COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1414

JOHN CONWAY & another[1]

vs.

PLANNING BOARD OF WESTFORD & others.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

John and Regina Conway (the Conways) own a parcel of land in the town of Westford that is burdened by a right of way (ROW) to access the property of the developers, Christopher H. Finneral and David A. Guthrie. The town's planning board (board) granted subdivision approval to divide the developers' property into two lots, one already improved with a house, and the second to support a new house. Following a summary judgment decision resolving some issues, and a trial on the remaining issues, a judge of the Land Court determined that the Conways lacked standing to appeal from the subdivision approval under G. L. c. 41, § 81BB, and, even if they had standing, the board did not abuse its discretion in granting contested waivers of

[1] Regina Conway.

[2] Christopher H. Finneral and David A. Guthrie.

the town's subdivision regulations. Assuming without deciding that the Conways have standing, we agree that the board did not abuse its discretion in granting the waivers. We therefore affirm the Land Court's judgment of dismissal.

1. Background. The facts relating to the history of the property are not in dispute. The parties' properties formerly were owned by Mary D. Agnew as a single parcel of land fronting on Main Street to the south. In 1969, the board approved a plan (1969 plan) that divided the property into two lots, lot A, containing the Main Street frontage, and lot B, containing 6.8 acres, to the rear or north of lot A. Access to lot B was shown on the plan to be by a thirty-foot wide right of way running along lot A's western boundary and ending in a partial cul-de-sac on lot B. The plan contained the notation, "[p]lanning [b]oard approval, subject to the condition that not more than one dwelling be erected on Parcel B without further approval of the Westfield [p]lanning [b]oard."

By a deed dated May 8, 1969, Agnew transferred lot A to predecessors of the Conways with reference to the 1969 plan and expressly reserved for herself and her heirs and assigns, "the right to use, in common with the grantees, their heirs and assigns, the thirty (30) foot right of way shown on said plan extending from Main Street northerly to other land of the grantor shown as Parcel B on said plan, for all purposes for

which streets and ways are commonly used in the [town], including the right to pave or otherwise improve and maintain all or any part of said right of way and to install or permit to be installed in, upon or over said right of way water, gas, drainage or sewerage pipes and any and all other utility services." The reserved easement itself did not require additional board approval for more than one lot on parcel B. If not for access over the ROW, lot B would be landlocked.

Sometime after approval of the 1969 plan, Agnew constructed a house on lot B. The Conways purchased lot A in 1994; access to their home is not by the ROW, but by a separate driveway approximately one hundred feet east of the ROW on Main Street. Mr. Conway testified that his only use of the ROW has been that he has walked on it "a little bit" to retrieve an errant golf ball or view his property.

The developers purchased lot B in 2015. They razed the existing house and constructed a new, large house referred to as the Finneral residence.[3] In 2016, the developers sought approval to subdivide lot B into two lots; lot one contained the Finneral

[3] The judge found that the use of the ROW to bring in fill and construction materials and equipment was "dramatically different" from what the Conways had experienced during the "Agnew years." "Increased traffic and the considerable construction activity on the Finneral site increased noise on the Conway Property while construction was underway. Construction-related noise and traffic ended once the Finneral Residence was built."

residence, and lot two was to be the site of a new house. The distance from the Conway house to the proposed new house is 1,000 feet. The plan proposed to extend the ROW through lot two and, on the existing ROW on the Conway property, excavate the pavement, install a new water line, expand the width of the traveled way from twelve feet to eighteen feet, and add granite curbing and a catch basin.

The board approved the subdivision and either waived several local regulations or determined that no waiver was required. The Conways appealed to the Land Court. Following a hearing on cross motions for summary judgment,[4] the judge remanded to the board for consideration of whether the board wanted to waive the requirement that the applicant must "own" all of the property shown on the subdivision plan and that all owners sign portions of the application (ownership waiver). On remand, the board both decided to grant the ownership waiver and

[4] The judge determined that factual disputes regarding the Conways' claims of standing would have to be resolved at trial. The judge rejected on the merits, however, the Conways' contention that, because the property lacked adequate frontage, the approval was invalid. The judge also rejected the board's initial conclusion that the term "owner" included the holder of an easement. While concluding as a matter of law that the road width waiver was in the public interest, the judge found that the board did not make a determination whether it was consistent with the intent and purpose of the subdivision control law. Similarly, the judge concluded that the board made inadequate findings to support the waiver of the dead-end cul-de-sac requirement.

made the findings necessary to support the waiver of certain road width requirements. The board reasoned that "the primary intention" of the owner signature requirements was "to ensure that [a]pplicants (whether fee simple owners or otherwise) have the authority to undertake the improvements shown on the plan." Finding that the developers had that authority by virtue of the reserved rights for all purposes for which streets and ways are commonly used, the board concluded that the waiver was appropriate and "consistent with the [r]egulations."

Following a trial on standing and two waivers (the ownership waiver and the cul-de-sac waiver), the judge reasoned that three of the six harms that the Conways asserted were related to noise, traffic, and dust impacts of construction, which, the judge concluded, are not among those harms that the subdivision control law [G. L. c. 41, §§ 81K-81GG] or the Westford subdivision regulations protect.[5] The judge found that the other three alleged harms related to post-construction noise, traffic, and safety in the ROW. As to these harms, however, the judge concluded that the developers' witnesses had rebutted the Conways' presumption of standing, and that the

[5] The judge found that the Conways will hear temporary, not constant, construction-related noise and will encounter construction-related dust on their property during construction on lot two, and that the board's decisions did not limit the period during which construction may occur.

Conways failed to produce any proof of injury resulting from increased noise, traffic, or unsafe use of the ROW after construction was complete. Thus, the judge concluded that the Conways lack standing to appeal from the board's decision to grant subdivision approval.

The judge further concluded that even if the Conways had standing, the board did not abuse its discretion in approving the ownership waiver.[6] The judge reasoned that the developers, through their ownership and easement rights, had the authority to "undertake all of the improvements shown on the" proposed subdivision plan, and concluded that the waiver of the signature requirement "does not substantially derogate from the intent and purpose of the Subdivision Control Law or local regulations."

2. Discussion. Waivers. Assuming without deciding that the Conways have standing,[7] we consider whether the board abused

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[6] The judge also found that the board did not abuse its discretion as to the cul-de-sac waiver; the Conways have not pursued this on appeal.

[7] Only persons aggrieved have standing to appeal from a board's decision to approve a subdivision plan. See G. L. c. 41, § 81BB; Krafchuk v. Planning Bd. of Ipswich, 453 Mass. 517, 522 (2009). "Abutters entitled to notice of planning board hearings, pursuant to G. L. c. 41, § 81T, enjoy a rebuttable presumption that they are persons aggrieved." Id. Here, the Conways are abutters, and also own the underlying fee of the ROW; they undoubtedly enjoy a rebuttable presumption of standing. Because the Conways do not prevail on the merits, the issue of standing is not outcome determinative, and, we need not resolve the question of whether the presumption was rebutted. See Mostyn v. Department of Envtl. Protection, 83 Mass. App. Ct.

its discretion in waiving strict compliance with its rules and regulations and in concluding that the waivers are in the public interest and not inconsistent with the intent and purpose of the subdivision control law. See G. L. c. 41, § 81R. See also Krafchuk v. Planning Bd. of Ipswich, 453 Mass. 517, 529 (2009). "A planning board's decision to grant or deny a waiver will be upheld unless premised upon 'a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary.'" Krafchuk, supra at 529, quoting Musto v. Planning Bd. of Medfield, 54 Mass. App. Ct. 831, 837 (2002). "The board's determination whether a particular waiver is in 'the public interest' involves a large measure of discretion, and if 'reasonable minds might in good faith differ, without doubting the reasonableness of the opposing view, the conclusion reached by the planning board should be sustained on judicial review. For it is the board, not the court, to whom the statute delegates the discretion, and the role of the court is merely to ascertain whether the board exceeded its authority.'" Id., quoting Arrigo v. Planning Bd. of Franklin, 12 Mass. App. Ct. 802, 809 (1981).

On appeal, the Conways limit their argument to the ownership waiver addressed at trial and the waiver of the fifty-foot road width requirement and requirement that there be

788, 792 & n.12 (2013) (question of standing need not be resolved where not outcome determinative).

sidewalks on both sides of the road (collectively the road width waiver). We address each in turn.

a. Ownership waiver. The board waived the requirement of the local subdivision rules and regulations that all owners sign the application. The Conways argue that because they are owners of the underlying fee in a portion of the ROW, the board could not consider the proposed subdivision plan without their signature. We have recognized "that a planning board has a legitimate interest in ascertaining whether the applicant has (or prospectively will have) sufficient ownership rights in the property to go forward with the project." Brady v. City Council of Gloucester, 59 Mass. App. Ct. 691, 697 (2003). And, it is true that where the identity of the owner of a portion of the property in a proposed subdivision was genuinely contested, we concluded that it would not be in the public interest to waive a requirement that all owners sign off on the application. See Batchelder v. Planning Bd. of Yarmouth, 31 Mass. App. Ct. 104, 106-109 (1991). Here, however, the developers have an express easement over the ROW and the uncontested right to improve and maintain the ROW consistent with the proposed plan. Accordingly, there is no ownership dispute.

The Conways contend that, as in Batchelder, the developers will be unable to comply with certain requirements of the subdivision approval because they are not the owners of the fee

in the ROW. Specifically, the Conways argue that the developers will be unable to comply with condition two of the "site specific conditions for the definitive subdivision plan," which provided that the ROW would be a "private way," and required the "owner or owners of Lots 1 and 2 (as shown on the Plan) . . . to assume all ownership, responsibility and liability for said roadway that may otherwise be assumed by the Town on roads that have been approved and accepted by the Town." Condition 2 also required, "prior to the release of lot 2, that the applicant . . . execute and record a covenant with the planning board, running with the land, and acknowledging that the roadway is a private roadway, constructed to planning board standards, and the developer agrees that it shall never be submitted to town meeting for a vote to have it become an accepted street . . . ."

The conditions, however, apply to and are binding on the applicant and the owners and subsequent owners of lots one and two on the subdivision plan and run with lots one and two in perpetuity. The conditions do not require the Conways' signature and are not binding on them. While we agree that the developers would not be able to assert ownership, the board was well aware of the limits of the developers' interest in the ROW. We conclude that the condition applies to the interests the

applicants hold, and that they have the authority to comply with the conditions.[8]

b. Road width waiver. Because the board waived the requirements that the subdivision road layouts be at least fifty feet wide and include sidewalks on both sides, and the developers agreed to construct off-site sidewalks or make a contribution to the town's sidewalk gift account, the Conways argue that the board essentially allowed the developers to "purchase" waivers.[9] Indeed, as the judge found, the developers volunteered and agreed to either make a payment of $12,838.50 to the sidewalk gift account or construct 1,131 linear feet of offsite sidewalk "in lieu" of constructing onsite sidewalks.[10] The judge observed, "[T]he board found that by granting the waiver (and other related waivers), the public interest would be served by either providing or planning for pedestrian access and safety measures that would benefit the public, as opposed to

[8] The Conways also contend that the developers are unable to authorize the town to maintain the storm drains if the owners fail to do so. The easement, however, authorizes the developers to maintain the easement and does not prevent them from engaging others to do so on their behalf.

[9] The Conways do not argue that the ROW, serving two houses, must comply, for safety or other reasons related to the purposes of subdivision control, with the fifty-foot width requirement and have sidewalks on each side or even that it was an abuse of discretion for the board to grant those waivers.

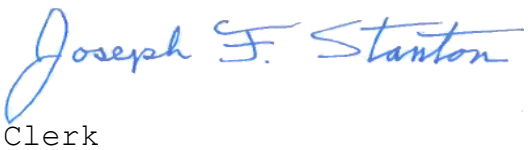
[10] The subdivision regulations, set forth in section 218-19 C, expressly allow for such a contribution or alternative construction.

non-public improvements for the benefit of a single additional residential lot."

On remand, the board made additional findings relating to the road width waivers, among others. It found that they protected the environment by minimizing impervious areas and preserving more of the existing vegetative cover and also allowed for smaller storm water management, less grading and clearing, and resulted in a larger natural buffer to adjacent properties. The board emphasized that the improvements to the road are to serve only one additional residence. In light of these findings, we are satisfied that, separate and apart from the developers' payment to the sidewalk gift account, the waivers were in the public interest and not inconsistent with the intent and purpose of the subdivision control law.

Judgment affirmed.[11]

By the Court (Blake, Sacks & Ditkoff, JJ.[12]),



Clerk

Entered: September 2, 2020.

[11] Here, the judgment of dismissal did not differentiate between those claims dismissed on the merits and those dismissed for lack of standing. On appeal, no party contends that, to the extent the judge ruled in the defendants' favor on the merits, a judgment affirming the board's decision should have entered. Thus the form of the judgment will remain the same regardless of the ground(s) on which we agree with the judge's rulings.

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