Date Filed: 12/20/2023 10:43 AM
Land Court
Docket Number: 23 PS 000673

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

LAND COURT DEPARTMENT
DOCKET No. 23 PS 000673 (Smith, J.)

BELLEVUE HILL IMPROVEMENT ASSOCIATION, INC.,

Plaintiff,

v.

BOSTON ZONING BOARD OF APPEAL, and UPTON INVESTMENT PARTNERS LLC (sic),

Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Statement of Facts

On September 5, 2023, the Boston Zoning Board of Appeals granted zoning relief to Upton Belgrade Investment Partners, LLC ("Upton") sufficient to enable it to construct a 124-unit apartment building. A true and accurate copy of the Board's decision is attached to Upton's Motion to Dismiss as Exhibit A. On September 26, 2023, Bellevue Hill Improvement Association, Inc. ("BHIA") filed its appeal in this action.[1]

BHIA was formed as a non-profit corporation in 2019. Its stated corporate purpose is "[t]o protect and preserve the Bellevue Hill Neighborhood, namely that section of West Roxbury bounded by the West Roxbury Parkway, Washington Street, Maplewood Street, St. Theresa Avenue and Centre Street. To improve the residential character of the area by promoting the

[1] The Complaint was not served on Upton until November 13, 2023. The day after BHIA's Complaint was filed, another appeal of the same decision was filed by seven individuals. That Complaint is before this Court following transfer from the MISC session of the Land Court. See, Fabiano, et al. v. Collins, et al., Docket No. 23 PS 000622 (KTS).

health, safety, convenience and general welfare of its residents. To discourage misuse of property, traffic hazards, and activities inconsistent with the peaceful enjoyment of residing in the community. To actively participate in neighborhood and related city wide (sic) matters which concern the well being (sic) of the membership." Exhibit B to Motion, Articles of Organization, Bellevue Hill Improvement Association, Inc., dated July 29, 2019.[2] BHIA filed timely annual reports for 2019 and 2020, but has not filed one since. See Exhibit C (business summary page from Secretary of Commonwealth).

The boundaries of the Association's neighborhood, as described in its Articles of Organization show that, at its closest point, the Bellevue Hill "neighborhood" is across the West Roxbury Parkway from the Project site. They are shown outlined in red in the Exhibit D to Upton's Motion. BHIA's most recent filing with the Secretary of State's Corporations Division identifies 7 officers and directors and their home addresses. Each of their home addresses is identified by the blue dots in Exhibit D. None of them are listed on the certified list of abutters to whom notice of the public hearing was given. See Exhibits E (Certificate of Change of Officers & Directors, BHIA) and Exhibit F (Board of Appeal Abutter's List).

Although BHIA did not receive notice of the public hearing at which the Zoning Board heard Upton's petition, several of its members were actively involved in opposition to the Project and its predecessor (intended to become a public charter school for the youth of West Roxbury and Roslindale, which have no high school facility), both before the Boston Planning and Development Agency (BPDA) and the Zoning Board. A number of Bellevue Hill residents submitted identical form letters to the Zoning Board in opposition to the project. See Exhibit H.

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[2] Upton's Motion to Dismiss for lack of subject matter jurisdiction may rely upon "documents and other materials outside of the pleadings," and the Court may consider them. Callahan v. First Congregational Church of Haverhill, 441 Mass. 699, 710 (2004).

Their residences are identified by the red dots in Exhibit D. Its involvement was perhaps most pointedly shown in the participation of their Director and counsel, Paul Nevins, and counsel for the abutters, Paula Olender, in a meeting with the developer that is described by Upton's principal, John R. Upton, in his affidavit submitted in the companion appeal in support of Upton's Motion for Bond. See Exhibit G, at ¶¶ 17-18. In short, they lured Upton to the meeting without counsel (at their request) without informing him that they were both lawyers. Their concerted action is further evidenced in their March 24, 2023 joint letter to Upton's principal, Jake Upton, co-signed by fifty-two others, in which they state, "the undersigned, many of whom have legal standing to appeal, will have no choice but to proceed to litigation…We do not relish the possibility of this site being the subject of protracted litigation and associated lengthy delays in its development" if Upton would not reduce the project size. See, Exhibit 3 to Affidavit of Paula B. Olender, attached to Plaintiff's Opposition to Defendant's Motion for Bond as Exhibit J in the Fabiano matter, all attached to Defendant's Motion as Exhibit I. By Upton's count, the signatories of the letter include all but one of the BHIA's latest officers and directors. Compare Exhibit I to Exhibit C.

Despite the BHIA members' knowledge of the Upton project, their participation in the permitting process and their submission of written testimony into the record, and their joint letter's clear indication of their understanding of the zoning appeal process, BHIA's appeal asserts four counts, three rarely if ever seen to be asserted in a zoning appeal: the Board of Appeals violated BHIA's due process and equal protection rights when it failed to comply with BHIA's written demand that the board convene a formal adjudicatory hearing pursuant to the requirements of Chapter 30A §§ 10A and11, which failure of due process and equal protection renders the board's decision "null and void." Plaintiff's Complaint at ¶¶ 8-12, 24-26. Two

additional counts are pled, one seeking private enforcement of Article 97 of the Massachusetts Constitution, another seeking declaratory judgment.

None of these counts have any place, legally or factually, in the challenge of a zoning decision, and it justifies a raised eyebrow and fair inquiry as to the true purpose of the appeal.

LEGAL ARGUMENT

I. STANDARD FOR MOTION TO DISMISS

"While a complaint attacked by a… motion to dismiss does not need detailed factual allegations… a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions… Factual allegations must be enough to raise a right to relief above the speculative level… [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)…" Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting from Bell Atl. Corp.v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1964-1965, 167 L. Ed. 2d 929 (2007). What is required at the pleading stage are factual "allegations plausibly suggesting (not merely consistent with)" an entitlement to relief, in order to "reflect[] the threshold requirement of Fed. R. Civ. P. 8(a)(2) that ***the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief***.'" Id. (emphasis supplied).

"Bare conclusory statements, unsupported by facts," render a Complaint subject to dismissal. Hall v. Nationstar Mortgage, LLC, 2016 Mass. App. Unpub. LEXIS 136 (2016). The Court must "look beyond the conclusory allegations of the complaint," Curtis v. Herb Chambers I-95 Inc., 458 Mass. 674, 676 (2011). Summarily asserted speculations and conclusions will not suffice. See Buffalo-Water 1, LLC v. Fidelity Real Estate Co., LLC, 481 Mass. 13, 17 (2018).

The Plaintiff's burden to establish its standing is to demonstrate "more than minimal or slightly appreciable harm…The adverse effect on a plaintiff must be substantial enough to

constitute actual aggrievement such that there can be no question that the plaintiff should be afforded the opportunity to seek a remedy. To conclude otherwise would choke the courts with litigation over myriad zoning board decisions where individual plaintiffs have not been, objectively speaking, ***truly and measurably harmed***. Put slightly differently, the analysis is whether the plaintiffs have put forth credible evidence to show that they will be injured or harmed by proposed changes to an abutting property, ***not whether they simply will be "impacted"*** by such changes." Kenner v. Zoning Bd. of Appeals, 459 Mass. 115, 121-122 (2011) (emphasis supplied).

The Complaint lacks a scintilla of "heft." Iannochino, supra.

II. THE PLAINTIFF IS NOT A PERSON AGGRIEVED

The Plaintiff's own pleading acknowledges that it is a "non-profit civic organization that represents the interests of families in the Bellevue Hill neighborhood" of West Roxbury. Complaint ¶ 1.

The Complaint contains no assertion that BHIA is a party in interest, no identification of a property interest that is intended to be protected by the zoning ordinance, and no other factual basis for asserting its standing to bring its appeal. Presumably, it's interest in joining the fight is no more than its corporate purpose to "represent the interests of families in the Bellevue Hill neighborhood," whether those families were real parties in interest or not.

The Plaintiff's standing argument runs into a brick wall of precedent, but it is not the first civic association to try. In Day v. BRG 161 S. Huntington, LLC, 2013 Mass. Super. LEXIS 227* (2013), a developer (BRG) sought and obtained zoning board approval of three variances and a conditional use permit allowing BRG to construct a 196-rental-unit apartment project at 161 Huntington Avenue in Jamaica Plain. In the permitting process, BRG was vigorously

opposed by the Jamaica Plain Neighborhood Council and its "Zoning Committee." When its opposition failed to carry the day and BRG was granted its relief, JPNC challenged the decision. Id. at *2.

Perhaps lacking confidence that it could acquire standing any other way, JPNC tried to argue that it should be classified as a "municipal board." Id. at *3. That did not go well.

The court concluded that JPNC was not a municipal board and could not acquire standing on that basis. "JPNC does not possess duties related to the building code or zoning code and only possesses certain discretionary, advisory rights." Id. at *6. In reaching that conclusion, the court considered the intended role of JPNC when formed, the plain meaning of Article 55 of the Zoning Code (pertaining to the Jamaica Plain Neighborhood District), and the City's recognition of JPNC and its members. Id. In essence, JPNC argued that, by virtue of the significant role that it played in marshalling citizen input into the zoning and planning process, it has acquired a special status akin to a planning board. Id. at *12-14. The Court was unpersuaded and followed the well-established precedent that such a neighborhood improvement council, by whatever name, cannot assert standing on the basis of its "general civic interest in the enforcement of the zoning [regulation]." Chongris v. Board of Appeals, 17 Mass. App. Ct. 999 (1984), Id. at 999; Waltham Motor Inn, Inc. v. LaCava, 3 Mass. App. Ct. 210, 218 (1975). A statement of corporate interest or purpose "cannot clothe a civic association with aggrieved person status." Chongris, supra.; Amherst Growth Study Committee, Inc. v. Board of Appeals, 1 Mass. App. Ct. 826, 827 (1973); Harvard Square Defense Fund, Inc. v. Planning Board of Cambridge, 27 Mass. App. Ct. 491, 496 (1989).

The Cardinal Rule of standing is that the claimed injury or loss must be personal to the plaintiff and cannot simply represent general, speculative concerns of the community. Day,

supra at *21-22, citing Denneny v. Zoning Board of Appeals of Seekonk, 59 Mass. App. Ct. 208, 211 (2003). BHIC has identified no harm of a property interest personal to it, and it cannot.

For this reason, the Complaint must be dismissed for lack of subject matter jurisdiction.

III. THE PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

A. The Complaint Fails to Mention G.L. c. 655 § 11

The Complaint purports to challenge the decision of the Boston Zoning Board, for which there is only one avenue, and that is the "exclusive remedy" afforded by G.L. c. 655 §11 of the Boston Zoning Enabling Act:

> "Any person aggrieved by a decision of said board of appeal…may appeal to the superior court department of the trial court sitting in equity… ***The foregoing remedy shall be exclusive***; but the parties shall have rights of appeal as in other civil actions."

c. 655 §11 (emphasis supplied).

And yet, the Plaintiff asserts counts under Chapter 30A (the Administrative Procedures Act), Articles 1, 10 and 12[3] of the Massachusetts Constitution and G.L. c. 231 § 1 et seq. (the Declaratory Judgment Act). None of these claims can survive the "exclusive remedy" language of c. 655 §11. Sweeney v. Pace, 30 L.C.R. 479, 481 (2022). Its absence from the pleading (deliberate or not) is fatal.

B. Chapter 30A Does Not Afford an Independent Right of Appeal for Persons Aggrieved by a Local Zoning Decision

Not only is the Plaintiff not a "person aggrieved" under c. 655 §11, it is not a person aggrieved under Chapter 30A, because it has identified no "statutory right to participate in the proceedings" before the Boston Zoning Board. Newton v. Department of Public Utilities, 367

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[3] Upton assumes the reference to Article 12, which relates to the rights of a defendant in criminal prosecutions, is a typographical error, and counsel intended to refer to Article 11, which guarantees the free, complete and prompt delivery of justice, "for all injuries or wrongs which he may receive in his person, property or character." The Complaint alleges no injury to person, property or character.

Mass. 667 (1975). It is not a "party to an adjudicatory proceeding," because it is neither "a specifically named person whose legal rights, duties or privileges are being determined in the proceeding" before the zoning board, nor a "person who as a matter of constitutional right or by any provision of the General Laws is entitled to participate fully in the proceeding." G.L. c.30A ¶ 1(3). While some of its members exercised the right to attend the public "Zoom" hearing on Upton's application and submitted letters of opposition to Upton's application,[4] no law, rule or regulation entitled them to notice of the public hearing (except insofar as any one of their membership might have been included on the Zoning Board's "list of abutters entitled to notice)[5], and no law, rule or regulation entitled them to be heard.

In short, the Boston Zoning Board of Appeals hearing, when the Board is acting on the application of a property owner for zoning relief, is a quasi-judicial proceeding that meets the requirements of G.L. c.30A § 11(8).[6] Foster from Gloucester, Inc. v. City Council of Gloucester, 10 Mass. App. Ct. 284, 294 n. 11 (1980). See also, Hansberry v. Mass. Interscholastic Ath. Ass'n, 86 Mass. App. Ct. 531, 540 (2014).[7]

Most importantly, however, is that Chapter 30A clearly specifies that, "[w]here a statutory form of judicial review or appeal is provided such statutory form shall govern in all

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[4] Letters in opposition to the Project were submitted to the Board of Appeals from multiple individuals who reside within the boundaries of the Bellevue Hill neighborhood. See Exhibit H to Motion.

[5] See Exhibit F to Motion.

[6] St. 1956 c.665 Section 8 provides in part that "[s]aid board of appeal shall cause to be made a detailed record of all its proceedings, which record shall set forth: the reasons for its decision; the vote of each member participating therein; the absence of a member or her or his failure to vote…"

Chapter 665 § 11's exclusive remedy provides that "[u]pon an appeal under this section, the court shall hear all pertinent evidence and determine the facts, and upon the facts as so determined, annul such decision if found to exceed the authority of such board or make such other decree as justice and equity may require."

[7] BHIA's Complaint cites Zoning Board of Appeals v. HD/MW Randolph Avenue, LLC, 490 Mass. 257, 258 (2022) to support its allegation that the denial its demand for an adjudicatory hearing denied it due process and equal protection and rendered the decision null and void. Complaint at ¶¶ 9-13. That decision concerns a review of a decision of the Housing Appeals Committee concerning a Chapter 40B housing appeal. It is designated by Chapter 40B §22 as the administrative agency hearing appeals of local zoning decisions pursuant to Chapter 30A.

respects," c. 30A §14, and the form of the judicial review of a Zoning Board decision is the "exclusive remedy" afforded by St. 1956 c. 665 § 11. Because the Plaintiff has failed to plead the only claim available to it, the Court has no jurisdiction to hear its Complaint.

C. Chapter 231 Does Not Afford a Right of Appeal for Persons Aggrieved by a Local Zoning Decision

Efforts to plead a declaratory judgment count in substitution of a zoning appeal have been rejected for nearly thirty years. See, Leonard v. Zoning Board of Appeals of Hanover, 96 Mass. App. Ct. 490, 499 (2019); Whitinsville Retirement Soc., Inc. v, Town of Northbridge, 397 Mass. 757, 763 (1985) (declaratory judgment act "may not be used to avoid the normal appellate route required in zoning disputes); Iodice v. Newton, 397 Mass. 329, 333-334 (1986). It matters not whether the appeal is based in the City of Boston or any other municipality. "The exclusivity of the remedy provided in both the Boston Zoning Enabling Act and G. L. c. 40A, § 17 precludes recourse to either the declaratory judgment act, G. L. c. 231A or the zoning declaratory judgment act, G. L. c. 240, § 14A as a substitute avenue to appeal the grant of a zoning approval." Sweeney v. Pace, 30 L.C.R. 480, 481 (2022).

This is elementary law.

D. Due Process and Equal Protection Claims Brought by a Party With No Property Interest Are Not Cognizable

The Complaint pleads that the decision of the Board "violates the Plaintiff's rights to procedural due process, substantive due process, and equal protection under Articles 1, 10 and 12 (*sic*) of the Massachusetts Declaration of Rights." Complaint ¶ 31. No facts are pled to identify the procedural or substantive rights it was deprived of beyond the Board's refusal of BHIA's demand that it conduct a formal adjudicatory proceeding, rather than the quasi-adjudicatory

hearing conducted by the Boston Zoning Board, like every other zoning board in the Commonwealth.

1. <u>Procedural due process was afforded</u>.

The Plaintiff seems to assert that the manner in which zoning boards have conducted their public hearings since the beginning of time violates the Massachusetts constitution. The fact of the matter is that the Boston Zoning Board acts in a quasi-judicial manner when it acts upon the application of a single property owner, hears testimony, makes findings of facts an determines the manner in which to apply the zoning code. See, <u>Mullin v. Planning Board of Brewster</u>, 17 Mass. App. Ct. 139, 143 (1983). It is only the *first step* in the due process of an applicant or anyone else *with a property interest at stake*: its decision, which is required by statute and caselaw to contain a recitation of facts adequate to support a finding, is subject to appeal to a court by anyone *with standing*, and that is all the process that is due. G.L. c.655 §§ 8, 11.

In that judicial review, the court will examine whether or not the board conducted an adequate hearing and the decision contained the specific findings required, and if they don't, the decision will be annulled. See <u>Warren v. Zoning Board of Appeals of Amherst</u>, 383 Mass. 1, 9-10 (1981) (the allowance of a variance without specific findings of the necessary conditions is invalid); <u>McNeely v. Board of Appeal</u>, 358 Mass. 94, 103 (1970) (the mere recital of statutory or code criteria is inadequate); <u>Brackett v. Board of Appeal of Building Department of Boston</u>, 311 Mass. 52, 54 (1942) (same); <u>Prusik v. Board of Appeal of Boston</u>, 262 Mass. 451, 457-58 (1928) (again); <u>McCabe v. Board of Appeal of Arlington</u>, 10 Mass. App. Ct. 934, 934 (1980) (failure to make findings under the statutory criteria relating to conditions of soil, topography, or shape is fatal to the variance); and <u>Lynch v. Board of Appeal of Boston</u>, 1 Mass.

App. Ct. 353, 356 (1973) (specific findings are the "conditions precedent" to the grant of a variance).

Setting aside the firmly established adequacy of the process (and manner of challenging it), it is axiomatic that a plaintiff in a procedural due process claim must first demonstrate a *protected property interest*; and in the context of land use approval, courts do not general find a property interest in a particular approval so long as the board or regulating authority had some discretion in the approval decision. See, Thomas R. Donahue, Leonard H. Kesten and Francesca M. Papia, *Civil Rights Claims Against Municipalities* §7.4, appearing in Mass Municipal Law (Second Edition updated in 2020, 2022). Where approval is *non-discretionary*, such as in the endorsement of an "approval not required" subdivision plan, or even a definitive plan where all of the requirements have been met, a violation of due process may result. Id. See, e.g., Creative Environments, Inc. v. Estabrook, 680 F. 2d 822, 833 (1st Cir. 1982) (assuming, without deciding, that a property interest is implicated in the context of a review of a definitive plan under G.L. c. 41 §81M); Freeman v. Planning Board of West Boylston, 419 Mass. 548, 559 (1995) (in a substantive due process claim, assuming plaintiff had a property right in approval of definitive plan).

The Plaintiff's Complaint fails in the most basic way: it fails to identify any protected property interest is has in the Board's decision pertaining to Upton's property.

"Only one whose rights are impaired by a statute can raise the question of its constitutionality, and he can object to the statute only as applied to him." Blixt v. Blixt, 437 Mass. 649, 661 (2002), quoting Massachusetts Comm'n Against Discrimination v. Colangelo, 344 Mass. 387, 390 (1962). Likewise, the property interest must be shown when challenging a government action. Adoption of Pierce, 58 Mass App. Ct. 342 (2003) (in Department of Social

Services' care and protection petition under G.L. 119 §24, older sibling lacked a constitutionally protected liberty interest in maintaining a relationship by visitation with her adopted sister).

2. Substantive due process.

For a substantive due process claim to survive, a plaintiff must prove arbitrary and capricious governmental action that deprives the landowner of a property interest. Mere erroneous action by local government does not rise to the level of a substantive due process violation. Brockton Lower LLC v. City of Brockton, 948 F. Supp. 2d 48, 67 (D. Mass 2013) (quoting Creative Environments, supra at n. 9). The government misconduct must be "stunning, evidencing more than humdrum legal error." Amsden v. Moran, 904 F.2d 748, 754 n.5 (1st Cir. 1990). In Thyng v. City of Quincy, 32 Mass. L. Rep. 215 (2014), the court analyzed an analogous situation in which the plaintiff alleged violations of the federal civil rights statute, 42 U.S.C. §1983, claiming that members of the Quincy conservation commission and other local officials conspired to violate his equal protection and substantive due process rights by impeding his efforts to develop a vacant lot through capricious and malicious actions spanning a period of more than a decade. Id. at *2-6. At trial, the jury found violations of the equal protection clause by the six defendants, and it found a substantive due process violation against one of the six defendants, the administrator of the Conservation Commission. Id. at 2.

All that is alleged here is the Board's refusal to entertain BHIA's demand for an adjudicatory hearing under Chapter 30A, when it instead conducted a quasi-adjudicatory hearing under c. 655 §11. If BHIA believes that the Board of Appeals failed in its process, its only conceivable remedy is pursuant to §11, which it likewise has no standing to assert.

3. Equal protection.

To prevail on a claim of a "class of one" equal protection violation, a plaintiff must show that "(i) he was treated differently than other similarly situated [people] and (ii) the differential treatment resulted from a gross abuse of power, invidious discrimination, or some other fundamental procedural unfairness." Mancuso v. Massachusetts Interscholastic Athletic Ass'n, 453 Mass. 116, 129 (2009), quoting Pagan v. Calderon, 448 F.3d 16, 34 (1st Cir. 2006), cert. denied, 532 U.S. 995 (2001).

The Plaintiff's Complaint is utterly devoid of any factual allegation that would suggest that the Zoning Board's conduct of the public hearing on Upton's application treated BHIA differently than others in its position (i.e., non-abutting private citizens with no property interest at stake), or that the mere declination to conduct a Ch. 30A evidentiary hearing was a gross abuse of power, invidious discrimination, or some other fundamental procedural unfairness.

E. BHIA Has No Standing To Enforce Article 97

1. The building does not "encroach on public land"

BHIA attempts to assert a claim as a "private attorney general" concerning a portion of DCR land on which the Clay Cars dealership parked automobiles. See Complaint at ¶¶ 15-22, 28-29. It appears to have over-exerted itself when it pleads that the Board of Appeals decision allows Upton to "construct a building that continues to encroach upon public land."

Had BHIA's counsel simply shared his suspicions with the administrative agency in charge of the property, it would have learned that DCR *approved* Upton's development plan, as evidenced by the Department's January 23, 2023 correspondence to Jake Upton, which finds that the Project is "consistent with the applicable terms and limitations of the DCR Restrictions," and reiterates that the DCR Restrictions remain valid, legally enforceable and cannot be released

without the approval of the Massachusetts Legislature. See Correspondence dated January 23, 2023 to Jake Upton from Patrice Kish, Chief of the Division of Design and Engineering, attached to Defendant's Motion as Exhibit J.

So, as a matter of *fact*, BHIA's allegation is provably false on its face.

This is an example of where the doctrine of exhaustion of administrative remedies would serve to allay the mistaken concerns of uninformed citizens and avoid frivolous constitutional claims. See, Zanghi v. Bd of Appeals of Bedford, 61 Mass. App. Ct. 82, 87 (2004).

2. There is no private right of action.

BHIA steps in deeper when it summarily alleges that it "has standing as a private attorney general" to seeking judicial review (Complaint ¶ 28), an assertion of law that is plainly false. Outside of the well-established ten-taxpayer right articulated in Chapter 214 §§ 3 (10) or 7A, there is no private right of action to enforce the deed restriction at issue. Chase v. Trust for Pub. Land., 16 L.C.R. 135 (2008), citing Enos v. Secretary of Env. Affairs, 432 Mass. 132, 138-39 (2000) ("[t]he general concept of environmental protection does not extend to allowing the plaintiff to challenge the Secretary's action"). See also, Knowles v. Codex Corp., 12 Mass. App. Ct. 493, 498-99 (1981), where private plaintiffs lacked standing to enforce conservation restrictions granted to the town by the property owner as "it [was] the conservation commission which was specifically charged with the responsibility for enforcing the town's rights under the formal instrument" and the case "raise[d] no implication of private nuisance and [did] not fall within any of the narrowly defined classes of cases in which the Legislature has conferred standing on private individuals who may wish to litigate questions concerning the allegedly wrongful use of public or private lands."

In any event, there was no action to bring in the first place.

CONCLUSION

The Complaint here represents the worst example of citizen activism run amok. A civic association representing residents of another borough, none of whom are abutters, files an action asserting all manner of claims except the claim that is compulsory. It then *sits* on the Complaint for six weeks before serving it, with knowledge that the real parties in interest – abutters entitled to notice - were filing their own action.[8] Elementary-level legal research would have revealed that the pled counts are plainly inapposite, the elements of the claims are ignored, and no legally-protected property interest is articulated. It is a rare instance in which a pleading so far misses the mark that it is *genuinely* frivolous.[9]

WHEREFORE, the Defendant respectfully requests that this Honorable Court dismiss the Complaint and award the private defendant costs; and upon further findings pursuant to motion filed in accordance with G.L. c. 231 § 6 F, attorney's fees.

Respectfully Submitted,
UPTON BELGRADE INVESTMENT PARTNERS, LLC,
By its Attorneys,

/s/ Michael W. Ford

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[8] Upton makes the educated assumption that Nevins knew that Olender would be appealing on behalf of the abutting condominium owners. They fought Upton together at both the BPDA and ZBA, they lured John Upton to Olender's condominium building to meet "without counsel," where the two counsel threatened Upton if he did not agree to remove the fifth floor, and they jointly threatened Upton with lengthy and expensive litigation. See Upton Affid., Exh. G at ¶ 18.

[9] Upton's counsel wishes to point out that the BHIA's Director and counsel here professes to be a highly experienced constitutional and civil rights lawyer, a fact the Court might wish to take into account in weighing the motion before it.

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Date: December 20, 2023

CERTIFICATE OF SERVICE

I, Michael W. Ford, hereby certify that on this 20th day of December 2023, a copy of this document was served via e-mail transmission upon:

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/s/ Michael W. Ford
____
Michael W. Ford