, it is also undisputed that the height of the building fell within the dimensional requirements at the time the special permit was issued.[7] It is also true, as the plaintiffs assert, that a number of trees along the border of the two properties will be removed, but the project includes the installation of a vegetative buffer zone and the building will be set back eighty-five feet. Although we agree with the plaintiffs that expert testimony is not required to demonstrate that "a towering

[7] It matters not, as the plaintiffs suggest, that the height requirements set forth in § 240-240(H)(5) of the Falmouth zoning code were amended after the special permit was issued.

building and the elimination of tree cover will disrupt views and vistas both for the [p]laintiffs, in particular, and for the neighborhood as a whole," see Appellant Brief 17, the plaintiffs needed to present some credible evidence of their claim. Because they have not done so, they do not have standing based on their allegation that the project will negatively impact their view and the visual character of the neighborhood.

Conclusion. The plaintiffs do not have standing to obtain judicial review of the board's decision and, as a result, summary judgment properly entered in favor of WHP. Given our conclusion, we need not address WHP's alternative argument that even if the plaintiffs had standing, they failed to show that the board acted improperly.

Judgment affirmed.

By the Court (Vuono, Henry & Ditkoff, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: July 14, 2022.

[8] The panelists are listed in order of seniority.