

Commonwealth of Massachusetts  
County of Essex  
The Superior Court

CIVIL DOCKET#: ESCV2008-00111-D

RE: Barbieri et al v Town of Andover Zoning Board of Appeals et al

TO: Denise A Brogna, Esquire  
Johnson & Borenstein LLC  
12 Chestnut Street  
Andover, MA 01810

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**NOTICE OF DOCKET ENTRY**

You are hereby notified that on **03/03/2009** the following entry was made on the above referenced docket:

**MEMORANDUM OF DECISION AND ORDER; Defendants' Motion for Summary Judgment is ALLOWED. (Christine M. Roach, Justice). Copies mailed**  
Dated at Lawrence, Massachusetts this 3rd day of March, 2009.

Thomas H. Driscoll Jr.,  
Clerk of the Courts

BY: Philip Massa  
Assistant Clerk

Telephone: (978) 687-7463

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT  
CIVIL NO. 08-111D

DOMENIC BARBIERI AND  
BARBARA BARBIERI

vs.

STEPHEN D. ANDERSON, et al.

**MEMORANDUM AND ORDER ON  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Domenic and Barbara Barbieri ("the Barbieris") appeal a decision of the Town of Andover Zoning Board of Appeals ("the Board") pursuant to G.L. c. 40A, §17. The Barbieris appeal the Board's decision to lift a Cease and Desist Order issued against Mr. Ralph Arabian on May 21, 2007, prohibiting him from importing fill and completing re-grading projects on a plot of land known as 65 Cheever Circle ("the Decision"). The Barbieris claim lifting the Order will harm them because Arabian's filling and re-grading projects have caused, and will continue to cause, excessive volumes of runoff water to enter their property. Following hearing on September 9, 2008, and based on a thorough review of all the pleadings and facts of record, the Defendants' Motion is **ALLOWED**.

Standard of Review

On a G.L. c. 40A, § 17 appeal, "[A board's decision] 'cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary.'" Roberts v. Southwestern Bell Mobile Systems, Inc., 429 Mass. 478, 486 (1999), quoting MacGibbon v. Bd. of Appeals of Duxbury, 356 Mass. 635, 639 (1970). A board's decision will be upheld if a rational basis for it exists which is supported by the record. Croteau v. Planning Bd. of Hopkinton, 40 Mass. App. Ct. 922, 924 (1996)(rescript). However, a reviewing judge hears the matter de novo, and determines the legal validity of the underlying decision based upon the facts found by the court in the record. Josephs v. Bd. of Appeals of Brookline, 362 Mass. 290, 295 (1972).

Summary judgment is properly granted in zoning as in other cases when there is no genuine issue as to any material fact, and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Carey v. New England Organ Bank, 446 Mass. 270, 278 (2006). A fact is material if it would affect the outcome of the case. A dispute of fact is genuine if the evidence would permit a reasonable fact finder, when viewing the evidence in the light most favorable to the non-moving party, to return a judgment for the non-moving party. Jupin v. Kask, 447 Mass. 141, 143 (2006); Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991). The Barbieris must set

forth specific facts showing there is a genuine issue of fact for trial. Mass. R. Civ. P. 56(e); Ng Bros. Constr. Inc. v. Cranney, 436 Mass. 638, 644 (2002). The following facts are taken from the parties' summary judgment filings drawing all proper inferences in favor of Plaintiffs as the non-moving party.

### Undisputed Factual Background

Arabian is the owner of two lots, 65 and 67 Cheever Circle (the former through his LLC, Terravert, a Massachusetts limited liability company), in the town of Andover. From May 2003 to September 2004, Arabian imported at least 314 cubic yards of fill onto 67 Cheever Circle for the purposes of re-grading the lot and landscaping his yard. During the period from 1999 to November 2006, Arabian also imported at least 580 cubic yards of fill onto 65 Cheever Circle.

On October 20, 2006, the Barbieris' attorney notified Arabian that the filling and re-grading activities on Arabian's property were causing a significant increase in flooding on the Barbieris' property. Arabian's engineer, Mr. Richard Kaminski ("Kaminski"), wrote two letters to the Inspector of Buildings, dated November 8, 2006 and January 10, 2007, disputing the Barbieris' claims, and asserting contrary observations and conclusions.

On January 31, 2007, the Barbieris' attorney wrote a letter to the Inspector of Buildings complaining that the filling and re-grading activities on Arabian's property were violating Section 4.1.4.5 of the Andover zoning bylaws. Specifically, the Barbieris' alleged that Arabian's filling and re-grading of 65 Cheever Circle had resulted in a slope exceeding the maximum allowed.

On April 10, 2007, Arabian was refused a permit to import additional fill based on the Barbieris' complaint. One month later Kaminski submitted a re-grading plan to the Inspector of Buildings to demonstrate Arabian's intended compliance with Section 4.1.4.5 upon the completion of re-grading. On May 21, 2007 the Inspector of Buildings issued a Notice of Violation and a Cease and Desist Order. The Notice cited Arabian's non-compliance with Andover zoning bylaws Sections 4.1.4.5(d) and (e).<sup>1</sup> Arabian filed an application with the Board on June 19, 2007, seeking a variance from, or a special permit under, Section 4.1.4.5.

The Board held two public hearings on the matter, the first on September 6, 2007 and the second on October 11, 2007. Between the two hearings the Board took a view of

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<sup>1</sup> Those sections read:

- d. All natural slopes exceeding thirty-five percent (35%) over a horizontal distance of ten feet as measured perpendicular to the contour on a tract or parcel of land intended or proposed for subdivision or on a building lot are protected and shall remain undisturbed.
- e. All areas with natural slopes exceeding twenty-five percent (25%) over a horizontal distance of thirty feet as measured perpendicular to the contour on a tract or parcel of land intended or proposed for subdivision or development, or on a lot intended for building purposes, shall be excluded from the calculation of the minimum lot area required for the applicable zoning district.

the property. Over the course of those hearings Kaminski testified that neither the pre-existing topography nor the post-filling and re-grading topography would violate Section 4.1.4.5. The Barbieris did not offer any expert testimony in opposition to Kaminski's proffer. Several neighbors also submitted written comments, some attributing significant changes in flow and drainage patterns to Arabian's projects, others claiming that no significant variation from pre-existing flow and drainage patterns had occurred.

The Board adopted Kaminski's opinion with respect to the pre- and post-filling slope of Arabian's land, and voted 5-0 to lift the Cease and Desist Order against Arabian.

### Discussion and Rulings

#### Plaintiffs' Standing

The court finds and rules that the Barbieris have standing to challenge the Board's decision to lift the Cease and Desist Order against Arabian. G.L. c. 40A §17.

To be a "person aggrieved," a plaintiff must demonstrate an infringement of her legal rights. "The claimed injury or loss must be personal to the plaintiff, not merely reflective of the concerns of the community." Denneny v. Zoning Bd. of Appeals of Seekonk, 59 Mass.App.Ct. 208, 211 (2003). Abutting landowners enjoy a rebuttable presumption that they are "persons aggrieved" by zoning board decisions. Martin v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141, 145-46 (2001). This presumption may be rebutted by evidence the decision will not harm the plaintiff. Denneny, 59 Mass.App.Ct. at 212. If the defendant successfully challenges the plaintiff's presumption of standing, the burden then lies with the plaintiff to show how she was harmed, and the question of standing becomes one of fact for the trial judge to decide. Id.

Defendants, concede, as they must, that the Barbieris are abutting landowners. They contend, however, that the presumption of standing has been rebutted by evidence presented to the Board. This evidence allegedly consisted of "expert testimony on slope steepness, zoning by-law non-violation and drainage history through the testimony and writings of Kaminski. Kaminski opined there were no steep slopes, no by-law violations, and that the grading at 65 Cheever Circle did not alter historic drainage patters [sic] or cause any drainage problems at 79 Carmel Road." Defendants' Memorandum at 9. Defendants further contend that Plaintiffs' claims of steep slope violations and drainage causation require expert testimony, because issues of hydrology and geology are beyond the scope of the common knowledge and understanding.

Assuming for purposes of argument that the written comments of Drs. Knut and Susan Hiller-Sturmhoefel, which were submitted to the Board prior to either public hearing and which corroborate the Barbieris' claims, are insufficient to establish the Barbieris' standing as downhill neighbors, the Barbieris now seek to rely on the affidavit of professional engineer Benjamin Osgood, Jr. ("Osgood"). The Barbieris' Emergency Motion for Late Filing of Expert Affidavit proffers his alleged expert opinion that the

volume of runoff water has and will continue to increase as a result of Arabian's filling and re-grading projects.<sup>2</sup>

I do not find Plaintiffs' proffer of aggrievement in this case to be overly speculative or so weak as to require expert testimony. Barvenik v. Board of Aldermen of Newton, 33 Mass. App. Ct. 129, 137-138 and n. 13 (1992). However, in the interest of fulfilling this court's role as an independent fact-finder, I exercise my discretion under Superior Court Rule 9A(a)(5) to allow the Emergency Motion and the Osgood affidavit on the issue of standing. Even without the affidavit, however, I find sufficient allegation of harm to the Barbieris' property interests to establish their standing in this case.<sup>3</sup>

#### De Novo Review of Board's Decision

The court finds and rules that the Board did not abuse its discretion in determining that Arabian had not violated Section 4.1.4.5 of the Andover zoning bylaws.

The facts before the Board are well detailed, and following independent review are hereby adopted by the court. The Board's findings properly noted information available to it (relevant professional opinions from Kaminski), as well as information not available (data on pre-existing conditions, and reliable records on importation of fill). This is not a situation where inadequate findings by the Board leave the reviewing court in a state of uncertainty as to the bases for the Board's decision. Roberts-Haverhill Associates v. City Council of Haverhill, 2 Mass.App.Ct. 715, 716-18 (1974).

The Board admittedly based its Decision in substantial part on Kaminski's opinions, but that is not error. The Barbieris presented no evidence at the Board hearings to contradict Kaminski with respect to the factual issues of slope steepness and Arabian's compliance with Section 4.1.4.5. Osgood's proffered affidavit, even if accepted by the court on the merits, is highly speculative and adds nothing reliably probative to the debate. The Board properly referred to the slope and dimensional requirements of the applicable bylaw at issue. The Decision responsibly required further re-grading to remain in compliance with the plans on file and all applicable bylaws.

For all of the reasons stated herein, Defendants' Motion for Summary Judgment is **ALLOWED**.

DATED: February 26, 2009



Christine M. Roach

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<sup>2</sup> Defendants understandably object to this filing, coming as it does more than three months after the Rule 9A period, and contend that the Emergency Motion should be denied and the affidavit disallowed for lack of timeliness.

<sup>3</sup> Defendants also assert as a basis for summary judgment that the Barbieris did not properly plead the Board's Decision to be an abuse of discretion. I find this argument unpersuasive. Though the Complaint erroneously recites the Decision, it makes sufficient allegations with respect to the applicable standard.