

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such 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 23.0 or 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. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-513

CHUAN WANG

vs.

PLANNING BOARD OF LEXINGTON & another.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The Lexington planning board (board) approved a special permit application filed by Barons Custom Homes, LLC (Barons), that allowed Barons to construct a sixteen-unit residential development in Lexington. The plaintiff, Chuan Wang, an abutter to the proposed development, opposed the application and, after it was approved by the board, filed a complaint for judicial review pursuant to G. L. c. 40A and G. L. c. 231A, naming the board and Barons as defendants. Wang's complaint alleged that the board's decision was based on an error of law because it failed to reserve an access easement for Wang as required by the board's subdivision regulations. On cross motions for summary judgment, a Superior Court judge entered judgment for the

¹ Barons Custom Homes, LLC.

defendants, reasoning that Wang lacked standing to challenge the board's decision.

We conclude that Wang was a person aggrieved by the board's decision and that he had standing to challenge it, because on this record there remains a dispute whether the board's decision, even as modified, complied with its own regulation requiring the reservation of an easement providing access to Wang's property. Accordingly, we reverse the order of summary judgment in favor of the defendants and remand the case to the board for a determination of whether the reservation of an easement by the modified plan provides access from the proposed loop road to Wang's property as required by section 175-7.2 (C) (2) of the Lexington subdivision regulations.

Background. We summarize the undisputed material facts. On April 11, 2019, Barons filed a special permit application for a proposed housing development named Fairland Commons. Barons sought permission from the board to construct sixteen dwelling units on its property between Lincoln Street and Fairland Street in Lexington, and a loop road to access the residential units from Fairland Street. A portion of the proposed loop road passes within twenty-five feet of Wang's undeveloped parcel, which is adjacent to and south of the proposed development.

In 2007, Wang sold a portion of his property between Lincoln and Fairland Streets, rendering the remainder of his

property landlocked. Consequently, Wang's property has no frontage on a public way.

The board unanimously approved the application in a written decision filed with the Lexington town clerk on July 24, 2019. After Wang filed his complaint for judicial review, Barons requested that the board modify the special permit by adding "a twenty-five (25) foot reservation of an easement from the interior driveway [the loop road] . . . to an adjacent landlocked property owned by [Chuan] Wang." The board unanimously approved the modification on April 24, 2020.

After hearing and consideration of cross motions for summary judgment on the complaint for judicial review, a Superior Court judge allowed Barons's summary judgment motion, concluding that Wang was not a person aggrieved under the Zoning Act, G. L. c. 40A, and therefore lacked standing to challenge the board's decision approving the special permit. Wang's cross motion for summary judgment was denied.

Discussion. Summary judgment is appropriate where there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. See Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). "We review a decision to grant summary judgment de novo." Boazova v. Safety Ins. Co., 462 Mass. 346, 350 (2012). On cross motions for summary judgment, we view "the evidence . . . in the light most

favorable to the party against whom judgment is to enter"
(quotation and citation omitted). Eaton v. Federal Nat'l Mtge. Ass'n, 93 Mass. App. Ct. 216, 218 (2018).

"Under the Zoning Act, G. L. c. 40A, only a 'person aggrieved' has standing to challenge a decision of a zoning board of appeals." 81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692, 700 (2012). As an abutter, Wang is presumed to be a person aggrieved, see G. L. c. 40A, § 11, but that presumption is rebuttable if, "as a matter of law, the claims of aggrievement raised by [Wang], either in the complaint or during discovery, are not interests that the Zoning Act is intended to protect." 81 Spooner Rd., supra at 702. If the relevant zoning ordinances and bylaws do not protect the abutter from the alleged harm, the presumption that the abutter is an aggrieved person is rebutted. Id. For the reasons that follow, we conclude that Wang's interest in an easement providing access to the proposed development was protected by the relevant zoning regulations and that his presumption of standing was not rebutted by the defendants.

Wang's complaint alleged that he was aggrieved by the board's decision because the special permit failed to provide an easement from the proposed loop road to his property as he asserted is required by section 175-7.2 (C) (2) of the subdivision regulations. That section provides that "[w]here a

way within the subdivision passes within [twenty-five] feet of an adjacent property, the subdivision plan must reserve an easement providing access from the way to the adjacent property." Here, it is undisputed that the loop road in Barons's subdivision plan passes within twenty-five feet of Wang's land, and that the proposed subdivision plan, and the board's original decision approving the plan, did not reserve an easement to access Wang's land from the loop road.

In an effort to correct this omission, Barons requested that the subdivision plan be modified "to include a twenty-five foot reservation of easement . . . extend[ing] from the interior driveway shown on the [plan] to the adjacent landlocked property owned by [Chuan] Wang." The board allowed the modification insofar as it reserved a twenty-five foot easement. However, for reasons that are not clear from the record, the board stopped short of concluding that the easement provided access to Wang's property. Indeed, the board specifically stated "[t]his approval shall not be construed as compliance with [the subdivision regulations]; nor does it provide legal access to the abutting property owned by [Chuan] Wang" (emphasis added). Thus, the record does not support the judge's conclusion that the easement "provid[ed] access from the way to the adjacent property."

We agree with Wang that the reservation of an easement that would not provide access to his land would not comply with the plain language of section 175-7.2 (C) (2) of the subdivision regulations. The board's failure to address whether the easement provides "access" from the loop road to Wang's property within the meaning of the regulation, and Wang's assertion that the location of the easement does not provide practical access, leaves a dispute about whether Wang is aggrieved by the board's decision. The judge assumed that the easement provided the access required by section 175-7.2 (C) (2), and thus mooted Wang's claim that he was aggrieved by the asserted noncompliance with that regulation, but in doing so the judge did not have the benefit of the board's own considered position on whether the easement satisfied the regulation.² Accordingly, on this record it could not be determined whether Wang's claim under section 175-7.2 (C) (2) had been mooted by the modification and thus left Wang without standing. The order of summary judgment in favor of the defendants must be reversed and the case remanded

² Although the board took the position in its summary judgment motion papers that the easement did so comply, its position on judicial review is not, in these circumstances, an adequate substitute for the agnostic position taken in its own decision. See, e.g., Doe, Sex Offender Registry Bd. No. 58574 v. Sex Offender Registry Bd., 98 Mass. App. Ct. 307, 313 (2020), citing Costello v. Department of Pub. Utils., 391 Mass. 527, 535-536 (1984).

to the board to determine whether the twenty-five foot easement reserved by the modified special permit provides access from the proposed loop road to Wang's property that satisfies section 175-7.2 (C) (2). Before deciding this issue, the board may, in its discretion, consider additional evidence and argument from the parties.³

We briefly address a second argument raised by Wang because it may arise in the further proceedings before the board.

Wang's complaint also alleged that the board's special permit failed to reserve an easement to allow for future extension of the loop road to Wang's land. More specifically, Wang claimed that the board failed to comply with section 175-7.2 (C) (1) of the Lexington subdivision regulations, which provides "[w]hen land adjoining the subdivision can be developed, . . . [t]he subdivision plan must reserve an easement to the adjoining land for the future extension of the street and other public facilities." The judge determined that Wang had no claim of aggrievement under this regulation because his land is landlocked and, therefore, cannot not be developed.⁴ It is

³ Deciding the case as we do, we need not address Wang's argument that the board did not comply with G. L. c. 40A, § 11 when it modified Barons's special permit without notice to Wang.

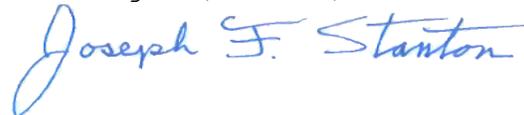
⁴ We are not persuaded by Wang's argument that his land "can be developed" within the meaning of section 175-7.2 (C) (1) of the subdivision regulations merely because it has the potential to be developed in the future if Wang acquires other adjoining parcels with the required frontage. To establish that he is a

undisputed that Wang's parcel currently has no frontage on a public street. A landlocked parcel cannot be developed because it cannot provide access to a public street system as required by § 6.9.12 (1) of the zoning bylaw.

However, the board did not address whether Wang's property "can be developed" within the meaning of section 175-7.2 (C) (1) of the Lexington subdivision regulations if the modified special permit, together with any further modification that may occur on remand, reserves an easement that provides access from the subdivision loop road to Wang's land pursuant to section 175-7.2 (C) (2) of those regulations. That question, on which we express no opinion, should be addressed by the board in the first instance.

The judgment is reversed and
the case is remanded to the
board for further
proceedings consistent with
this memorandum and order.

By the Court (Kinder, Sacks &
D'Angelo, JJ.⁵),



Clerk

Entered: May 12, 2022.

person aggrieved, Wang must "offer more than conjecture and hypothesis." Barvenik v. Aldermen of Newton, 33 Mass. App. Ct. 129, 133 (1992).

⁵ The panelists are listed in order of seniority.