COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-357

PETER KIRK & another[1]

vs.

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

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiffs, abutters to the site of a proposed affordable housing project in Weston, appeal from a judgment of the Land Court affirming the grant by the defendant, zoning board of appeals of Weston (board), of a comprehensive permit under G. L. c. 40B, § 21, that authorized construction of the project. We discern no cause to disturb the judgment, and affirm.

Declaratory judgment. We first consider the plaintiffs' challenge to the declaratory judgment entered by the Land Court, which concluded that the defendant, 269 North Ave, LLC (developer), may cut back all roots and branches of trees protruding onto its property. First set out in Michalson v.

[1] Bryan Johnson. A third plaintiff, Maxine Breen, was dismissed before the trial, and is not a party to this appeal.

[2] 269 North Ave, LLC.

Nutting, 275 Mass. 232, 233-234 (1931), the so-called "Massachusetts rule" allows property owners to cut back the intruding branches and roots of their neighbors' trees. "Where the trunk of a tree stands wholly on the land of one proprietor, he has been deemed the owner of the entire tree . . . though there is no doubt of the right of the adjoining proprietor to cut off limbs and roots which invade his premises." Levine v. Black, 312 Mass. 242, 243 (1942). Notably, the Supreme Judicial Court recently reaffirmed the Massachusetts rule, holding that "[o]ur resolution has been and remains to authorize the cutting back of overhanging branches and intruding roots." Shiel v. Rowell, 480 Mass. 106, 112 (2018). Nothing in the case law suggests that the Massachusetts rule should be constrained by a reasonableness standard along the lines urged by the plaintiffs in the present case, nor by factors such as whether the cutting is "defensive" (i.e., to abate nuisance) or "offensive" (i.e., to develop land), or whether the trees are needed to enhance privacy when neighbors live in close proximity to one another.[3]

We likewise reject the plaintiffs' contention that, because a tree straddling a boundary line is coowned by the property owners on either side of the boundary line, each coowner owes a

[3] The Shiel court recognized that neighbors now live in closer proximity to one another than when the rule was first established, yet still declined to change the rule. See Shiel, 480 Mass. at 110.

duty to the other to refrain from harming that tree. The lone binding authority cited by the plaintiffs observes that, in some jurisdictions outside Massachusetts, a coowner has the "right to prevent his neighbor from so dealing with [the neighbor's] part as unreasonably to injure or destroy the whole," but notes that "[e]ven under [this] view it is difficult to see why either owner should have any less right to cut off branches and roots than he would have if the trunk stood entirely upon the other's land" (emphasis added). Levine, 312 Mass. at 243-244. The developer does not plan to cut down the whole of the boundary line tree. At most, under the guidance of a certified arborist the developer will cut back the roots and branches of the boundary line tree that have grown onto the developer's property. Thus, even if Levine established a right for coowners to prevent the unreasonable destruction of a boundary line tree, that right is neither implicated nor violated here.

We accordingly agree with the Land Court judge that the developer may cut back the roots and branches of both boundary line and nonboundary line trees, subject to the conditions set out in the permit, irrespective of the effect the cutting may have on the trees. Doing so will not violate any property rights of the plaintiffs, so the plaintiffs are not entitled to injunctive or declaratory relief.

Comprehensive permit. "[T]he Legislature's intent in enacting G. L. c. 40B, §§ 20-23, is 'to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing' in the Commonwealth." Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 28-29 (2006), quoting Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 354 (1973). To that end, G. L. c. 40B confers upon zoning boards the authority to waive local regulations that may hamper the construction of affordable housing, particularly in circumstances, as in Weston, where fewer than ten percent of the town's housing stock meets the criteria for affordable housing.[4] See Board of Appeals of Hanover, supra at 354-355. "The statute reflects the Legislature's considered judgment that a crisis in housing for low and moderate income people demands a legislative scheme that requires the local interests of a town to yield to the regional need for the construction of low and moderate income housing, particularly in suburban areas." Standerwick, supra at 29. We cannot disturb the board's grant of a comprehensive permit "unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." Jepson v. Zoning Bd. of Appeals of Ipswich, 450 Mass. 81, 96 (2007),

[4] The level of affordable housing in Weston is approximately three and one-half percent.

quoting MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 639 (1970).

Viewed against that standard, the board acted within its authority in deciding to waive compliance with the setback requirements ordinarily applicable under the Weston zoning by-law. As explained earlier, the Land Court judge correctly concluded that the developer is within its rights to cut roots and branches protruding onto its property. There was evidence at trial suggesting that the plaintiffs' concerns that the trees on their property will die as a result of the project is speculative.[5] In any event, even were we to assume that some or all of the trees would be injured or die as a result, the board was within its authority to conclude that the need for affordable housing in the town outweighs the town's interest in preserving the trees. The circumstances are quite unlike those in Reynolds v. Zoning Bd. of Appeals of Stow, 88 Mass. App. Ct. 339, 349-350 (2015), on which the plaintiffs rely, where potential contamination of the groundwater serving local private

[5] The plaintiffs' expert testified that the ultimate impact of the project on the trees is "extremely variable," that there are a "large range of predictors" that affect the likelihood of mortality, and that "there is a broad range of survivability." The defendant's expert testified that, in his opinion, the project would not cause the death of any of the trees.

wells posed a risk to human health.[6,7]

Judgment affirmed.[8]

By the Court (Green, C.J.,
Massing & Lemire, JJ.[9]),

Clerk

Entered: March 17, 2020.

[6] Our view of the case obviates any need to consider the developer's contention that the plaintiffs are without standing to maintain this appeal. But see Marashlian v. Zoning Bd. of Appeals of Newburyport, 421 Mass. 719, 721 (1996).

[7] There is likewise no merit in the plaintiffs' contention that the permit is invalid because the board is without authority to waive compliance with State tree protection laws. Nothing in a property owner's exercise of its rights under the "Massachusetts rule" constitutes a violation of either G. L. c. 87 § 11, which criminalizes the willful cutting of another's tree, or G. L. c. 242, § 7, a civil statute imposing damages for the willful cutting down of trees on the land of another "without license."

[8] In the exercise of our discretion, we decline the developer's request for an award of its appellate attorney's fees.

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