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NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

CAROL J. LORTIE & another [FN1] *vs.* ZONING BOARD OF APPEALS OF WESTPORT & others. [FN2]

12-P-1575

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This is an appeal from a judgment upholding a variance granted by the zoning board of appeals of Westport (board). We reverse and remand.

Background. The plaintiffs, Carol J. Lortie and Paul H. Costa, own property adjacent to property currently owned by defendant Underwood Farm of Westport, Inc. (Underwood and Underwood property), whose principal owners are defendants William and Nancy McDonald (collectively, the McDonalds). Prior to 1985, the Underwood property operated as a motel. In 1985, the property was converted into eleven residential apartments. In 2006, the McDonalds sought a variance authorizing them to demolish the existing apartments and build eleven residential condominium units. The Underwood property is located in a business district zone under the Westport zoning by-law (by-law). Only single and two-family residences are permitted in this zone. Additionally, one of the stated purposes of the by-law is to protect the public health, safety, convenience, and welfare by, among other things, preventing overcrowding of land, lessening traffic congestion, preventing undue concentration of the population, and providing adequate air and light. The board held a hearing on the variance application. In his affidavit, Costa states that at the hearing he expressed concerns with the proposed development "because it substantially increased the density at the site (from 7[,]690 square feet of living space to 12,100 square feet), and because it increased the proximity of dwelling units to [his] property and increased the height and visibility of those units . . . ." Costa also avers that, at the hearing, he and Lortie requested that "the Board insert . . . conditions that [the] units be at least forty feet from any property and that they not have full basements." The board granted the variance, subject to the conditions requested, in April, 2007 (original variance). [FN3] Costa's affidavit alleges: "[w]e relied on those conditions in reaching a decision not to appeal the Board's original [variance]."

The condominiums were built in 2008-2009. A triplex unit was built twenty-eight feet from the plaintiffs' property line. During the construction process, fifty trees and mature vegetation, which had acted as a buffer between the properties, were removed from the plaintiffs' property, the soil was regraded, and a retaining wall erected.

In August of 2009, Underwood filed an application with the board to amend the original variance by eliminating the setback and basement requirements. The plaintiffs opposed the application. On September 30, 2009, the board voted to modify the original variance by eliminating the forty-foot setback requirement and allowing basements up to seventy-three inches in height (amended variance). The plaintiffs filed a three-count lawsuit seeking, among other things, judicial review of

the board's decision to amend the variance. [FN4] In their count under G. L. c. 40A, § 17, the plaintiffs alleged that the original variance violates the by-law's density provision and will increase noise, population, overcrowding of land, and traffic congestion over levels associated with use that is allowed by the by-law; the McDonalds and Underwood wilfully violated the original variance conditions; and the amended variance "substantially increases the negative effect of [] Underwood's development . . . ."

Underwood and the McDonalds filed a motion for partial summary judgment on the basis of standing. The motion was allowed by a Superior Court judge, who ruled: "[t]he fact that neighbors can see one another's houses is not the kind of 'harm' that is peculiar to the plaintiffs; that the zoning ordinances are intended to prevent; or that is sufficiently substantial to constitute real aggr [ie]vement." The plaintiffs moved for reconsideration of that decision, citing *Marhefka v. Zoning Bd. of Appeals of Sutton,* 79 Mass. App. Ct. 515 (2011). In his ruling denying the motion for reconsideration, the judge stated: "[t]he variance that allows construction of condominium units on the [Underwood property] was granted in 2007. The plaintiffs did not seek judicial review of that decision. It is too late for them to do so now." The judge further noted that the amended and reduced setback condition did not violate the by-law and, therefore, the plaintiffs could not appeal the decision on this basis. The judge then concluded that the only grounds for appeal was an exacerbation of nonconformity in density and use. The judge reasoned that the plaintiffs failed to produce evidence that they have a reasonable expectation of proving such an exacerbation and, therefore, summary judgment was appropriate. This appeal ensued.

Discussion. We review de novo the judge's decision granting the motion for summary judgment on the issue of standing. *81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline,* 461 Mass. 692, 699 (2012). Under G. L. c. 40A, § 17, a "person aggrieved" is one who asserts "a plausible claim of a definite violation of a private right, property interest, or legal interest." *Harvard Square Defense Fund, Inc.* v. *Planning Bd. of Cambridge,* 27 Mass. App. Ct. 491, 493 (1989). A protected interest can arise from the express language or the implicit intent of a by-law's provisions. *Marhefka v. Zoning Bd. of Appeals of Sutton, supra* at 519-520. "Where plaintiffs allege several claims of aggrievement, they only need to satisfy their burden of proof with respect to one claim in order to establish standing." *81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline, supra* at 704 n.16. Further, zoning by-laws are intended to give plaintiffs "full notice . . . to know what is projected and to have opportunity to protest . . . ." *Kane v. Board of Appeals of Medford,* 273 Mass. 97, 104 (1930).

It is undeniable that the plaintiffs, initially, had standing to challenge the original variance. The proposed use violated the by-law's provisions relating to density and use. Further, Costa expressed concerns regarding the density of the units proposed, their proximity to his dwelling, and their height and visibility -- concerns that the by-law is intended to protect. After construction, the plaintiffs experienced significant trespass on their property. The natural buffer between properties was removed, the condominium buildings were closer to the plaintiffs' property, and they had full basements.

In their complaint against the amended variance, the plaintiffs alleged that they did not challenge the original variance in reliance on the conditions the board imposed and that the amended variance "substantially increases the negative effect of [] Underwood's development . . . ." We conclude that in deciding the motion for summary judgment, the motion judge misapprehended the nature of the plaintiffs' claims, reasoning that because they did not appeal the original variance, the scope of judicial review was limited only to the amended variance. See *Marhefka v. Zoning Bd. of Appeals of Sutton,* 79 Mass. App. Ct. at 518 (standing does not mean that the parties must prevail on the merits, rather, only that they put forth credible evidence to substantiate their claim). The plaintiffs were warranted in relying on the conditions imposed by the original variance in not seeking an appeal. "If . . . not, then they were grossly misled into giving up a right to object to the granting of the [defendants'] application . . . ." *Day v. Zoning Bd. of Review of Cranston,* 92 R.I. 136, 139 (1961) (applying the doctrine of administrative finality).

Thus, the judge erred when, in ruling on the plaintiffs' motion to reconsider, he "affirmed" the allowance of summary judgment. To conclude otherwise would, in effect, deny the plaintiffs their

right to judicial review of a decision that directly affects their property rights. Such a result would not be in accord with the intent of the by-law. The plaintiffs, therefore, have a cognizable right to seek judicial review of the amended variance.

Summary judgment (as to count I) is vacated and the case is remanded for further

proceedings consistent with

this memorandum and order.

By the Court (Milkey, Carhart & Sullivan, JJ.),

Entered: July 29, 2013.

FN1. Paul H. Costa.

FN2. Underwood Farm of Westport, Inc., William McDonald, and Nancy McDonald.

FN3. A record from the board's hearing reflects that Costa expressed concerns regarding the project's setbacks, septic, and wetlands impacts. The board record further reflects that Costa was also concerned with th expanding developments occurring in the subject area since 1958: "[i]f changes are allowed for expansion again, where will it stop." In response to this specific concern, the McDonalds' attorney stated that the development "could be moved another [seven feet] away from Costa's property."

FN4. The other counts, which included a claim that Underwood removed trees from the plaintiffs' property, were resolved by a trial in Superior Court.

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