COMMONWEALTH OF MASSACHUSETTS

THE APPEALS COURT

No. 2012-P-0359

MAUREEN M. MAURI AND RONALD A. MAURI

Plaintiffs, Appellees

v.

ZONING BOARD OF APPEALS OF THE CITY OF NEWTON AND HARVEY CREEM, JOSEPH S. COSGROVE, VINCENT FARINA, BROOKE LIPSITT, SELMA H. URMAN, HILLARY BROWN, WILLIAM M. MCLAUGHLIN, JAMES H. MITCHELL, THOMAS J. PHILLIPS AND JONATHAN S. SALES, IN THEIR CAPACITIES AS MEMBERS OF THE ZONING BOARD OF APPEALS OF THE CITY OF NEWTON, AND JOHN D. LOJEK, IN HIS CAPACITY AS COMMISSIONER OF INSPECTIONAL SERVICES OF THE CITY OF NEWTON, AND BONNIE E. CHANSKY AND JAMES D. CHANSKY AND ERNEST D. ROGERS

Defendants, Appellants

On Appeal from a Judgment of the Land Court

BRIEF OF THE AMICI CURIAE

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INTRODUCTION

The undersigned Newton aldermen submit this brief, as friends of the Court, to address some of the impacts on zoning and land use in Newton that would result if this Court does not affirm the Land Court's interpretation of Section 30-15(c) of the Newton Zoning Ordinances as well as arguments raised in a proposed brief amicus filed by three Newton attorneys, Jason A. Rosenberg, G. Michael Peirce, and Terrance P. Morris.[1]

More specifically, the undersigned amici are the two senior members of the Board of Aldermen in terms of total years in office. Alderman Lisle Baker has been elected to fourteen terms as the Ward Alderman for Newton's Ward Seven, including three two-year terms as President of the Board, and now serves as Board President Emeritus. He also is an attorney and is a professor of law at Suffolk University Law School, though writing in an individual capacity. Alderman Brian Yates has been elected to twelve terms as an alderman-at-large from Newton's Ward Five, and served for twenty years as Chair of the Board's eight-

[1] As they indicated, these attorneys regularly participate as counsel or advisors in matters before the Board of Aldermen and other Newton land use boards and commissions, including this matter, according to the Record of Proceedings and Decision of the Zoning Board of Appeals. (Joint Record Appendix, pp. 69-70).

member Zoning and Planning Committee, which recommends amendments to Newton's zoning to be enacted by the Board of Aldermen as a whole.

At the same time, the undersigned amici want to make clear that they themselves do not claim to offer arguments in the City's stead. The undersigned amici, however, do have extensive experience with Newton zoning in general and the subject ordinance in particular, which may be valuable to this honorable Court. Both have served on the Board of Aldermen's Zoning and Planning Committee since its creation in 1988. The undersigned Alderman Baker was a co-sponsor of the amendments to Newton's zoning ordinance now before this honorable Court. The undersigned Alderman Yates chaired the Zoning and Planning Committee at the time of the adoption of the subject zoning ordinance amendment. Finally, both aldermen were also actively involved in the Board's consideration and adoption of Newton's updated Comprehensive Plan.

It is therefore from their general and particular experience, both with Newton zoning in general, and the history of amendments to Section 30-15, that the undersigned amici wish to offer their brief amicus curiae, with the understanding that they are speaking as individual aldermen and not for the Board as a whole.

I. The Land Court correctly found that the neighbors of the subject lot, the plaintiff Mauri, et al, were "persons aggrieved" by the decision of the Commissioner of Inspectional Services, which decision was in turn upheld by the Zoning Board of Appeals, because to do otherwise would leave an error of law in interpreting a local ordinance without a clear remedy.

Messrs. Rosenberg, et al, argue that because certain uses are permitted on the nonconforming lot at issue, that it undercuts the privacy interest of the appellee next door.[2] That is a novel test of standing which involves arguing that because some accessory uses on the nonconforming lot are permissible, so also should a new residence on that lot, in their place. Whatever test for standing is applied, it should not be one where the opportunity to do something implies the opportunity to do everything. Such a test would effectively rewrite the substantive ordinance in the guise of limiting access to the courts.

What their argument does highlight is the need for even-handedness in local zoning. It is obvious that if Newton's Commissioner of Inspectional Services mistakenly denied a landowner the right to build on a lot because of an error in interpreting the local zoning ordinance, the landowner would have a right to appeal to the Zoning Board

[2] The reliance of Messrs. Rosenberg et al. on O'Connnell v. Vainisi, 82 Mass.App.Ct. 688 (2102) appears misplaced, since the decision upheld a finding of standing in favor of an abutter to property on which a structure had allegedly been improperly erected.

of Appeals, and beyond that, to Court. But what about the opposite situation, where a local official like Newton's Commissioner of Inspectional services, with the best of faith, makes an error of law in interpreting the local ordinance and issues a building permit to allow residential construction on a nonconforming lot? Is such a wrong to be without a remedy?

At least in the case of a zoning variance or a special permit, there is notice to parties in interest and an opportunity to be heard. But in the case of a building permit grounded on a mistake of law, the only recourse is to appeal to a body which can rule on the legal interpretation which is then at issue. In order to have ordinances like the one before the court interpreted correctly, there has to be even-handed opportunity for an abutter or other presumptively adversely affected party to seek to rectify the error, first at the Zoning Board of Appeals, and if that forum is not sufficient, in court. If the policy in favor of equal treatment under the rule of law is to be vindicated, the rules of standing, at least in a case like the one before this Court, need to be interpreted broadly enough so as to honor the rights of both the nonconforming lot owner and the neighbor alike.

II. Allegations of a history of misinterpretation of local ordinance provisions cannot prevent the Land Court from rectifying such errors of law.

Messrs. Rosenberg argue that prior interpretations of the subject ordinance by Newton's Commissioner of Inspectional Services create some justifiable development expectations for owners of some otherwise nonconforming lots. It is understandable that upholding the Land Court's interpretation of Section 30-15(c)of the Newton ordinances may adversely affect those owners, like the appellants, who may have been given what turned out to be mistaken advice. But that misinterpretation, even though made in good faith by the Commissioner of Inspectional Services, should not prevent this Court from correcting that interpretation if it constitutes an error of law, any more than it should prevent a local official from correcting the error on his or her own.[3]

Messrs. Rosenberg et al. also argue that deference to property rights should inform the decision in this case.[4] We agree that is an appropriate lens through which to view the

[3] The hardship for the appellants of this misinterpretation may have been ameliorated to some degree by the apparent history of how their property was valued as "undevelopable land" by Newton's assessors, as indicated at the Joint Record Appendix, p. 25. It would be instructive to know if the other situations cited by Messrs. Rosenberg et al. are similarly situated.

[4] In particular, Messrs. Rosenberg et al. cite selected and unidentified portions of Newton's Comprehensive Plan, which though a public record, has not been admitted as part of the Joint Record Appendix in this case.

facts. On the other hand, we submit that binocular vision will give a clearer perspective to the Court. To be balanced and inclusive, the property rights lens focused on the unbuildable lot's owner should also be supplemented by a focus on nearby neighbors as well. The property right of one owner to build will of necessity affect the property right of his neighbor to use and enjoy his property.

Indeed, it is important to understand that the arrangement of local zoning involves property right interdependence, where the limitation on an owner's right to build is balanced and complemented by the limit on what a neighbor can build as well, rather than view those rights in isolation.

Moreover, while Messrs. Rosenberg at al. often appear before Newton land use boards to argue on behalf of those seeking to develop their land, as local legislators, the undersigned are also conscious of the thousands of Newton residents who rely on the protection of Newton zoning to assure the quiet enjoyment of their homes and the investments they have made. That interest, while more diffuse, is nonetheless real because it is the mutual reciprocity of zoning limitations on development which provides the foundation for the stable neighborhoods that makes the varied villages of Newton desirable places to reside. It was to assure this neighborhood stability that

gave rise to the subject zoning amendments, and which the Land Court implicitly upheld in its interpretation of the provisions of the specific ordinance at issue.

III. That some lots created in an earlier zoning regime so as to be undersized under more current zoning dimensional requirements may be merged with others to form larger lots than is the general pattern in a neighborhood is not grounds for allowing otherwise undeveloped undersized lots to be built upon.

A basic principle of zoning is to continue to upgrade the quality of land use controls with time and experience. The policy that properties should be conforming as much as possible to current zoning rules is the policy behind the doctrine of merger of lots in common ownership so that structures erected on them will be able to conform to updated dimensional controls. The undersigned aldermen concur with the account of the legislative history which the Land Court used to confirm its reading of the subject ordinance, including the affidavit of our former colleague, George Mansfield[5]. The interpretation of the Land Court of Section 30-15, with which the undersigned agree, will also continue to support the creation of more, rather than less, conformity with current dimensional rules, a desirable end in itself, and one that lies behind the general merger rules of General Laws, Chapter 40A, Section 6. That such merger may on occasion allow a larger structure, which

[5] Joint Record Appendix, pp. 108-110.

would also have to comply with a stricter set back and yard requirements, on a combined lot, is inherent in the doctrine of merger, and not grounds for construing an ordinance to deny merger where it would otherwise be warranted.

Newton's zoning ordinance strikes a balance between upgrading new development, while preserving existing nonconforming homes, and that is the balance also struck by the Land Court in its interpretation of the subject ordinance.

Conclusion

The undersigned amici curiae Newton aldermen respectfully urge this court to affirm the December 22, 2011 judgment of the Land Court.

Respectfully submitted,

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Certificate of Compliance with Mass. R. App. P. 16(k)

The undersigned hereby certifies, pursuant to Mass. R. App. P. 16(k, that the Brief of Amici Curiae complies with all the applicable rules of court concerning the filing of briefs, including Mass. R. App. P. 16(a), 16(f), 16(h), 18, and 20.

Signed under the pains and penalties of perjury this - 29th day of November, 2012.

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NEWTON ZONING BOARD OF APPEALS,
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Defendants-Appellants

CERTIFICATE OF SERVICE FOR AMICUS BRIEF

I, on behalf of the Amici Newton Aldermen: myself, Ward Seven Ward Alderman, R. Lisle Baker; Ward Five Alderman-at-Large Brian Yates, hereby certify that I served two copies of the BRIEF OF THE AMICI ALDERMEN to the following counsel by first class mail, postage prepaid, on November 30, 2012:

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