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Increased Traffic As Meeting the Special Damages Requirement for Aggrieved Party Standing

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INCREASED TRAFFIC AS MEETING THE SPECIAL DAMAGES REQUIREMENT FOR AGGRIEVED PARTY STANDING

In *Joseph v. Township of Grand Blanc*,[1] the township board amended a zoning ordinance to allow the construction of a commercial building. Plaintiff, an owner of a residence located one mile from the rezoned property, brought suit in a Michigan trial court to enjoin the ordinance from taking effect and to have it declared null and void. In his complaint, plaintiff alleged ". . . that because of this rezoning, traffic will be increased on the dirt road fronting his property; because of this, he has suffered economic and esthetic losses."[2] Upon defendant's motion for summary judgment, the trial court held that since plaintiff's property was located one mile from the rezoned property, and since he did not allege any special damage, plaintiff was not an aggrieved party and could not maintain the action. On appeal, the Michigan Court of Appeals affirmed, reasoning that the increase in traffic, ". . . with its attendant difficulties for property owners whose property fronts on the street, are matters which address themselves to the police authorities of the municipality rather than to the zoning authorities."[3] It thus held that plaintiff suffered no substantial damage, was not an aggrieved party, and could not challenge the ordinance. This case, then, squarely presents the issue of who has standing to challenge a zoning regulation, and it is with this issue that this comment is concerned.

Changes in zoning regulations may be accomplished either through legislative rezonings or through administrative determinations by the board of zoning appeal. All jurisdictions provide methods for the judicial review of administrative zoning decisions, and the majority confer a right of appeal on "any person aggrieved" by such a decision.[4]

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1. 5 Mich. App. 566, 147 N.W.2d 458 (1967).

2. *Id.* at 568, 147 N.W.2d at 460.

3. *Id.*

4. *See, e.g.*, ALI MODEL LAND DEVELOPMENT CODE art. 8, app. B at 207-08 (Tent. Draft No. 1, April 24, 1968); CAL. CIV. PRO. CODE ANN. § 1067 (Deering 1959); COLO. REV. STAT. ANN. § 3-16-5 (1963); FLA. STAT. ANN. § 176.16 (1966); MICH. STAT. ANN. § 5.2940 (1958); N.Y. VILLAGE LAW § 179(b) (McKinney 1966).

As this term is rarely defined by legislation, the courts must be relied upon to determine who is and who is not sufficiently "aggrieved" within the terms of the statute. The enabling acts do not provide a statutory appeal from legislative rezonings, but the courts adopt an identical approach in determining who is entitled to injunctive relief from a rezoning ordinance.[5]

One of the most helpful pronouncements on standing to appeal is contained in a recent Maryland decision[6] involving a rezoning:

> In zoning cases, the rule . . . is that for a person to be aggrieved . . . the decision must not only affect a matter in which the protestant has a specific interest or property right but his interests therein must be such that he is personally and specifically affected in a way different from that suffered by the public generally.[7]

This statement of the rule reflects the general judicial understanding. Under it, courts have held that absent a showing of "special damages" a party will not be heard to challenge a zoning regulation.[8] Nevertheless, the problem of standing should not be reduced to a mere mechanical application of a formula.[9] All too frequently the special damage rule is applied by a court without clear analysis, simply as a tool to deny relief. Unfortunately, the ambiguities latent in the statement of the special damages rule allow the courts to escape a closer analysis of the standing problem.

I. The Proximity Requirement

Certain situations presented to the courts permit a relatively simple determination of the existence or nonexistence of special damages.

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5. For cases on this point, *see* Krasnowiecki, *Planned Unit Development: A Challenge to the Established Theory and Practice of Land Use Control,* 114 U. Pa. L. Rev. 56, n. 23 (1965).

6. DuBay v. Crane, 240 Md. 180, 213 A.2d 487 (1965).

7. *Id.* at 185, 213 A.2d at 493.

8. Fitzgerald v. Merard Holding Co., 106 Conn. 475, 138 A. 483 (1927); Michigan-Lake Bldg. Corporation v. Hamilton, 340 Ill. 284, 172 N.E. 710 (1930); Bauernschmidt v. Standard Oil Co., 153 Md. 647, 139 A. 531 (1927); O'Brien v. Turner, 255 Mass. 84, 150 N.E. 886 (1926); Cohen v. Rosevale Realty Co., 121 Misc. 618, 202 N.Y.S. 95, (Sup. Ct. 1923); White v. Old York Road Country Club, 318 Pa. 346, 178 A. 3 (1936). *But see* Appeal of Beard, 64 Conn. 526, 30 A. 775 (1894), for a discussion of Conn. Pub. Acts of 1893, Chap. 175, giving the right of appeal to every property owner in a town where a county commissioner grants a license to sell liquor and based on the idea that ". . . every property owner in town has a substantial interest in prosperity and good order of the town. . . ." and is therefore aggrieved by such a decision.

9. A finding of special damages must be made and this finding should be a matter for *ad hoc* determination by the court of record; *see* 2 A. Rathkopf, The Law of Zoning and Planning 63-16 (1966).

Obviously, a party having an interest in land[10] who is being prevented by a zoning decision from making a desired use of such land is ". . . personally and specially affected in a way different from that suffered by the public generally."[11] The difficulty arises when a decision is made permitting a landowner to use his land in a manner which other persons find objectionable. In this type of case, the alleged special damages must be critically analyzed by the court to determine whether the petitioner has the requisite standing to challenge the zoning regulation.[12] In some of these cases,[13] courts have held that reasonably close proximity to the zoned property is sufficient to establish an adverse effect. On this basis, without further proof, plaintiffs have sustained the burden of proof on the aggrieved party issue. Other courts have adopted the converse of this position, and have held that without an allegation of close proximity a party is not aggrieved and cannot be granted the relief demanded.[14] These courts have evidently overlooked the meaning of a proximity allegation.

In *Blumberg v. Hill*,[15] plaintiff owned property in a residential district, one mile from defendant's property. Defendant was granted a permit, by an administrative ruling, for the building of a guest house. In denying plaintiff's prayer for injunction, the court declared:

> One who is merely in the class of a resident-owner of zoned property in and a tax payer of the municipality and whose only interest is to have strict enforcement of zoning regulations for the general welfare of the community . . . is not an aggrieved person. . . . As one may not assume the role of champion of the community to challenge public officers to meet him in courts of justice to defend their official acts, so one having only a general interest may

10. For the purpose of this article the type of interest necessary is unimportant.

11. DuBay v. Crane, 240 Md. 180, 213 A.2d 487 (1965).

12. *See, e.g.*, Marcus v. Montgomery County Council, 235 Md. 535, 201 A.2d 777 (1964), cited in *Joseph*, where petitioners alleged that traffic and school population would be increased as a result of recent rezoning. *Held:* Such inconveniences were likely to be suffered by any member of the general public and that, therefore, petitioners suffered no special damages. The *Joseph* court, however misconstrued this case as holding that traffic increases can never constitute special damages. It merely supports the principle that one does not suffer special damages if his loss is identical to that suffered by the general public.

13. *See, e.g.*, Elwyn v. City of Miami, 113 So. 2d 849 (Fla. 1956); Hernreich v. Quinn, 350 Mo. 753, 168 S.W.2d 1054 (1943).

14. Malena v. Commerdinger, 233 N.Y.S.2d 549 (Sup. Ct. 1962); Balsam v. Jagger, 231 N.Y.S.2d 450 (Sup. Ct. 1962).

15. 119 N.Y.S.2d 855 (Sup. Ct. 1953).

> not adopt the part of an advocate of municipal welfare to proceed against a zoning board of appeals to procure a judicial enforcement or interpretation of zoning regulations.[16]

The court found on the evidence that plaintiff had only a "general interest" in the strict enforcement of zoning regulations.[17] From this type of case it can be argued that the distance between plaintiff's property and the rezoned property is significant only when the plaintiff is attempting to show that the damages alleged are suffered in consequence of such proximity and are peculiar to him for this reason. It is only in this type of case that close proximity should be the determinative factor in establishing that the plaintiff is genuinely aggrieved and not merely "assuming the role of public champion." Proximity should not be a requirement for special damage in every case.[18]

A distinction must also be taken between what is required to appeal to a court and what is required for the granting of the relief demanded on appeal. In *Tata v. Township of Babylon*,[19] plaintiffs were located in the "immediate vicinity" of a rezoned parcel, and alleged imminent pecuniary loss and a "drastic aesthetic upheaval" due to the rezoning.[20] Defendants moved to dismiss the appeal on the ground that the complaint lacked proper allegations of special damage necessary to confer standing to appeal. The court recognized that:

> [t]he question does not go to the quantum of damages at this point, but rather to their existence *per se*. . . . [A]ssuming the pleading is accepted, plaintiff's evidence of loss is then closely scrutinized. . . .[21]

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16. *Id.* at 857.

17. *See also* Marcus v. Busch, 1 Mich. App. 134, 134 N.W.2d 498 (1965), cited in *Joseph*, where a zoning board granted a use variance to allow defendant to erect an office building in a zone prohibiting such use. The court found no proof that plaintiffs were property owners nor that they had suffered any damage whatsoever. Plaintiffs therefore had no standing as aggrieved parties to challenge the board's action.

18. *See* Crozier v. County Comm'rs of Prince George's County, 202 Md. 501, 97 A.2d 296 (1953), where petitioner was located "within the immediate neighborhood" of property rezoned from 2-family homes to apartment houses and depreciation in value of property, *inter alia*, was alleged. The court did not concern itself with the importance of proximity, but, rather, decided the case on the existence of special injury to petitioner—*i.e.*, damages and deprecation of the land. *See also*, Weinberg v. Kracke, 189 Md. 275, 55 A.2d 797 (1947); Tyler v. Bd. of Zoning Appeals, 145 Conn. 655, 145 A.2d 832 (1958).

19. 52 Misc. 2d 667, 276 N.Y.S.2d 426 (Sup. Ct. 1967).

20. *Id.* at 668, 276 N.Y.S.2d at 427.

21. *Id.* at 669, 276 N.Y.S.2d at 428.

The court then held that the recited special damages were adequate to give standing to sue but not to prevail. This distinction cannot be overemphasized, since the fact that one is aggrieved does not in itself entitle him to prevail in his action to strike down the zoning regulation. Relief will be granted only if the court can find the action of the legislative or administrative body an abuse of "discretion," "arbitrary," "capricious," or "contrary to law."[22] The *Joseph* decision must be analyzed against this background.

II. Losses Not Based on Proximity

The *Joseph* court held that economic and aesthetic losses resulting from an increase in traffic, with its incidental difficulties, were matters for police authorities and could not be considered special damages. In support of this proposition, the court cited *Victoria Corp. v. Atlanta Merchandise Mart, Inc.*[23] In *Victoria,* defendant had been granted a use variance. Plaintiff's only objection to the issuance of a building permit was ". . . the increased traffic and congestion on the streets which would be generated or induced by the presence of such a building."[24] The court held that ". . . [s]uch increase in traffic congestion and attendant difficulties in finding parking places are matters which address themselves to the police authorities of the municipality rather than to the zoning authorities."[25] Plaintiff, in this case, was a corporation conducting business in a building located one-half mile from the proposed new use. Plaintiff did not allege economic and aesthetic loss caused by traffic increases, but only that increased traffic congestion would generate parking difficulties in front of its building. Police measures might alleviate inconvenience in the second kind of case, but they cannot eliminate the damage suffered by plaintiff in the *Joseph* case if such damage does in fact exist.

That damage due to such economic and aesthetic loss may amount to special damages and thus possibly form the basis for relief is indicated by *222 East Chestnut Street Corp. v. Board of Appeals.*[26] Plaintiff's apartment building was located across the street from property which was granted a special use allowing construction of a parking lot. Plaintiff, objecting to the permit, alleged that the proposed structure

22. *See generally* 2 A. Rathkopf, *supra* note 9, at 65-1.
23. 101 Ga. App. 163, 112 S.E.2d 793 (1960).
24. *Id.* at 164, 112 S.E.2d at 794.
25. *Id.* at 165, 112 S.E.2d at 795.
26. 14 Ill. 2d 190, 152 N.E.2d 465 (1958).

would ". . . interfere with its light and air, congest traffic in the street, and reduce the value of its property."[27] The granting of the permit was affirmed in the circuit court, and upon appeal the Illinois Supreme Court looked into plaintiff's claim of special injury and damage to determine whether plaintiff had standing to maintain the suit. Plaintiff had asked the court

> . . . to take judicial notice, first, that the fumes, noise and dust [from the cars using the parking lot] contemplated by [tenants of plaintiff's building] would in fact cause such injury as to render plaintiff's apartments less desirable and, second, that their effect will extend to a depreciation of the rental and sales value of plaintiff's property.[28]

The court admitted the possibilty of special damages of such a nature but denied relief to plaintiff since ". . . such elements of special damage are matters of affirmative proof, not judicial notice . . . [and] . . . that special injury in the respect claimed [cannot] be assumed . . . in this case."[29]

III. Conclusion

The *Joseph* decision raises the question of when proximity to the rezoned property is essential to a finding that a neighbor challenging the rezoning has standing to appeal. To date, most courts have relied on a finding of proximity as the basis for conferring standing, although the reasoning which underlies these decisions is not clear. This analysis of the *Joseph* case has suggested that proximity need not be the only basis for conferring standing when other factors indicate that a litigant has a legitimate interest in a zoning controversy.

Another approach to the standing problem raised by the *Joseph* decision is suggested in a comment by one zoning authority that nearly half of all the reported zoning cases involve a conflict between residential and commercial uses on a travelled public highway. While the courts have been ambivalent in according weight to traffic increases in making decisions about zoning changes,[30] the impact of a traffic build-up on administrative and legislative attitudes toward zoning

27. 10 Ill. 2d 130, 131, 139 N.E.2d 221, 222 (1956).

28. 14 Ill. at 193, 152 N.E.2d at 467.

29. *Id; but see* Circle Lounge and Grille v. Bd. of Appeals of Boston, 324 Mass. 427, 86 N.E.2d 920 (1949), where the court examined this causal relationship to determine the existence of special damages. For cases holding that special damages were made out by a showing of increases in traffic, *see* Stocksdale v. Barnard, 239 Md. 541, 212 A.2d 282 (1965); Richmark Realty Co., Inc. v. Whittlif, 226 Md. 273, 173 A.2d 196 (1961).

30. Stevens v. Town of Huntington, 20 N.Y.2d 352, 229 N.E.2d 591, 283 N.Y.S.2d 16 (1967).

policy is too obvious to require documentation.[31] Plaintiff's intervention in *Joseph* may have been self-protective. He may have felt the necessity to intervene at that point, rather than risk an accumulation of zoning changes following the change allowed in that case. As a consequence of such an accumulation of change, the use of his own property may be affected. Because changes in the amount and flow of traffic have a bearing on zoning policy, objecting neighbors might well be allowed to challenge zoning decisions which bring about traffic changes which might affect their own property. In such circumstances, a court could well find the economic and aesthetic loss to property value which plaintiff's petition alleged as having occurred in the *Joseph* decision.

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31. Wilson v. Borough of Mountainside, 42 N.J. 426, 201 A.2d 540 (1964).