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INTRODUCTION

Massachusetts has 351 cities and towns that exercise the power bestowed upon them by the legislature to regulate land use within their bounds, to the extent that such regulation is not inconsistent with the laws of the commonwealth. Thus, the use, character, development and aesthetics of the Massachusetts physical landscape is governed by a checkerboard of locally implemented ordinances, by-laws and other regulations enacted under this constitutional authority in conjunction with Massachusetts' zoning and regional planning statutes.

Local administration of land use through zoning is not unfettered, for the legislature also provided for judicial review of local board decisions. By statute, the only persons empowered to appeal a local zoning board decision are those who constitute a "person aggrieved" by the local board decision and who therefore have standing. Without a person aggrieved, the court lacks jurisdiction over the appeal.2

Since passage of the Zoning Enabling Act revisions in 19333 setting forth the right to appeal local board decisions,4 Massachusetts courts have defined the types of harms a person must suffer to be aggrieved and therefore have standing to challenge a zoning decision. Standing rests on defining a type of cognizable harm. The procedure to prove or challenge standing couples a rebuttable presumption with a specialized evidentiary burden that further complicates this jurisdictional element of a zoning appeal. When a defendant challenges a plaintiff's standing with a motion for summary judgment, the standard of review under rule 56 of the Massachusetts Rules of Civil Procedure imposes additional considerations that challenge even the most experienced lawyer.5

One would think that, over the years, the courts would have worked all the kinks out of the standing issue. To the contrary, Massachusetts courts are repeatedly asked to resolve legal and factual nuances in determining whether persons are aggrieved and have standing to challenge a local zoning board decision. Thus, in 2006, the Supreme Judicial Court ("SJC"), in its much anticipated decision in Standerwick v. Zoning Board of Appeals of Andover,6 made some significant pronouncements in the law of standing that have affected lawyers' approaches to zoning appeals.

The SJC in Standerwick addressed the two major aspects of standing: (1) defining the legally cognizable harms that confer "person aggrieved" status on a plaintiff — the substantive grounds for standing; and (2) the presumptions and burdens placed on the plaintiff and defendant on the issue of standing — the procedure for asserting or challenging standing.7 Standerwick retooled the way both a plaintiff's and a defendant's lawyer should approach a standing dispute and provided a strategy that adds muscle to a defendant's challenge to standing. Then, in Jepson v. Zoning Board of Appeals of Ipswich,8 the SJC considered additional facets of the same two issues and provided guidelines for plaintiffs to prove their claim to standing against a defendant's attack.9 Left in the wake of these two decisions are the creative attorneys who test and explore the legal nuances of standing and the trial courts who must resolve the often fact-intensive standing disputes.

2. Being a "person aggrieved" was first articulated as a jurisdictional requirement of a zoning appeal in Marotta v. Bd. of Appeals, 336 Mass. 199, 202-03 (1957). See also infra text accompanying note 26.
3. St. 1933, c.269, § 1. In 1920, the Massachusetts legislature passed the first act allowing cities and towns in the commonwealth to enact zoning regulations, St. 1920, c.601, §§ 1-9, codified at Mass. Gen. Laws ch. 40, §§ 25-30A (Ter. Ed.). No avenue for judicial review was provided as this act only permitted appeals by "[a]ny person who is aggrieved by the refusal of a permit" to the local municipal authority. See St. 1920, c.601, §5, codified at Mass. Gen. Laws ch. 40, § 27 (Ter. Ed.). After passage of the Home Rule Amendment in 1966, see infra notes 13 and 14 and corresponding text, the Zoning Enabling Act was substantially revised in 1975. St. 1975, c.808, § 1. Durand v. IDC Bellingham, LLC, 440 Mass. 45, 50 (2003) ("Prior to the amendment of the zoning power belonged exclusively to the State, and could be exercised by municipalities only to the extent that State law permitted them to do so.")
5. This article refers to the party who is challenging the zoning relief granted as the plaintiff and to the successful applicant for the relief at the local level as the defendant.
7. Id. at 28.
9. Id. at 92-98.
Part I of this article outlines the judicial process for reviewing Massachusetts zoning decisions and the principles of standing. Part II provides a brief factual background for *Standerwick* and its procedural history. Part III analyzes the SJC’s pronouncements on the harms recognized as affording standing under sections 20 through 23 of General Laws chapter 40B. It also addresses decisions involving both chapters 40A, commonly called the “Zoning Act,” and the “Zoning Enabling Act,” and 40B of the General Laws subsequent to *Standerwick* that have focused on defining the harms cognizable for purposes of standing. Part IV discusses *Standerwick*’s impact on a plaintiff’s presumption of standing in the context of summary judgment and analyzes the procedure for proving or challenging standing through the prism of civil procedure.

I. ZONING AND STANDING

A. The Statutory Foundation for Zoning in Massachusetts

The Home Rule Amendment to the Massachusetts constitution is the starting point for the regulatory scheme affecting land-use activities. Under the Home Rule Amendment, cities and towns may enact local ordinances or by-laws to exercise any power conferred upon them by the legislature in subject areas that have not been occupied by or reserved for state control and in a manner not inconsistent with the Massachusetts constitution and laws.

Statutorily, the starting place for zoning in Massachusetts is chapter 40A. Chapter 40A's seventeen sections set forth a zoning scheme guiding cities and towns in the enactment of ordinances and by-laws; through the standard regulatory permitting tools for the safe and orderly regulation of land and the authority and makeup of local zoning authorities; for enforcement, notice and public hearing requirements; and in providing appellate rights to those persons seeking review of a local zoning decision either to the permit granting authority or to court. Whether it be the regulation of certain land uses in districts, the imposition of dimensional requirements for lots and structures, the change of land uses within municipal boundaries, or the relief from zoning by-law requirements due to hardship on an individual property owner, cities and towns have broad police powers to make decisions that best fit the landscape and the public welfare of their citizens. When persons affected by a local zoning board decision believe that the local board has acted beyond the scope of its authority under the local ordinance or by-law, they may seek *de novo* review either in a superior court of the county where the land is located or in the land court (or, in Hampden County, in the housing court).

Chapter 40B authorizes cities and towns within a jurisdiction to collaborate for the economic, efficient and orderly promotion of the general welfare of their citizens and the development of land within their jurisdictions. The most notable, controversial and exercised provisions of chapter 40B are sections 20 through 23, which provide for the issuance of comprehensive permits for affordable housing. The intended, essential purpose of the comprehensive permit is to allow a qualified builder proposing subsidized low- or moderate-income housing to sidestep many restrictive local dimensional and intensity zoning requirements imposed under chapter 40A that adversely affect a project’s economics and to seek approval of such development under one comprehensive permit before the local zoning board of appeals.

B. Standing

Given that land-use regulation is statutory, any review of the law of standing to appeal local zoning decisions should start with the statute. Section 17 of chapter 40A provides for appeal as follows:

Any person aggrieved by a decision of the board of appeals or any special permit granting authority or by the failure of the board of appeals to take final action concerning any appeal, application or petition within the required time or by the failure of any special permit granting authority to take final action concerning any application for a special permit within the required time, whether or not previously a party to the proceeding, or any municipal officer or board may appeal to the land court department, or the superior court department.
department in which the land concerned is situated ... by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk. 23

Chapter 40B appeals follow section 17 in that “[a]ny person aggrieved by the issuance of a comprehensive permit or approval may appeal to the court as provided in section seventeen of chapter forty A.” 24 The difficulty posed for land-use lawyers is that nothing within section 17 details the meaning of “aggrieved,” the linchpin that confers standing on a person to challenge a local board decision. That statutory prerequisite has been treated as jurisdictional. 25 The judicial decisions are numerous, and the land-use lawyer is required to pore carefully over profuse amounts of case law rendered since 1933 in order to identify the important hurdles through which a plaintiff must jump before a court may reach the merits of the local zoning decision. 26 The SJC’s decision in Standerwick v. Board of Appeals of Andover in 1949 was the first case to explain the concept that came to be known as aggrievement. 28 In Circle Lounge & Grille, Inc., the SJC was faced with a plaintiff business owner who appealed the local board’s grant of a variance to the defendant developer, who intended to start a competing business across the street from the plaintiff’s parcel. 29 The SJC found that a person aggrieved is typically one whose “legal rights have been infringed,” 30 and proceeded to define what is meant by legal rights. 31 The SJC held that those legal rights, however, do not include a “strictly private right in the enforcement of zoning regulations, unless some statute creates such right.” 32 Noting that the governing zoning statute was more than just remedial, the SJC determined that the legislature’s enactment of the statute did not intend to “create in anyone arbitrary rights to interfere with the use of another’s land.” 33 In order for a claim of aggrievement to confer standing, the “rights created must bear a rational relation to the situation and use of the plaintiff’s property.” 34 To determine these rights, the SJC explored the purpose of the zoning statute. 35 The SJC stated that the primary purpose of the regulation of land use through zoning is “the preservation in the public interest of certain neighborhoods against uses which are believed to be deleterious to such neighborhoods.” 36 The SJC’s analysis in Circle Lounge & Grille, Inc. is the basic rubric by which later courts have used and continue to use to evaluate a plaintiff’s claimed harms to determine whether that plaintiff has standing.

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Although the approach of Circle Lounge & Grille, Inc. has been essentially unchanged in the years subsequent, the courts’ implementation of this approach has created the large body of case law that is critical to understand because it further defines, and also sometimes creates confusion about, the typical harms that present a “plausible claim of a definite violation of a property right, property

25. Linking “person aggrieved” to jurisdiction was first articulated in Marotta v. Bd. of Appeals, 336 Mass. 199 (1957). Marotta stated that “[t]he Superior Court had no jurisdiction to consider the case unless an appeal (if not by a municipal officer or board) was taken by an aggrieved person. It is immaterial that the point was not raised in the answers or before the Superior Court.” Id. at 202-03 (citations omitted). The authority cited by Marotta for this concept of jurisdiction derived from probate cases wherein only a person aggrieved could appeal a probate decree in equity. See id. at 202 (citing Pattee v. Stetson, 170 Mass. 93, 94 (1898)).
26. Depending on the circumstances of a case, the de novo review of a local zoning decision may lead to a dual-stage structure of a zoning case. See, e.g., Raskind v. Town of Lexington Bd. of Appeals, 13 LCR 229 (Mass. Land Ct. 2005) (trial decision on merits of zoning decision), rev’d 68 Mass. App. Ct. 1115 (2007) and Raskind v. Town of Lexington Bd. of Appeals, 10 LCR 166 (Mass. Land Ct. 2002) (trial decision on standing). One stage will revolve around the plaintiff’s standing, the other around the merits of granting the special permit, variance or other zoning relief. This structure usually does not create a problem with presenting the two issues where the parties are before the court on summary judgment. Proof of standing, however, often overlaps or is intricately intertwined with proof of the merits. Where the zoning appeal is set for trial on both issues, disputes may arise about the timing of the presentation to the court of evidence relating to the two issues depending on the evidentiary overlap of the grounds for standing and the subject matter of the zoning relief. At trial, a defendant naturally desires to have the plaintiff’s standing addressed first through the plaintiff’s presentation of his or her case in order to leave the defendant the opportunity to end the case with a directed verdict or involuntary dismissal before presenting his or her prima facie case for granting the zoning relief at issue. Notwithstanding a defendant’s preference, the issue of standing in a zoning case may not be completely developed for the court without a full presentation of the project at issue, which is better done in the context of the defendant’s affirmative evidence. The resolution of these disputes is likely to vary considering trial judges’ discretion to conduct trials as they see fit. See Commonwealth v. Flemington, 360 Mass. 404, 409 (1971); Commonwealth v. Bosworth, 257 Mass. 212, 214 (1926); Posell v. Herscovitz, 237 Mass. 513, 514 (1921); Commonwealth v. Lugo, 64 Mass. App. Ct. 12, 17 (2005); see also Mass. R. Civ. P. 42(d) (“A motion to bifurcate a civil trial rests solely within the discretion of the judge.”).
28. The SJC in Circle Lounge & Grille, Inc. did not use the term “aggrievement” to refer to a plaintiff’s harms that are cognizable to confer standing. The Appeals Court in Prudential Ins. Co. v. Bd. of Appeals, 18 Mass. App. Ct. 632 (1984), is the first reported appellate case using this term. Id. at 633. The SJC has also referred to a plaintiff’s harms as aggrievement. See Jepson v. Zoning Bd. of Appeals, 450 Mass. 81, 88-89 (2007); Marashlian v. Zoning Bd. of Appeals, 421 Mass. 721, 729 (1996).
30. Id. at 430.
31. Id.
32. Id. at 431.
33. Id. The statute at issue was St. 1924, c. 488 as amended by St. 1941, c. 373, which governed zoning in Boston. However, the SJC noted that its discussion of “any person aggrieved” applied as well to the same language in the statute governing zoning in the rest of the commonwealth (i.e., the predecessor to chapter 40A). Circle Lounge & Grille, Inc., 324 Mass. at 432.
34. Id. at 431.
35. Id.
36. Id. at 429-30.
interest, or legal interest sufficient to bring [a plaintiff] within the zone of standing.”37 The important questions that a land-use lawyer must ask when reviewing the case law and the strengths of a plaintiff’s standing are (1) whether the claimed injury is of a type that the pertinent zoning provisions are intended to protect against, (2) whether the plaintiff claims an injury to his or her private legal interest, and (3) whether the claimed injury is special and different from that suffered by the rest of the community.38

Although “aggrievement is a ‘matter of degree,’ and ‘the variety of circumstances which may arise seems to call for the exercise of discretion rather than the imposition of an inflexible rule,’”39 Massachusetts courts have recognized some aggrievements as typically within the “scope of interests protected by the Zoning Act,”40 such as increased noise,41 increased or decreased light,42 diminished property values,43 decreased privacy due to increased density,44 the potential for litter,45 and drainage, erosion and flooding.46

Very commonly recognized claims of aggrievement are due to increased pedestrian or vehicular traffic from development and the congestion, safety and parking problems associated with such increases. In Bedford v. Trustees of Boston University,47 the Appeals Court upheld the trial judge’s determination that the plaintiff had standing to challenge the Boston Board of Appeal’s decision, ruling that the plaintiff had provided sufficient evidence of a reasonable likelihood that he would be harmed by an increase in pedestrian and vehicular congestion and that such harms were of the types which zoning was intended to prevent or mitigate.48 The Appeals Court also upheld the trial judge’s determination that the plaintiff’s standing was unaffected by the defendant’s assertion that the plaintiff had an improper motive in appealing.49 The defendant claimed that the plaintiff was using the appeal to leverage a higher price for his property in a potential sale to the defendant rather than being motivated by the harm to his property interests.50 Under the factual circumstances, the Appeals Court found “nothing offensive in the plaintiff’s negotiations and simultaneous attempts to protect an interest recognized by the zoning law.”51

Other types of claims of aggrievement are not “typical,” however, and have not been as well received by the courts. Primary among these claims are aesthetic concerns. When a plaintiff’s only claims are negative visual impacts from a potential development, the plaintiff is not likely to survive a challenge to standing.52 Specifically, the Appeals Court in Barvenik v. Board of Aldermen, stated that “[s]ubjective and unspecific fears about the possible impairment of

38. An ultimate question, of course, is whether plaintiff has in fact suffered the injury claimed, together with the related issues of who has the burden of proof and what is the nature of the evidence that the aggrieved person must produce. These issues are addressed in Part IB (2) infra.
42. See id.
48. Id. at 378. The Appeals Court noted that § 2 of the Boston Enabling Act states that “[a] zoning regulation shall be designed among other purposes to lessen congestion in the streets … to provide adequate light and air; to prevent overcrowding of land; [and] to avoid undue concentration of population.” Id. at 377 n.4 (quoting St. 1956, c. 665, § 2). See also Marashlian v. Zoning Bd. of Appeals, 421 Mass. 719, 723 (1996) (ruling that a minimal increase in traffic and loss of parking sufficient to confer standing).
50. Id.
51. Id. at 378. Courts are wary of a party using the appeal process for personal gain unrelated to the purposes that zoning is intended to protect. See Hogan v. Hayes, 19 Mass. App. Ct. 399, 404 (1985). However, a plaintiff’s appeal of a local board decision is considered to be petitioning activity and protected by the Massachusetts Anti-SLAPP statute, Mass. Gen. Laws ch. 231, § 59H (2008), from a defendant’s retaliatory actions such as those for abuse of process or intentional infliction of emotional distress. A defendant may be successful in prosecuting such claims related to zoning challenges in the face of a special motion to dismiss pursuant to the Anti-SLAPP statute by either showing an independent basis for such claims, i.e., other than the petitioning activity, or showing that the zoning appeal is devoid of any reasonable factual support or any arguable basis in law. See Ayasli v. Armstrong, 56 Mass. App. Ct. 740, 748 (2002) (finding that even though defendants’ persistent challenges to plaintiffs’ development of their property role played in plaintiffs’ decision to file action claiming violations of Massachusetts civil rights act, Mass. Gen. Laws ch. 12, §§ 11H, 11I (2008), there was independent basis for complaint, namely defendants’ interference with plaintiffs’ right to use and enjoy their property); Vittands v. Sudduth, 49 Mass. App. Ct. 401, 413-15 (2000) (finding that superior court properly denied defendant’s Anti-SLAPP statute special motion to dismiss defendant’s claims of abuse of process and intentional infliction of emotional distress because plaintiff’s declaratory judgment action challenging permits granted to defendant was devoid of reasonable factual and legal support); see also Garabedian v. Westland, 59 Mass. App. Ct. 427, 431-34 (2003) (special motion to dismiss should not have been granted because plaintiff’s declaratory judgment action, which sought judgment that development of his property was permissible, was in part based on non-petitioning activity, it would not expose defendants to legal expense or damages, and defendants did not show that complaint was devoid of factual or legal support).

The SJC has professed that motive is irrelevant in the determination of whether there is petitioning activity under the Anti-SLAPP statute and that the focus is “on the conduct complained of” only. Office One, Inc. v. Lopez, 437 Mass. 113, 122 (2002). Likewise, no reported Massachusetts case has included the motive behind a zoning appeal as an element in the determination of a plaintiff’s standing. The focus is only on whether the plaintiff’s aggrievement is a harm cognizable for purposes of standing under the applicable zoning scheme. Certainly evidence that a plaintiff has motives other than legitimate land use issues might be used by a defendant to challenge the credibility of the plaintiff’s evidence. See Martin v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141, 146 (2002); Federman v. Bd. of Appeals, 35 Mass. App. Ct. 727, 732 (1994) (“The Marblehead by-law … purposes promotion of the health, safety, convenience, and general welfare of its inhabitants, a conventional statement of the objective of zoning. No more than any zoning code, the Marblehead by-law does not protect a particular property owner’s view, except as an incidental consequence of legislating density or height of structure.”) (internal citation omitted.); Barvenik v. Bd. of Aldermen, 33 Mass. App. Ct. 129, 132-33 (1991); Baxter v. Bd. of Appeals, 29 Mass. App. Ct. 993, 995 (1990); Harvard Square Def. Fund, Inc. v. Planning Bd., 27 Mass. App. Ct. 491, 493 (1989).
aesthetics or neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood feeling, or the loss of open or natural space are all considered insufficient bases for aggrievement under Massachusetts law.53 Such claims of aggrievement usually express instead matters of general public concern that are appropriately addressed in the local administrative process.54

Aesthetics are a valid concern of a zoning board but may not confer standing.55 Nevertheless, aesthetic concerns may confer standing where the local by-law or ordinance expressly imparts protection for such an interest.56 For example, the local by-law in Monks v. Zoning Board of Appeals of Plymouth,57 provided that a special permit can be granted only on the finding that “the proposed structure will not in any way detract from the visual character or quality of the neighborhood.”58 The Monks court determined that the “town of Plymouth created and defined a protected interest” by enacting this local by-law provision. Specifically, the plaintiffs in Monks claimed a visual impact from a proposed 190-foot cellular tower, and the court found in the record sufficient evidence from which it could reasonably infer that the tower would be visible from the plaintiffs’ home.60 Similarly in Martin v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints,61 the plaintiffs challenged the local board’s issuance of a special permit for the 139-foot steeple located 300 feet from the plaintiffs’ home.62 Although the SJC was not persuaded that the trial judge’s finding that the visual impacts on the plaintiffs’ home were “‘extreme and unique’ … [and] caused by presence of such an enormous structure looming over [the plaintiffs’] property,”63 the SJC found that the plaintiffs had standing to challenge the local board’s issuance of the special permit because the local by-law provided that the board should take “visual consequences” into consideration for any proposed structure and that “[v]iews from public ways and developed properties should be considered treated in the

57. Monks v. Zoning Bd. of Appeals, 335 Mass. 464, 470 (1957) (plaintiffs entitled to assert their interest in preserving the integrity of their own property caused by new development. Courts have consistently ruled, however, that a plaintiff’s ‘legitimate interest in preserving the integrity of his district.”64 The Appeals Court, however, has not interpreted that interest broadly.65

Another area that can be problematic for a plaintiff attempting to establish aggrievement is a plaintiff’s interest in the integrity of the neighborhood. Massachusetts courts have recognized standing to appeal a local zoning board’s decision where the plaintiff has a “legitimate interest in preserving the integrity of his district.” The Appeals Court, however, has not interpreted that interest broadly.66 In Cohen v. Zoning Board of Appeals of Plymouth,67 the Appeals Court noted that its ruling on standing was limited to recognizing the “legitimate interest [of owners of property in a single family district] in preserving the integrity of the district from the intrusion of multi-family housing.”68 Therefore, it is unlikely that plaintiffs will establish standing by claiming that they have an interest in preserving dimensional requirements, i.e., setbacks, in the neighborhood.69 Even where the interest is one of uses, the SJC noted in Circle Lounge & Grille, Inc. that the zoning statute did not confer aggrieved status on a “proprietor in a less restricted zone … by the introduction into a more restricted zone of any use permitted in the zone in which the proprietor’s property is located.”70

Massachusetts courts have scrutinized the claims of plaintiffs whose aggrievement is associated with a business property.71 As early as Circle Lounge & Grille, Inc., the SJC found that protection from injury due to business competition was not a purpose of zoning

59. Circle Lounge & Grille, Inc. v. Board of Appeals, 324 Mass. 427, 432 (1949); see also Sherrill House, Inc. v. Bd. of Appeals, 19 Mass. App. Ct. 274, 276 (1985). Although it may seem plausible at first blush for a defendant to argue that a plaintiff is estopped from asserting aggrievement where the plaintiff has his own zoning problem or non-conformity, no appellate case has deemed a plaintiff’s zoning status as relevant to standing. See Vainas v. Bd. of Appeals, 337 Mass. 591, 594 (1958) (finding defendant’s contention that plaintiff did not have standing without merit and stating such contention was “none the less so because the plaintiff’s property is likewise nonconforming.”); Reynolds v. Bd. of Appeals, 335 Mass. 464, 470 (1957) (plaintiffs entitled to assert their interest in maintaining integrity of zoning district notwithstanding nonconforming use in their property). Certainly, if such an argument were deemed relevant, the scope of issues in the zoning appeal would unnecessarily expand and thereby divert attention from the merits of the permit at issue. Cf. Bellardo v. Nantucket Planning Bd., Misc. Case Nos. 12871 and 129198, slip op. at 19 (Mass. Land Ct. Dec. 14, 1990). That is not to say, however, that one who suffers from the same defect complained of may not be able to prove a legitimate interest in preserving the neighborhood from the same non-conformity.72
regulations. The SJC stated that “injury from business competition has generally been considered damnum absque injuria”—a loss or damage without injury. The SJC noted that it is more likely that zoning increases competition by limiting the physical areas where certain businesses can be conducted within a town or city. 

Even though common sense dictates that any development would increase congestion, traffic and parking problems, and create drainage issues, artificial light and noise, a plaintiff must substantiate claims of aggrievement or have his or her standing successfully challenged. The Appeals Court in Butler v. City of Waltham stated that the plaintiff’s injury flowing from the board’s decision must be “special and different from the injury the action will cause the community at large.” This requirement that the injury be particularized to the specific plaintiff recognizes that the public administrative process and review at the local level is designed to address the general concerns of the community, and thus a plaintiff should only have the right to appeal when the plaintiff suffers specific harms that may not have been adequately addressed by the zoning board. For example, in Denneny v. Zoning Board of Appeals of Seekonk, the Appeals Court ruled that the plaintiff did not establish standing because claims of danger to neighborhood children and to the health of the community from a 135-foot communication tower were not sufficiently specific to the plaintiff. Plaintiffs will also not be allowed to address the merits of a local zoning board decision where they only proffer “a general civic interest in the enforcement of the zoning ordinance.”

Although a defendant may be largely successful in challenging many of the plaintiff’s various harms, all that is needed to proceed to a full judicial review of the merits of a board decision is one aggrieved plaintiff who has sufficiently supported one recognized harm. Additionally, courts treat a plaintiff’s claim of standing entirely separate from the adjudication of the merits of the appeal and do not limit the substantive scope of the review even where a plaintiff’s standing provides no support to or evidence of the ultimate merits of the plaintiff’s complaint. In other words, once a plaintiff has standing, the law permits him or her to challenge any zoning violation or aspect of zoning relief, including a violation or relief which has no effect on the plaintiff and which would not alone be a basis for aggrievement — a penny of standing opens the door to a pound of relief.

2. Rebuttable presumption and plaintiff’s burden of proving “aggrievement”

The actual harm claimed by the plaintiff and its connection to the alleged zoning violation is the substantive aspect of a plaintiff’s aggrievement. Proving the existence of the aggrievement is a process not to take lightly, for a plaintiff who fails to satisfy this jurisdictional prerequisite will not proceed to de novo review on the merits.

In 1957, the SJC in Marotta v. Board of Appeals of Revere was faced with the plaintiffs’ appeal of a variance granted to applicants seeking a use not allowed in the zoning district encompassing the property. The defendant applicants claimed that the plaintiffs failed to show that they were persons aggrieved. The SJC noted that the only relevant fact found by the trial judge in Marotta was that the local board determined that the plaintiffs owned property within the neighborhood affected by the defendants’ variance. Although a plaintiff living within the area affected by the board’s decision does not necessarily denote that plaintiff to be a “person aggrieved,” the SJC found that “it is reasonable to hold that there is a presumption that property owners to whom the board in the performance of its statutory obligation has sent notice as persons ‘deemed by the board to be affected thereby’ have an interest and are persons aggrieved.”

The relevant statutory provision regarding the presumption afforded the plaintiff is section 11 of chapter 40A, wherein “parties in interest” are entitled to notice of the local board’s consideration of local zoning matters. “Parties in interest” are identified as:

[Abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list . . . . The assessors maintaining any applicable tax list shall certify to the permit granting authority or special permit granting authority the names and addresses of parties in interest and such certification shall be conclusive for all purposes.]

In Marotta, the SJC pronounced that the jurisdictional requirement, “person aggrieved,” is “not to be narrowly construed.” The SJC reasoned that even though there is a likelihood that landowners not “aggrieved” by the board decision for purposes of zoning would be included in the statutory notice, the board’s good-faith determination carries significant weight and should be held to its implications where the board is the necessary defendant in the appeal. The SJC found that the plaintiffs’ presumption in Marotta was sufficient to satisfy the jurisdictional requirement as there was no “direct evidence” to contest the issue. The SJC recognized at the same time that the plaintiff’s presumption is rebuttable. The SJC stated that if the defendant challenges a plaintiff’s presumption of aggrievement with “additional

75. Id. at 429.
77. Circle Lounge & Grille, Inc., 324 Mass. at 430.
79. Id. at 440.
81. Id. at 212-13.
85. No appellate case has analyzed whether a plaintiff with standing may be limited in the extent to which he may challenge a zoning approval. This aspect of standing presents an area where a land use lawyer may be able to narrow the relief available to a person with standing in particular factual circumstances of an appeal and appropriate legal rationale.
87. Id. at 200.
88. Id. at 202.
89. Id. at 203.
90. Id. at 204. The statutory obligation referred to by the SJC in Marotta was found in § 17 as it appeared in chapter 40A in 1957. See St. 1954, c. 368, §2.
92. Id.
93. Marotta, 336 Mass. at 204.
94. Id. at 204-05.
95. Id. A presumption under the law is an “assumption that a fact exists based
evidence,” the “point of jurisdiction will be determined on all the evidence with no benefit to the plaintiffs from the presumption as such.” Just as the SJC established in Circle Lounge & Grille, Inc. that the framework for determining whether a plaintiff’s harm is sufficient to show aggrievement to challenge a local zoning decision, it established in Marotta the procedure for plaintiffs and defendants to assert and challenge the court’s jurisdiction to hear the merits of the local zoning board decision.77

Related to this presumption is the burden of proof in civil cases.78 The burden of proof involves two distinct concepts. First, the burden of production, also referred to as the burden of going forward, is the burden placed on a party to produce sufficient evidence so that a jury can find in favor of the proposition supported by such evidence.79 Second, the burden of persuasion is the burden placed on a party to produce the degree of proof dictated by the law that is needed to persuade the jury to a favorable verdict.100 A rebuttable presumption applies to the burden of production and encompasses a “burden-shifting procedure” between the parties to an action during the proceedings prior to the factfinder’s deliberations.101 The presumptive standing afforded a party shifts the burden of production to the other party to produce evidence on the issue on which the party with the presumption still carries the burden of persuasion.102 The party with the burden of production must introduce sufficient proof to rebut the presumption in order to invoke the burden of persuasion.

A small body of appellate case law that developed in the four decades after the SJC’s decisions in Circle Lounge & Grille, Inc. and Marotta addresses the burden of proof associated with a plaintiff’s aggrievement. The case law is consistent in applying the rebuttable presumption to plaintiffs who are “parties in interest” under chapter 40A and in holding that, if a defendant’s challenge to the plaintiff’s standing is supported by sufficient evidence, the plaintiff’s presumption disappears, leaving the issue of aggrievement to be determined on all the evidence and the plaintiff with the burden to prove that he or she is one of the limited number of individuals entitled to challenge the local board’s decision.103 That case law, however, did not explain the quantum or the nature of the defendant’s “additional evidence” that is needed to rebut the plaintiff’s presumption.104 In 1995, the SJC in Watros v. Greater Lynn Mental Health & Retardation Association105 affirmatively stated that the amount of evidence needed for the plaintiffs’ presumption to recede is “evidence warranting a finding contrary to the presumed fact.”106 The facts in Watros, however, did not permit a meaningful understanding of the SJC’s standard, because the defendants in Watros produced no evidence to challenge the plaintiffs’ presumption, thus rendering the statement obiter dictum.107

Another area regarding the burden of proof on the issue of aggrievement that escaped clarification in the earlier legal history of standing is the type and quality of evidence a plaintiff needs to meet the burden. Although a plaintiff challenging a local zoning decision who is a party in interest under chapter 40A enjoys a presumption of aggrievement as noted above, it is rebuttable, and if properly challenged, it is the plaintiff’s burden to persuade the factfinder that he or she is a person aggrieved. A plaintiff who is not a party in interest has no presumption and carries the burden of persuasion from the beginning of an appeal.

The SJC in 1996 significantly clarified the law concerning a plaintiffs’ burden of proof on standing in Marashlian v. Zoning Board of Appeals of Newburyport.108 In Marashlian, the plaintiffs claimed harm from minimally increased traffic and decreased parking availability from a proposed hotel development.109 After an evidentiary hearing, the trial judge found sufficient support for the plaintiffs’ assertion.110 The trial judge further found that one plaintiff’s harm from increased traffic and decreased parking availability was within the zoning’s scope of concern and that the other plaintiff had a legitimate interest in protecting his tenants, clients and employees from increased traffic and congestion.111 The trial judge therefore ruled that the plaintiffs had standing to challenge the special permit and two variances granted by the local board of appeals to the defendant.112 The Appeals Court, however, reversed and denied the plaintiffs’ standing based on their failure to carry their burden of proof.113 The SJC disagreed with the Appeals Court and upheld the trial court’s decision, pronouncing that plaintiffs have the burden to “put forth credible evidence to substantiate claims of injury to their legal rights.”114 The SJC further stated that “[a] review of standing based on ‘all the evidence’ does not require that the factfinder ultimately find a plaintiff’s allegations merituous[, because] [c]o do so would be to deny standing, after the fact, to any unsuccessful plaintiff.”115 However, at the point where a plaintiff’s burden arises and a court is reviewing a plaintiff’s standing based on all the evidence,

on the known or proven existence of some other fact or group of facts.” Black’s Law Dictionary, supra note 76, at 1223.

96. Marotta, 336 Mass. at 204.
97. Id. at 203-04.
98. Mark S. Brodin & Michael Avery, Handbook of Massachusetts Evidence § 3.1 at 60 (8th ed. 2007) (hereinafter “Massachusetts Evidence”).
99. See id. § 3.1 at 60; see also Commonwealth v. Pauley, 368 Mass. 286, 290 (1975).
100. See Analogic Corp. v. Bd. of Assessors, 45 Mass. App. Ct. 605, 607 (1998); Massachusetts Evidence § 3.1 at 60.
101. See Massachusetts Evidence § 3.1 at 60.
106. Id. at 111 (citing Barvenik, 33 Mass. at 131 n.7); Paul J. Liacos, Handbook of Massachusetts Evidence 53-54 (5th ed. 1981).
107. See Watros 421 Mass. at 106.
109. Id. at 722-23.
110. Id. at 719, 722.
111. Id. at 722.
112. Id. at 719.
113. Marashlian v. Zoning Bd. of Appeals, 37 Mass. App. Ct. 931, 933 (1994), S.C., 421 Mass. 719 (1996). In particular, the Appeals Court found that the plaintiffs failed to provide specific proof that the plaintiffs would suffer harm and that the injury suffered would be special and different from others throughout the area affected by the proposed hotel. Id.
114. Marashlian, 421 Mass at 721, 723.
115. Id. at 721.
“[standing] is essentially a question of fact for the trial judge.”

Even the Marashlian trial judge’s finding that the variance allowing fewer parking spaces than zoning required still provided adequate parking did not defeat the plaintiffs’ standing. The SJC ruled that the finding did not dispose of the plaintiffs’ standing but rather went to the plaintiffs’ ultimate success on the merits of the court’s consideration of the local board of appeal’s exercise of discretion. If the plaintiff produces specific factual evidence that credibly shows the existence of a harm cognizable under the zoning by-law, it does not matter that the harm was minimal for the purposes of standing. As to the degree of harm, the SJC rejected previous appellate decisions that suggested that to acquire standing a plaintiff must show a substantial likelihood of harm greater than that which could result from an as-of-right use of the property.

Notwithstanding the SJC’s Marashlian decision, it is fair to say that a practical meaning of “credible evidence” is not easily gleaned from Massachusetts case law. The Appeals Court in 2005 took further steps to articulate an understanding of credible evidence in Butler v. City of Waltham. In Butler, the court tried the question of whether the anticipated traffic consequences claimed by the plaintiffs were sufficient to confer standing to challenge the grant of a special permit to increase the size of a nonconforming structure and tiffs were sufficient to confer standing to challenge the grant of a special permit to increase the size of a nonconforming structure and the grant of dimensional variances. The Appeals Court stated that the requirement of showing “credible evidence” has both a quantitative and a qualitative component and presumes the evidence is admissible.

Quantitatively, the evidence must provide specific factual support for each of the claims of particularized injury the plaintiff has made. Qualitatively, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the board’s action. Conjecture, personal opinion and hypothesis are therefore insufficient.

The Appeals Court in Butler reconciled language found in some earlier zoning cases by stating that the requirement that a plaintiff must make a “plausible claim” is the same as stating that a plaintiff must produce “credible evidence.” The trial judge had ruled that the plaintiffs, who lacked the presumption of standing, had the burden of persuasion and failed to sustain it. Presumably, the trial judge meant the burden to establish standing by a preponderance of the evidence. The Appeals Court affirmed the trial judge’s conclusion that the plaintiffs lacked standing but stated that the trial judge placed too onerous a burden on the plaintiffs by requiring them to persuade the factfinder that their claims of particularized injury are more likely true than not, which is the burden of persuasion (a preponderance of evidence) in civil cases. Rather, the Appeals Court held that “[w]hen the judge determines that the evidence is both quantitatively and qualitatively sufficient … the plaintiff has established standing and the inquiry stops.

II. Standerwick v. Zoning Board of Appeals of Andover

A. Background

In 2001, Avalon at St. Clare, Inc. (“Avalon”) sought to build a residential multi-unit development in Andover, Massachusetts. Avalon’s plan for the site, and the subject of four years of litigation and appeals, was to raze the existing structure and build eight buildings containing 152 residential units. Avalon submitted the project to the Andover Zoning Board of Appeals (the “Andover ZBA”) for a comprehensive permit under chapter 40B. In May 2002, the comprehensive permit was approved by the Andover ZBA. In June 2002, seven neighbors of the project appealed the comprehensive

116. Id.
117. Id. at 723.
118. See id.
119. Justice Francis O’Connor dissented in Marashlian and would have found that plaintiffs were without standing to challenge the local zoning board of appeals’ decision. See id at 728 (O’Connor, J., dissenting). The dissenting opinion points out that the trial judge’s determination that the plaintiffs had standing (and thus the SJC’s majority opinion affirming same) is at odds with the trial judge’s factual finding that the mitigating factors proposed for the project and the corresponding minimal impacts that could be caused by the project ultimately were not going to cause plaintiffs harm. See id. at 729-30. The variation in legal analysis between the majority and dissenting opinion is the same issue at play nine years later in Butler v. City of Waltham, 63 Mass. App. Ct. 435 (2005). For a full discussion of the Marashlian decision see Mark Bobrowski, The Zoning Act’s “Person Aggrieved” Standard: From Varzenik to Marashlian, 18 W. New Eng. L. Rev. 385 (1996) and Edward S. Hershfield, Standing in Zoning Cases: Marashlian v. Zoning Board of Appeals of Newburyport, 41 B.B.J. 14 (1997).
120. See Marashlian, 421 Mass. at 724. The SJC did find that it is proper to consider the magnitude of harm that could be caused by an as-of-right use of the property. See id.
122. Id. at 438-39. The issue of standing was first presented to the trial judge on summary judgment. Id. at 435-36. The only issue on standing that survived summary judgment was an issue of fact on traffic impact. Id. at 436.
123. Id. at 441.
124. Id. (internal citations omitted).
127. Id. at 440 n.12.
129. See Black’s Law Dictionary, supra note 76, at 1220.
130. Butler, 63 Mass. App. Ct. at 441-42. The difference between the Marashlian majority and dissenting opinions and Butler’s resurrection of the issue demonstrates that even after the substantial case law development on plaintiff’s standing to challenge a local zoning decision reasonable minds can differ under a given set of facts as to whether a plaintiff has carried his or her burden to show “credible evidence” based on consideration of “all the evidence.”
132. Id. at 21.
135. Id. at 23.
136. Plaintiffs Eileen Standerwick, Kristin Clarke, Dean Shu, Susan Powers, Judi Desuisseu, Madeline St. Amand and Michael Marcoux appealed as direct abutters and abutters to abutters within 300 feet to the locus. Plaintiffs Jane Bowman and Timothy Carter appealed as neighbors of the locus, but not as abutters under Mass. Gen. Laws ch. 40A (2006) as they lived over 1,000 feet from locus. See Standerwick v. Andover Zoning Bd. of Appeals, No. 2002-1094, slip op. at 3 (Mass. Super. Ct. July 23, 2003) (order granting defendant’s motion for summary judgment and dismissing complaint), aff’d, 447 Mass. 20 (2006). Judi Desuisseu did not own the property at which she lived, but expected to own it someday because it was owned by her parents. Id. at 3, 8. A tenth plaintiff, William Davidson, was named in the original complaint but was removed by the amended complaint. See Amended Complaint, Standerwick, Superior Court Docket No. 2002-1094 (filed June 24, 2002) (hereinafter “Amended Complaint”).
permit to superior court.137 The plaintiffs claimed that the Andover ZBA exceeded its authority by issuing the comprehensive permit because (i) the project’s locus is in a rural setting without public transportation and other services, (ii) the locus is inappropriate for a multi-family residential structure, (iii) the Andover ZBA did not adequately protect the future project residents or the residents of the town, (iv) there remained unresolved issues of sanitary sewage affecting the public health, and (v) the comprehensive permit was not consistent with relevant laws and regulations and the “regional need for low and moderate income housing is … outweighed by valid planning objections.”138

On July 28, 2003, the trial judge allowed Avalon’s motion for summary judgment, holding that the plaintiffs lacked standing to challenge the comprehensive permit.139 Specifically, the trial judge ruled that one plaintiff did not have standing because she had no property interest in the property abutting the locus,140 and the two plaintiffs without the presumption of standing failed to present facts to show that the project would affect them “distinct from the manner in which all townspeople are affected.”141 With regard to the six plaintiffs presumed to have standing, the trial judge concluded that Avalon properly rebutted the presumption.142 The trial judge found these six plaintiffs’ claims of aggrievement from diminution in property values “is not a concern recognized by [chapter] 40B, in light of the compelling justification of the need for affordable housing, and their claimed aggrievement from light and noise had no grounding in the policies of chapter 40B because they were purely aesthetic concerns.”143 The trial judge ruled that Avalon’s expert affidavits contradicting the plaintiffs’ concerns of traffic and drainage were sufficient to rebut the presumption and that the plaintiffs had no reasonable likelihood of showing any harms because they amounted to pure conjecture, hypothesis and speculation.144 The trial judge also ruled that the plaintiffs had no reasonable expectation of being able to prove their claimed aggrievement from vandalism and crime because they did not assert during discovery that they were intending to produce admissible evidence to support their claims.145

Six plaintiffs appealed the trial judge’s decision to the Appeals Court.146 The Appeals Court reversed the finding that the plaintiffs lacked standing.147 The Appeals Court disagreed with Avalon’s argument that aggrievement under chapter 40B is different than chapter 40A, stating that “[i]n order to interpret the term ‘person aggrieved’ as used in [chapter 40B], § 21, we look to the interpretation given the identical term in [chapter 40A], § 17.”148 Thus the Appeals Court determined that the proper interests to consider in evaluating a plaintiff’s aggrievement under chapter 40B are those types of interests intended to be protected under chapter 40A, the Zoning Enabling Act, which includes a diminution in property value.149 The Appeals Court also found that at least some of the harms that the plaintiffs claimed were legally cognizable for standing and that the plaintiffs’ presumption of standing was not sufficiently challenged by Avalon.150

B. The SJC Decision

The SJC granted further appellate review and affirmed the superior court decision,151 thereby ending the plaintiffs’ challenge to the comprehensive permit. First, the SJC removed any question whether a plaintiff has standing to challenge a comprehensive permit under chapter 40B based on a claim of diminution in property values.152 Second, the SJC held that Avalon successfully rebutted the plaintiffs’ presumption of standing on summary judgment because Avalon’s discovery of the plaintiffs’ claims of aggrievement showed that the plaintiffs had “no reasonable expectation of proving a legally cognizable injury.”153 Standerwick, therefore, is an important milestone in the long line of cases that interpret one of the most fundamental aspects of a zoning appeal and provides a guide to lawyers on both the substantive and procedural components of standing.

III. Substantive Grounds for Standing — Focusing on the Interests That the Statutory Scheme Protects

The main portion of Standerwick focuses on the substantive grounds for standing, that is, the harms cognizable for standing. The SJC followed the rubric established in Circle Lounge & Grille, Inc. of looking first at the interests that fall within the protective umbrella of the pertinent zoning statute, here chapter 40B.154 It determined that the legislature, in its effort to promote affordable housing in Massachusetts through enactment of chapter 40B, did not intend to protect individual property values.155 Although Standerwick presents a sea change in the prior practice of standing under chapter 40A, the SJC remained consistent both in its active support of the legislative purpose of chapter 40B156 and with previous case law that examined the statutory purpose in setting the limits of standing.

139. Id. at 21-22.
141. Id. at 9.
142. Id. at 25.
143. Id. at 10, 12-13. In support of its determination that the plaintiffs’ interests were not recognized under chapter 40B, the trial judge cited the unreported decision in Connor v. Town of Barnstable, Civil Action No. 01-0394 (Mass. Super. Ct. Dec. 1, 2001) (order granting defendant’s motion to dismiss), in which the court determined on a motion to dismiss that aesthetic concerns are not an interest protected by chapter 40B. Id.
145. Id. at 35-37.
147. Standerwick, 447 Mass. at 27.
149. See id.
150. Id. at 337.
152. Id. at 21.
153. Id. at 35 (quoting Kourouvacilis v. Gen. Motors Corp., 410 Mass. 706, 714 (1991)).
154. Id. at 27; see also Circle Lounge & Grille, Inc. v. Bd. of Appeals, 324 Mass. 427 (1949).
Standerwick clarified an issue left open in Bell v. Zoning Board of Appeals of Gloucester,157 where the SJC found, without explanation, that “the same standing requirements apply to appeals under [chapter] 40A and [chapter] 40B appeals.”158 In Bell, there was no need for the SJC to differentiate the application of chapter 40A “standing requirements” from chapter 40B. Standerwick limited the “substantive standards” of standing under chapter 40B to policies pertinent to chapter 40B so as to exclude diminution of value, a measure of aggrievement that was pertinent under chapter 40A. Standerwick merely applied the well-established “standing requirements” set forth in Circle Grille & Lounge, Inc. that require one to look to the statute to determine whether diminution in value is an interest intended to be protected.159 Chapter 40B did not protect such an interest.160

The SJC’s comments on diminution of property value provide further understanding and clarification of such harm as an interest to be protected under chapter 40A, but not under chapter 40B. Standerwick confirms that “[a] claim of diminution of property values must be derivative of or related to cognizable interests protected by the applicable zoning scheme.”161 In doing so, the SJC gives weight to its relatively cursory decision upholding aggrievement based on diminution of value from the obstructed view in Tsagronis v. Board of Appeals of Wareham,162 the oft-cited case for the proposition that diminution of value is sufficient to establish aggrievement under chapter 40A.163 In Tsagronis, the SJC tied the plaintiffs’ claim of diminution in property value to their challenge to the increased density caused by the variance from local zoning to build on a non-conforming lot.164 Since density of development is an interest of zoning, Tsagronis did not present a situation where the plaintiffs were solely protecting the economic value of property.165

The SJC in Standerwick was concerned that if standing could be achieved by any diminution in value, whether or not linked to a cognizable interest protected by zoning, abutters could attain standing merely by claiming that any change on adjacent property would cause a diminution in value.166 The SJC cautioned that claims of diminution in value could be used inappropriately as an end run around failed attempts to show aggrievement from the traditional harms recognized for standing.167 The SJC, however, appeared to recognize that in some circumstances, diminution in property value caused by use of land in violation of zoning may be evidence of harm sufficient to earn a plaintiff standing.168

The Appeals Court’s recent decision in Central Street, LLC v. Zoning Board of Appeals of Hudson169 directly applied Standerwick’s comments on diminution in value as a legitimate claim of aggrievement. In Central Street, LLC, the defendant received a variance from the board of appeals to build on a recently divided lot that did not have sufficient frontage under the zoning by-law.170 Before analyzing the trial judge’s factual analysis of the plaintiff’s evidence supporting its claim of diminution in property value, the Appeals Court applied the Circle Lounge & Grille, Inc. rubric and “first consider[ed] whether the alleged injury to the plaintiff’s personal interest … is an injury to a specific interest that the applicable zoning statute, ordinance, or by-law at issue is intended to protect.”171 The Appeals Court found that frontage specification among zoning provisions is a dimensional requirement that functions to provide access (for vehicles, utilities and municipal services) to parcels, controls density of development and preserves the character of the neighborhood.172 The Appeals Court then analyzed the proposed improvement to the parcel and found that the 30-foot driveway, parking spaces, shed and large garage designed to facilitate an excavation business directly abutting the plaintiff’s property provided sufficient circumstances that rendered “diminution in real estate values … derivative of or related to cognizable interests protected by the applicable zoning scheme.”173

Both Tsagronis and Central Street LLC present situations in which the grants of variances from bulk requirements were being appealed — a variance grant being one of the more limited powers of local authorities to derogate from zoning requirements. It is likely that a claim of diminution in value will be more difficult to correlate factually, as contemplated by Standerwick, to an interest of zoning when the grant of a special permit is at issue.174 When a special permit is involved, the zoning relief sought is not prohibited absent hardship as in the case of a variance, but rather is available under interpretation of chapter 40B, the application of Standerwick to chapter 40B cases gives quite clear guidance.

158. Id. at 553 (emphasis added).
159. Circle Lounge & Grille, Inc., 447 Mass at 27.
161. Id. at 31-32.
164. Tsagronis, 415 Mass. at 335-36. The lot in question was nonconforming in Tsagronis because the town increased the frontage and lot size after the preliminary subdivision plan was filed. Id. at 329-30. The variance was required because the lot had lost its exemption under chapter 40A, § 6. Id. at 331. See also Dwyer v. Gallo, 73 Mass. App. Ct. 292, 296-97 (2008) (stating that “diminution in value of the property … is not a sine qua non of standing in zoning cases” in response to defendants’ claim that plaintiffs did not have standing because they would suffer no diminution in their property value and finding that plaintiffs gave sufficient proof to confer standing based on concerns related to overcrowding and increased density, which were recognized private property rights protected by the local by-law).
165. Standerwick v. Zoning Bd. of Appeals, 447 Mass. 20, 32 (2006) (citing Tranfaglia v. Building Comm’n, 306 Mass. 495, 503-04 (1940)). The dissent in Tsagronis would have dismissed the appeal for lack of standing, but the dissent disagreed with the majority’s upholding plaintiffs’ standing based on diminution of value because of a lack of evidence to support their claim where the presumption has receded. See Tsagronis, 415 Mass. at 333 (Abrams, J., dissenting).
166. Standerwick, 447 Mass. at 32.
167. Id.
168. Id.
170. See id. at 488. The defendant received an approval-not-required endorsement from the planning board to divide its parcel into two lots, thereby creating the lot that required a variance to be buildable. Id. at 488.
171. Id. at 492.
172. Id.
173. Id. (quoting Standerwick v. Zoning Bd. of Appeals, 447 Mass. 20, 31-32 (2006)). The Appeals Court held that the trial judge erred in applying the evidentiary standard to the determination of standing and reversed the trial judge’s ruling that dismissed the plaintiff’s action for lack of standing. Id. at 493-94.
174. See also Russell v. Zoning Bd. of Appeals, 14 LCR 460 (Mass. Land Ct. 2006) (involving claim by abutter of diminution of property value due to construction of single-family home on undersized lot requiring variance from several local ordinance provisions). The superior court’s decision in Contarrese v. Mount Washington Bank, No. SUCV 2003-6080, 2006 WL 4326671, at *13 (Mass. Super. Ct. Dec. 12, 2006), however, demonstrates a situation where a plaintiff, challenging the grant of a variance by claiming, among other harms, that she would suffer a diminution in value to her residential property by the construction of a drive-up teller window at a bank, did not show that the diminution in value was derivative of or related to cognizable interests protected by the applicable zoning scheme. Id. The plaintiff’s only claim of diminution in value was that the commercial nature of the proposed structure would affect the

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more careful, discretionary control by the local authority of the nature of the land-use.175 Nevertheless, the land-use lawyer should be attentive in his or her review of the “considerations” reflected in the special permit provisions in the local by-law or ordinance and whether diminution of property value can be and is correlated to the interest intended to be protected.176

Recently, in Sweenie v. Planning Board of Groton,177 the Appeals Court applied the reasoning in Monks v. Zoning Board of Appeals of Plymouth, which can be characterized as dealing with aesthetic interests, to allow local by-law provisions that required consideration of water contamination by gasoline station tanks to provide grounds for standing.178 The by-law provided for a water resource overlay district and a special permit process that required the special permit granting authority to “give consideration” to the “degree of threat to water quality that would result if the control measures failed.”179 The Appeals Court had reversed the superior court’s dismissal of the zoning appeal and found that “consideration would necessarily permit the parties exposed to the ‘threat of water quality’ to present their evidence and argument to the local special permit granting authority and then, if necessary, to the reviewing court under Chapter 40A, § 17.”180 The SJC granted further appellate review and, disagreeing with the Appeals Court’s determination, affirmed the superior court’s dismissal.181 The SJC reasoned that even if the zoning by-law created a protected interest, as was the case in Monks, that “alone is not a sufficient basis on which to confer standing.”182 The SJC rejected the Appeals Court’s determination that the abutters’ unsubstantiated “fears” could confer standing because the plaintiffs failed to carry the burden to substantiate factually their claims to bring themselves within the legal scope of an interest protected by the by-law.183 The plaintiffs’ claim of diminution lacked the evidentiary component of their aggrievement, that is, they failed to “plausibly demonstrate a cognizable interest.”184 Notwithstanding that the failure to establish evidence of the harm left plaintiffs’ standing wanting, the SJC and Appeals Court decisions in Sweenie stress the need for careful review by the land-use lawyer (and careful drafting by the municipality) of the local by-law or ordinance since a valid claim of aggrievement may be lurking within the local administration of chapter 40A.

The SJC spoke again on the subject of standing and the interest that chapter 40B intends to protect in Jepson v. Zoning Board of Appeals of Ipswich.185 Following its reasoning in Standerwick, the SJC held in Jepson that the individual landowner had standing to challenge a comprehensive permit because his claim of harm from flooding to his property due to the proposed development constituted “a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest” intended to be protected by chapter 40B.186 The SJC looked to the specific language of the statute, and although wetland issues are not typically within the jurisdiction of a zoning board, the SJC found that the legislature intended to maintain “consideration” by the zoning board of the various recommendations of the local boards in the comprehensive permit process under chapter 40B, section 21, including those of the local conservation commission.187 Thus, in this case, “the interests of the conservation commission, and [Department of Environmental Protection], in the prevention of flooding in, bordering, or affecting an integral and comprehensive wetlands system adjacent to an affordable housing development are interests that the G. L. c. 40B statutory scheme intends to protect.”188

Thus, Standerwick and its progeny teach that the land-use lawyer should never take his or her eye off the ball — the zoning statute and the zoning by-law or ordinance at issue — and should always focus initially on whether the claimed injury is of a type that the regulatory scheme at issue was intended to protect. Although the SJC has not moved from its position in Marotta that “the words ‘person aggrieved’ in such statute as 40A … are not to be narrowly construed,”189 the court’s recent focus on the intent of the overall regulatory scheme may provide a defendant the means to limit a plaintiff’s ability to challenge a project or a certain aspect of it.

IV. PRESUMPTIONS, BURDENS AND SUMMARY JUDGMENT — STANDING THROUGH THE PRISM OF CIVIL PROCEDURE

The second issue the SJC addressed in Standerwick involves the intersection between the evidentiary burdens placed on the parties regarding standing and summary judgment practice under rule 56 of the Massachusetts Rules of Civil Procedure.190 Standerwick more

market value of her property. See id. The superior court, relying on Standerwick, found that such claim alone only took into consideration the economic value of property and had no necessary relation to an interest protected by the zoning scheme. See id.

175. See Land Use Handbook, supra note 19, § 9.01, at 267.

176. A claim of diminution of property value in an appeal of a grant of a special permit under Mass. Gen. Laws, ch. 40A, § 6 (2008) may invoke cases like Tigronis and Central Street LLC because quite often a change to, and in particular an increase in, a pre-existing nonconforming use or structure will involve an increase in or non-permissible perpetuation of non-compliance with, density requirements.


178. Id. at 485.

179. Id. at 484.

180. Id. at 485.


182. Id. at 44-45.

183. Id. at 545.

184. Id.


clearly confirms the SJC’s dicta in *Bell v. Board of Appeals of Gloucester* that a plaintiff’s presumption will be rebutted if a defendant shows on summary judgment that a plaintiff has no likelihood of proving aggrievement. *Standerwick*’s confirmation stresses the need for the plaintiff and defendant to focus on aggrievement through the prism of civil procedure in order to effectively challenge or support standing.

The analogy in the *Standerwick* superior court decision provides a clear understanding of the lesson to be taken away from the case: “The defendants have ‘called the plaintiffs’ hand’ during discovery, a clear understanding of the lesson to be taken away from the case: the plaintiffs did so during discovery. The Appeals Court in *ticulated their aggrievement was not addressed by the SJC because the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled,” The court’s jurisdiction is not required to be pleaded under rule 8(a). Nor is jurisdiction a special matter that must be pleaded under rule 9 of the Massachusetts Rules of Civil Procedure. Since only those persons who are aggrieved by a local zoning decision are entitled to challenge it, a safe application of rule 8(a) to zoning appeals urges a plaintiff to specify that he or she has standing, as a person aggrieved or is an abutter with the presumption of standing. Section 17 of Chapter 40A does not provide much guidance and only states that “the complaint shall allege that the decision exceeds the authority of the board or authority, and any facts pertinent to the issue, and shall contain a prayer that the decision be annulled.”

No appellate case has dictated that rule 8(a) or section 17 requires a more specific articulation of aggrievement. Notwithstanding the lack of legal authority that a plaintiff’s aggrievement should be pleaded with specificity, it is sensible that a defendant be afforded the opportunity to produce only that evidence which correlates to an aggrievement actually claimed by the plaintiff. The SJC stated in *Standerwick* that the defendant “may rebut the presumption of standing by seeking to discover from [the plaintiff] the actual basis of their claims of aggrievement.” It is difficult to extract from that statement any specific pleading requirement for a plaintiff who is presumed to have standing. Rather, the SJC’s language seems to suggest a mere claim that a plaintiff has standing, i.e., is a “person aggrieved” or is an abutter, would be sufficient and that the “articulation” of such aggrievement would await discovery.

Although Massachusetts courts have opined that standing cannot be waived and may be raised by the trial court *sua sponte,* as aspect of the evidentiary burden for a rule 56 summary judgment.


193. See also Mass. Gen. Laws ch. 231, § 7 (2008) (“[T]he declaration shall state concisely and with substantial certainty the substantive facts necessary to constitute a cause of action.”).

194. As discussed *supra* note 25 and accompanying text, standing is jurisdictional to the court’s review of an appeal from a local board decision. See Marotta v. Bd. of Appeals, 336 Mass. 199, 204 (1957). *Cf.* Fed. R. Civ. P. 8(a)(1) (Federal Rule 8(a) contains a requirement that the pleading set forth “a short and plain statement of the grounds for the court’s jurisdiction”). However, Mass. R. Civ. P. 10(d) requires a plaintiff to state the respective residences of the parties, which facts may be pertinent but not necessarily conclusive to establish the presumption of standing afforded an abutter, as well as to venue.

195. A plaintiff who is not presumed to have standing to challenge a local zoning decision because he or she is not a “party in interest” has a more immediately apparent burden to plead a claim of standing to appeal.


197. *Cf.* Grad-Allen v. New Cingular Wireless PCS, LLC, 16 LCR 719, 720 n.4 (Mass. Land Ct. 2008) (plaintiffs did not allege presumption of standing in complaint, but did state that they were abutters in case management memorandum filed with land court pursuant to Standing Order 1-04 of land court).

198. See Marotta v. Bd. of Appeals, 336 Mass. 199, 202 (1957) (“It is immaterial that the [jurisdiction of the trial court to consider the case on appeal] was not raised in the answer of the Superior Court.”); Town of Pembroke v. Parks, Misc. Case No. 07-353249KFS, 2008 WL 1148551, at *5 n. 5 (Mass. Land Ct. Apr. 11, 2008) (“[t]he issues of subject-matter jurisdiction, including issues of standing, may be raised and revisited by this court at any time throughout the proceeding, either by motion of the parties or sua sponte. Lack of subject-matter jurisdiction is generally not curable, and certainly not waivable.”); see also Bonfatti v. Zoning Bd. of Appeals, 48 Mass. App. Ct. 46, 49 (1999) (“[t]he duty of note and decide a jurisdictional question, regardless of the point at which it is first raised,” and whether any party has raised it.”); Hansen & Donahue, Inc. v. Town of Norwood, Misc. Case No. 262549, slip op. at 1 (Mass. Land Ct. June 6, 2002) (stating that “while neither side raised the issue of Plaintiffs’ standing in the context of this case, this court nonetheless may do so sua sponte where … it appears Plaintiffs cannot establish their standing to question the status of an abutter’s property under Mass. Gen. Laws ch. 240, § 14A.”), rev’d, 61 Mass. App. Ct. 292, 297, n.11 (2004) (“We are not suggesting that the court could not independently decide that the direct effect requirement had not been met [no confer standing under § 14A] even if the parties agreed it had been. We have, however, instructed judges that they should not grant summary judgment on grounds not raised by the parties, without giving the parties fair opportunity to address the issue.”).
of harm in the complaint that will assist a defendant to challenge standing. A plaintiff without benefit of the presumption may plead more than a statement of “aggrievement” and provide some detail of the type of harm (e.g., traffic, drainage or decreased light). Despite a plaintiff’s claim of standing in the complaint, a defendant will likely seek to explore the specific harm on which the plaintiff bases the appeal in order to determine a strategy to challenge standing, that is, first, to determine whether the harm is cognizable for purposes of standing, and second, to determine the type of evidence (i.e., expert opinion, field surveys and studies, engineering calculations and the like) the defendant must mount to rebut the plaintiff’s presumption. Beyond stating the type of harm, a requirement that a plaintiff provide further detail about the extent or the source of harm when asked by the defendant will likely be left to a case-by-case determination.

In accordance with *Standerwick*, the defendant may further “seek to discover” the “basis” for a plaintiff’s aggrievement. Defendants would rather limit the number of experts and breadth of any opinion, if possible. Therefore, the defendant may seek to isolate the particular traffic problem (e.g., queue, delays or dangerous pedestrian conditions at a specific intersection), drainage problem (e.g., increased runoff from pervious surfaces or increased flooding events) or diminution in property values (e.g., the presence of a house on an undersized lot) claimed by the plaintiff in order to focus the evidence on the specific aggrievement. Depending on the nature, size and scope of a project, and the number of plaintiffs, aggrievement stated in broad terms such as “drainage” or “diminution in value” or “traffic” may or may not be sufficient to afford the defendant an opportunity to mount efficiently evidence (likely expert evidence) to rebut the presumption of standing.

A plaintiff who is evasive in detailing a claim of aggrievement, whether in the complaint or during discovery, may be confronted with more aggressive motion practice to compel further answers to discovery requests. Since both parties to land-use litigation are especially sensitive to litigation cost, non-responsive answers to deposing requests that lead to extensive non-dispositive motion practice are not likely to be well received by the court.

199. Although the defense that a plaintiff lacks standing to appeal a local board decision does not fall squarely within the realm of an affirmative defense, it may be prudent for the plaintiff to plead such defense as an affirmative defense in accordance with Mass. R. Civ. P. 8(c). *See* Black’s Law Dictionary, *supra* note 76, at 451 (defining an affirmative defense as “a defendant’s assertions of facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all the allegations in the complaint are true”); *see also* Watros v. Greater Lynn Mental Health and Retardation Ass’n, Inc., 37 Mass. App. Ct. 657, 660 (1994) (stating that defendant asserted as affirmative defense that plaintiffs were not persons aggrieved with sufficient standing to give court jurisdiction over complaint); Klime v. Scituate Planning Bd., 9 LCR 64, 65 (Mass. Land Ct. 2001); Rosenthal v. Town of Millbury Zoning Bd. of Appeals, 3 LCR 115, 115 (Mass. Land Ct. 1995). Moreover, the defendant does not carry the burden of proof on the issue of plaintiff’s standing necessitating fair notice of a defense to standing in the defendant’s pleading, *see* White v. Spence, 5 Mass. App. Ct. 679, 685 (1977), and the issue is a jurisdictional prerequisite to a court’s review of the merits.

200. *See* Smith v. Massimiano, 414 Mass. 81, 85 (1993) (“A summary judgment motion under rule 56 ‘concedes the validity of the pleading’ and, unlike rule 12 motions, focuses on the merits of the controversy.” (internal citations omitted)).

201. Under a motion to dismiss standard the judge assumes that the facts in the complaint are true in determining whether a claim has been made that entitles the plaintiff to relief. *See* Iannacchino v. Ford Motor Co., 451 Mass. 623, 635-36 (2008); Eigerman v. Putnam Inv., Inc., 450 Mass 281, 285-86 (2007).

202. *Id.* at 170.

203. *See* Reik v. Zoning Bd. of Appeals, 15 LCR 536 (Mass. Land Ct. 2007). In *Reik* the plaintiffs did not articulate the basis for their real estate expert’s opinion regarding their claim of diminution of value in response to the defendant’s interrogatories. *Id.* at 5. The plaintiffs also did not produce the expert’s report in response to the defendant’s request for production of documents nor identify its existence in their response or privilege log. *Id.* at 6. The expert report was first identified at the deposition of one plaintiff and a subsequent privilege log showed that it was prepared weeks before written discovery responses. *Id.*
B. Discovery — Building the Foundation to Support or Challenge Standing

Avalon, the developer in Standerwick, artfully used summary judgment to point to the plaintiffs’ lack of evidence of aggrievement after rebutting the plaintiffs’ presumption of standing as abutters. This tactic, however, took more than a motion for summary judgment and legal argument. Rather, the defendant’s challenge to plaintiffs’ standing gained its evidentiary support early in the case. Based on plaintiffs’ aggrievement as articulated in their complaint, Avalon proceeded to inquire, through discovery, into the specific adverse impacts of the proposed development claimed by plaintiffs.

Although chapter 40A provides a presumption of standing to abutters, plaintiffs should be prepared at all stages to defend their standing. This is especially true during the discovery period where defendants can seek the basis of a plaintiff’s aggrievement in order to build the grounds for rebutting and moving for summary judgment on standing.

1. Discovery tools

a. Defendants’ focus for building a rebuttal to the presumption of standing

Rule 56(c) of the Massachusetts Rules of Civil Procedure sets the stage by providing that summary judgment may only be rendered “if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under rule 36, together with affidavits, if any, show no genuine issue as to any material fact … “208 For the defendant, careful use of these discovery tools can develop the tactic that was strategically and successfully employed in Standerwick of merely pointing to the plaintiffs’ lack of evidence needed to oppose summary judgment.

First, a defendant should inquire in discovery as to the basis for a plaintiff’s presumption of standing. A plaintiff may be in the vicinity of the project subject to the appeal but not as required by section 11 of chapter 40A, that is, (1) as an “abutter[,]” (2) as an “abutter[,]” within three hundred feet [of the defendant’s property boundary],” (3) as one who “owns[] land directly opposite [the defendant’s land] on any public or private street or way,” or (4) listed on the assessors’ certification to the permit granting authority of the names and addresses of parties in interest.209 The circumstance that no plaintiff qualifies as a party in interest with the presumption of standing may not end the appeal, but it relieves the defendant of the burden of production and squarely places the burden of persuasion on the plaintiff to prove standing.

Employing discovery is a defendant’s opportunity to learn of the plaintiff’s aggrievement and to see if the plaintiff is willing to expend the effort, and likely the money, necessary to maintain the appeal. First, the plaintiff should be asked to identify all harms that will be suffered from the proposed project.210 One of the most important inquiries for a defendant is a request pursuant to rule 26(b)(4)(A)(i) of the Massachusetts Rules of Civil Procedure for the plaintiff to identify each person the plaintiff expects may be called as an expert witness at trial and the subject matter of the testimony. If the plaintiff answers that he or she does not expect at the time of inquiry to call an expert witness to testify as to particular harms, the defendant, as in Standerwick, may have grounds for summary judgment.

As to those of the plaintiff’s claims of aggrievement that the defendant suspects are baseless or unsupported, the questions propounded to the plaintiff must be drafted so as to elicit a response that shows no likelihood of producing any evidence at trial for consideration by the factfinder. Since a defendant is required to prove a negative under this standard, the discovery techniques must first explore all the plaintiff’s bases of aggrievement, that is, the types of harm the plaintiff claims is affecting his or her private legal interest. Once the plaintiff has articulated these harms, the defendant should determine which harms are cognizable for conferring standing by linking each of plaintiff’s harms to the type of injury that zoning is intended to protect against and inquiring whether the claimed injury is special and different from that suffered by the rest of the community. For those harms claimed by the plaintiff that are within the scope of protection of the zoning scheme and particular to the plaintiff, the defendant should explore all facets of the evidence necessary to prove the plaintiff’s aggrievement in order to show either that (1) the plaintiff’s evidence is inadequate because it is comprised of conjecture, hypothesis and speculation or is otherwise not supported by appropriate expert evidence, or (2) no evidence at all will be forthcoming.

Although the tools of discovery may be used in any sequence,211 the procedure for challenging a presumption of standing and the lessons of Standerwick suggest that the defendant should weigh the time and expense of, and likely results obtained from, each method of discovery against the need, first, to seek the plaintiff’s source of harm and, second, to explore the plaintiff’s evidence of those harms.

b. Plaintiff’s opportunity to evaluate the project subject to appeal

In some cases, the plaintiff has been involved in the public permitting process before the local board that is the subject of the appeal. In other cases, however, a plaintiff’s first participation in the local process is filing the notice of appeal with the town clerk within 20 days after the board decision.212 Although discovery is an important opportunity for the plaintiff to gain necessary information to evaluate his or her harms from the defendant’s project, the plaintiff need not wait for formal discovery to commence.213 Depending on the scope of the proposed project, the defendant has likely prepared and submitted to local boards, op. at 6 (Mass. Super. Ct. July 23, 2003), aff’d, 447 Mass. 20 (2006).

210. In Standerwick, the harms were articulated in response to interrogatories. See Standerwick v. Andover Zoning Bd. of Appeals, C.A. No. 2002-1094, slip
213. Land use cases are managed under the superior court and land court “F” (fast) track. In superior court, discovery requests and non-expert depositions are to be completed, subject to judicial discretion, within 10 months from the date of the filing of the complaint. See Superior Court Standing Order 1-88(F)(i)(5). In land court, discovery is to be completed within six months from that date. See Land Court Standing Order 1-04(F)(ii)(2).

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prior to the plaintiff’s appeal, various architectural and engineering plans, calculations, reports and studies that evaluate the project’s impacts, and the local board may have retained specialized professionals to conduct peer reviews of the submission. Such information is part of a public record that can be accessed by a public information request pursuant to the Massachusetts Public Information Law* and the Freedom of Information Act. In addition to identifying possible aggrievement from the project, such information is useful in identifying the evidence that a defendant will proffer and whether expert or other specialized evidence will be necessary to support any claim of harm. A plaintiff who properly evaluates his or her aggrievement and fully articulates that during discovery may dissuade the defendant from challenging the presumption of standing — or at least postpone such a challenge until trial.

2. Discovery disputes in standing cases

Increased disputes regarding inadequacy of the plaintiff’s responses to discovery of the claims of aggrievement are likely to arise from uncertainties about Standerwick. The land court dealt with such a dispute in Reik v. Zoning Board of Appeals of Barnstable. In Reik, the defendant moved to compel production of the report of the expert that plaintiffs identified in their response to expert interrogatories. The expert’s report purportedly opined on the plaintiffs’ claims of diminution in property value due to the variance granted defendant to build a single-family home. The defendant sought production of the report because the plaintiffs’ answers to expert interrogatories stated in general terms that they would suffer a diminution in value but provided no detail of the amount of diminution or the cause. The land court disagreed with the plaintiffs’ argument that the answers to interrogatories were sufficient, at least until such time as the defendant prepared to produce its own expert report. Because standing was jurisdictional and proof of diminution in property value required expert testimony, the land court concluded that “it is neither unreasonable nor unfair to require the plaintiffs to demonstrate the basis for their standing at this point in the proceeding.”

In Reik, the land court noted that judges differ over whether to order discovery of experts beyond interrogatories. Since discovery is a significant stage in the burden-switching procedure of challenging a plaintiff’s standing, an individual judge’s exercise of discretion in discovery and scheduling orders for a particular case may have as much of an impact on variations in the application of the law of standing as individual judges’ interpretations of Standerwick.

C. The “Credible Evidence” Sufficient to Support or Challenge Standing

1. The expert determination

Early in any litigation, one question every lawyer should ask is whether his or her client needs an expert to support his or her claims and, in discovery, whether the opposing party will use an expert in defense. De novo zoning appeals in Massachusetts are no different, and Standerwick clearly points out that a plaintiff proceeds precariously by failing to produce an expert to prove claims of harm that are beyond common knowledge. In addition, a defendant’s challenge to standing may be fruitless without an expert to rebut factually the plaintiff’s claims of aggrievement. Determining the need and type of expert under Standerwick should be made in light of the burden of proof standing articulated in Butler.

The first stage is to identify what types of aggrievement require expert testimony in order to present evidence of a “qualitative” nature sufficient to support a plaintiff’s claim of aggrievement. An expert is typically needed where the fact to be determined is beyond the common knowledge of the average lay person. The technical nature of land development itself suggests that many of the issues addressed by a local board are beyond the common knowledge of most people and require expert testimony, i.e., traffic, drainage and diminution in property values, to name a few. Understandably, in the wake of Standerwick, trial courts have increased their scrutiny on the need for an expert.

In Standerwick, plaintiffs opposed Avalon’s motion for summary judgment and filed two affidavits. An affidavit by one plaintiff, who was a licensed real estate salesperson, stated that the proposed development would devalue her property by as much as 20 percent due to close location, traffic density and impact of nonconforming uses and structures. The other affidavit, by a certified real estate appraiser, opined that the proposed development would cause a 20 percent diminution in value to the immediate abutter’s property because Avalon proposed a greater height than allowed by zoning, and the project would result in an increase in traffic and impair the view by placing a garbage compactor near other residential properties. The SJC determined that these expert affidavits established that the plaintiffs’ concerns regarding traffic and drainage were unfounded, especially where the plaintiffs did not produce any expert evidence to support their burden of proving their claims of aggrievement. The SJC also affirmed the trial judge’s determination that the claims of aggrievement due to crime and vandalism required expert testimony.

216. 15 LCR 536 (Mass. Land Ct. 2007) (order allowing defendant Lente Festina, LLC’s motion to compel production of plaintiff’s testifying expert’s previously prepared report and the documents upon which that expert relied in reaching his opinions). The land court’s ruling in Reik was made while the SJC’s decision in Standerwick was pending.
217. Id. at 537.
218. Id. at 536.
219. Id. at 537.
220. Id. at 547.
221. Id. at 549.
222. Id. at 546.
225. Id.
226. Id.
227. Id. at 35-36.
experience and understanding.\textsuperscript{234} As a result, under the standard because they are “beyond the scope of common knowledge, ex-

plaintiffs also claimed aggrievement due to decreased navigability near their residence, the reduced width of the water access to their

for their aggrievement was a reduction in the water surface area

ter of law under chapter 40B.\textsuperscript{230}

documentation at trial for consideration by the factfinder.\textsuperscript{229} The plaintiffs' affidavit evidence on the issue of diminution of property value in support of a claim of aggrievement did not confer standing as a mat-

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In Russel v. Planning Board of Marion,\textsuperscript{231} the developer was proposing to install a floating dock system tied to an existing stone pier.\textsuperscript{232} In discovery, the plaintiffs articulated that the basis for their aggrievement was a reduction in the water surface area near their residence, the reduced width of the water access to their residence, and decreased safety due to increased boat traffic. The plaintiffs also claimed aggrievement due to decreased navigability and increased noise and pollution.\textsuperscript{233} The land court found that all the plaintiffs' claims of aggrievement required expert testimony because they are “beyond the scope of common knowledge, experience and understanding.”\textsuperscript{234} As a result, under the standard illuminated in Standerwick and in light of the developer's expert testimony on the project's effects, the land court ruled that, in the absence of any independent factual basis for the plaintiffs' concerns and with no expert opinion, the plaintiffs failed to substantiate their claims of aggrievement with evidence in response to the rebuttal of their presumption of standing.\textsuperscript{235}

In Levin v. Zoning Board of Appeals of Framingham,\textsuperscript{236} the defendant developer of elderly housing under a comprehensive permit presented expert affidavits to address matters of site design, sewer-age, landscaping, lighting, traffic, water, and drainage.\textsuperscript{237} Thirteen plaintiffs submitted affidavits regarding their concerns for the proj-

ect but offered no expert evidence.\textsuperscript{238} As in Russel, the land court in Levin noted that the plaintiffs failed to provide any expert evidence regarding their claims relating to noise, dust, wildlife, privacy, blasting, loss of views, loss of open space, the number of emergency service trips to locus, density, loss of integrity of town government and issues regarding increased senior pedestrians, and found that their claims were based only on “apprehension and speculation.”\textsuperscript{239} The land court granted summary judgment to the defendants, ruling that the plaintiffs did not have standing for the same reasons as in Standerwick — the plaintiffs had no reasonable expectation of being able to prove their claimed aggrievement.\textsuperscript{240}

Once the need for an expert is identified, the second issue is how much factual detail does an expert need to present in order to constitute evidence of a “quantitative” nature that will be admissible and sufficient to support a plaintiff’s claim of aggrievement. Even where a proper “type” of evidence is presented, i.e., an admissible expert opinion, such evidence may not provide the “specific factual support” necessary to substantiate a plaintiff’s claims of aggrievement. In Contarrese v. Mount Washington Bank,\textsuperscript{241} the abutter/plaintiff produced the appropriate expert (a licensed real estate appraiser) to opine on diminution in value to the plaintiff’s property (residential home) from the proposed development (construction of a drive-up teller window to a bank) adjacent to the plaintiff’s property.\textsuperscript{242} The expert, however, provided a personal opinion that was not supported by market analysis or comparable sales data as the factual basis necessary for her opinion that plaintiff’s property would suffer a diminution in value. The superior court found that real estate appraiser’s reliance on “common wisdom” and “personal opinion of potential buyers’ ‘perceptions’” was speculation that did not confer standing on the plaintiff, in light of defendant's expert evidence.\textsuperscript{243}

In Russel v. Zoning Board of Appeals of Peabody,\textsuperscript{244} however, the land court found credible the evidence supporting the plaintiffs’ claims of diminution in value even though the real estate appraiser’s affidavit was “lacking in some specificity.”\textsuperscript{245} The Russel plaintiffs challenged the grant of variances from several provisions of the local zoning ordinance to allow the division of a lot with an existing two-family dwelling into two lots for the purpose of building a single-family home on the newly created lot.\textsuperscript{246} The defendants challenged the plaintiffs’ presumption of standing with excerpts from the plaintiffs’ own depositions wherein they conceded that their claims of harm were based on personal opinions and concerns.\textsuperscript{247} The plaintiffs’ evidence in response to the standing challenge was an affidavit of a real estate salesperson as to value. The affidavit provided no exact figures, comparables or an estimate of the percentage of decrease of value.\textsuperscript{248} Instead, the salesperson concluded that the addition of a single-family home would result in some diminution in the plaintiffs’ property value because of increased density and decreased light and air and because the proposed house was not in keeping with the character of the neighborhood.\textsuperscript{249} What convinced the land court that the plaintiffs had standing was the fact that the salesperson’s affidavit was “essentially an unchallenged expert opinion,” and the harm claimed by the expert was directly related to an interest protected by zoning, i.e., density.\textsuperscript{250}

Although these decisions seem to leave little room for lay or non-

expert testimony on harms constituting aggrievement in a zoning

228. \textit{Id.}

229. \textit{Id.}

230. \textit{Id.} at 37.


232. \textit{Id.} at 638.

233. \textit{Id.} at 640.

234. \textit{Id.}

235. \textit{Id.} at 641.


237. \textit{Id.} at 439.

238. \textit{Id.} at 441.

239. \textit{Id.}

240. \textit{Id.} at 442.


constitute evidence of a “quantitative” nature that will be admissible and sufficient to support a plaintiff’s claim of aggrievement. Even where a proper “type” of evidence is presented, i.e., an admissible expert opinion, such evidence may not provide the “specific factual support” necessary to substantiate a plaintiff’s claims of aggrievement. In Contarrese v. Mount Washington Bank,\textsuperscript{241} the abutter/plaintiff produced the appropriate expert (a licensed real estate appraiser) to opine on diminution in value to the plaintiff’s property (residential home) from the proposed development (construction of a drive-up teller window to a bank) adjacent to the plaintiff’s property.\textsuperscript{242} The expert, however, provided a personal opinion that was not supported by market analysis or comparable sales data as the factual basis necessary for her opinion that plaintiff’s property would suffer a diminution in value. The superior court found that real estate appraiser’s reliance on “common wisdom” and “personal opinion of potential buyers’ ‘perceptions’” was speculation that did not confer standing on the plaintiff, in light of defendant's expert evidence.\textsuperscript{243}

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Although these decisions seem to leave little room for lay or non-

expert testimony on harms constituting aggrievement in a zoning

242. \textit{Id.} at *7. The superior court noted that the plaintiff’s expert had 15 years of residential appraisal experience but no commercial appraisal license or experi-

243. \textit{Id.} One of defendant’s experts had 30 years of residential and commercial appraisal experience, and the other had 28 years of similar experience. \textit{Id.} at *8. From the superior court’s description of the defendant’s experts’ evidence, it is apparent that the superior court considered these analyses to be factually supported, including a traffic analysis by the defendant’s traffic expert. \textit{Id.} at *8, *12.

244. 14 LCR 460 (Mass. Land Ct. 2006).

245. \textit{Id.} at 463.

246. \textit{Id.} at 460-61.

247. \textit{Id.} at 462.

248. \textit{Id.}

249. \textit{Id.} at 462-63.

250. \textit{Id.} at 463.
appeal, the following discussion suggests a lawyer should not overlook using a little common sense and knowledge to develop the factual components of a plaintiff's aggrievement.

2. Common sense and knowledge

Appellate decisions seem to support the position that a plaintiff may in certain circumstances substantiate a claim of aggrievement on technical issues without proffering an expert opinion.251 In Jepson, for example, an appeal of a chapter 40B comprehensive permit, the SJC found that the plaintiff sufficiently demonstrated standing on the issue of flooding by providing his personal observation of the flooding problems on his property and by relying on the expertise and findings of the local conservation commission as to flooding affecting the adjacent wetlands.252 Avalon presented two affidavits (one by an engineer and the other by the senior project manager) that the proposed development would have no negative impact on flooding in the wetlands adjacent to the proposed development.253 Avalon contended that the plaintiff had not proven standing because (1) the plaintiff did not present expert evidence in response to its experts and the presumption had receded; and (2) that the zoning board of appeals conditioned the project on alleviating the issue of flooding.254

The abutting individual landowner provided his own affidavit in which he described recent developments in the wetlands (the construction of beaver dams) and the resulting flooding on his property, including photographs of such flooding.255 He also provided copies of documents from the local conservation commission to the Massachusetts Department of Environmental Protection to be plaintiff's "expert opinion" but rather evidence that took the plaintiff's evidence "out of the realm of apprehension and speculation." See id.

251. As to admissibility of lay opinions, see MASSACHUSETTS EVIDENCE, supra note 98, at §§ 7.2.1, 7.2.2.
253. Id.
254. Id.
255. Id. at 91.
256. Id.
257. Id.
258. Id. at 91 n.13.
259. The SJC did not indicate that it considered the documentation between the conservation commission and the Massachusetts Department of Environmental Protection to be plaintiff's "expert opinion" but rather evidence that took the plaintiff's evidence "out of the realm of apprehension and speculation." See id.
260. Id.
262. Id. at 385-86.

"While expert testimony may sometimes be required in a particular case, we have never held that it is always required."260

In Choate v. Zoning Board of Appeals of Mashpee,261 the Appeals Court found that the plaintiffs had substantiated their claim of aggrievement on the issue of traffic in part because of common sense and knowledge.262 In Choate, the plaintiffs challenged the grant of a variance to build two single-family homes on two adjoining undersized lots.263 On cross motions, i.e., the plaintiffs' motion for summary judgment and the defendants' motion to dismiss, the superior court allowed the defendants' motion to dismiss based on the plaintiffs' lack of standing.264 The plaintiffs' claims of aggrievement were based on the assertion that the addition of two more homes on an unpaved portion of a circular way would increase traffic volume and traffic problems, hasten the deterioration of the unpaved portion of the road, impair the natural and undeveloped environs and diminish their property values.265 The Appeals Court held that the defendants rebutted the presumption of standing with sufficient evidence, consisting of portions of the plaintiffs' depositions and a defendant's affidavit that was submitted with the defendants' motion to dismiss, together with the materials submitted with the plaintiffs' motion for summary judgment (the plaintiffs' affidavits, the defendants' responses to requests for admissions and answers to interrogatories, and the local board decision, including a memorandum from the town fire marshal).266

The Appeals Court agreed with the superior court that the claims of aesthetic harms were insufficient as a matter of law and that the plaintiffs' claims of diminution in property values were pure conjecture and personal opinion insufficient to confer standing.267 The Appeals Court disagreed, however, with the superior court's determination that the plaintiffs' concern regarding the traffic on the circular way did not confer standing.268 In rejecting standing, the superior court relied on the defendants' subjective opinions about traffic and on the local board decision that conditioned the variance on compliance with the fire marshal's memorandum.269 In contrast, the Appeals Court characterized the fire marshal's memorandum not as a recommendation but rather as a professional opinion on the inadequacy of the circular way and how it did not meet by-law requirements. Furthermore, the Appeals Court noted that none of the defendants' evidence addressed the plaintiffs' concerns about the congestion from two-way traffic and the deterioration of the surface of the circular way.270

Most instructive in the Choate decision was the Appeals Court's statement that "it was a matter of common sense rather than expertise
to know that a house on each of the defendants’ two lots would generate more traffic than one house on the two lots if combined.271 In Choate, the plaintiff testified about the physical characteristics of the circular way, including that it was only twelve feet wide.272 The Appeals Court declared “it a matter of common knowledge that more than twelve feet is needed for two ordinarily sized vehicles to pass in opposite directions.”273 The Appeals Court cited further factual support in one plaintiff’s deposition that described an incident where an ambulance was unable to pass down the circular way to respond to an emergency.274 Relying on this information submitted at the trial court, the Appeals Court determined that the plaintiffs sustained their burden, based on all the evidence, to show standing to challenge the board decision.275

A plaintiff seeking to employ “common sense” should, however, be careful to consider all the rational conclusions that are possible from a practical view of the facts about the neighborhood of the proposed project. As demonstrated in Butler, common sense can equally support the facts asserted by a defendant, and therefore reliance on common sense can fail to establish credible evidence of a claim of aggrievement, especially in comparison to a defendant’s more robust showing.276 Although there is no firm rule on the role of common sense and knowledge in the battle over a plaintiff’s standing, these decisions demonstrate that the plaintiff who makes the effort to develop specific facts to support his or her harm may be able to succeed without employing the opinion of an expert.

D. A Case of Standing on Summary Judgment

In analyzing Standerwick’s lessons, it is important to understand the specific rule of civil procedure being employed. The SJC applied the well settled standard of review under rule 56 that allows a court to enter judgment as a matter of law where there are no material facts in dispute, including of course no issues of credibility underlying an issue of material fact.277 Under rule 56, the moving party has the burden of proving that there is no triable issue of fact.278 The court must review the facts in the light most favorable to the non-moving party and draw any reasonable inferences from them in favor of the non-moving party.279 In cases where the party opposing summary judgment will have the burden of proof at trial, the moving party is entitled to summary judgment if he or she demonstrates that his or her proffer of material admissible under rule 56(c) is unmet by countervailing materials and that the party with the burden of proof has no reasonable expectation of proving an essential element of that party’s case.280 “[A] moving party need not submit affirmative evidence to negate one or more elements of the other party’s claim.”281 As discussed below, summary judgment presents an important means by which both the plaintiff and defendant can make their case on standing in a zoning appeal.

1. Possibilities for a plaintiff to prove standing on summary judgment

As an initial observation, rule 56 presents several possible outcomes for a plaintiff that should always be considered during a zoning appeal. First, the plaintiff’s appeal may reach the merits of the local zoning decision. This will occur either because a defendant who challenges the plaintiff’s presumption of standing nonetheless fails to produce sufficient evidence to rebut the presumption or because the plaintiff produces credible evidence to support legally cognizable claims of injury in the face of a properly rebutted presumption. Where the defendant only challenges the plaintiff’s standing on summary judgment, the plaintiff who successfully supports claims of aggrievement and does not file a cross motion for summary judgment on the merits of the local zoning decision will likely see the appeal proceed to trial.282

Second, the plaintiff’s appeal may not reach the merits of the local zoning decision. This will occur where the plaintiff does not claim a legally cognizable injury or produce credible evidence sufficient under rule 56(c) to support a claim of injury. Where a plaintiff has no presumption of standing, his or her burden to invoke the jurisdiction of the court is immediate, and should be met first with a proper complaint that alleges the elements of standing in order to avoid a motion to dismiss. Even in cases where the defendant produces no evidence to support a challenge to standing, the plaintiff will not have the opportunity to address the merits of the local decision unless he or she produces credible evidence.

Third, the determination of whether the plaintiff has standing may not be reached on summary judgment because there are material factual disputes regarding the plaintiff’s aggrievement.283 Factual disputes may arise when the issue of standing is to be determined on “all the evidence,” which “is essentially a question of fact for the trial judge.”284 Under rule 56(c), the defendant has the burden to

271. Id. at 385-86.
272. Id. at 386.
273. Id.
274. Id.
275. Id. at 387.
281. Id.
283. See, e.g., Raskind v. Town of Lexington Board of Appeals, 9 LCR 479, 480 (Mass. Land Ct. 2001) (decision denying cross-motions for summary judgment finding that credibility of plaintiff’s affidavit was raised on summary judgment requiring “the question of standing [to be decided at trial, based on all the evidence]”); Butler v. City of Waltham Zoning Bd. of Appeals, 9 LCR 473, 475 (Mass. Land Ct. 2001), aff’d d. 63 Mass. App. Ct. 435 (2005) (ruling on summary judgment that no plaintiff had standing, except possibly one whose standing was based on claim of harm from traffic that could not be resolved on summary judgment); see also Pateuk v. Coppola, 6 LCR 312, 315 n. 8 (Mass. Land Ct. 1998) (“Even if there was a technical defect in the procedural route followed by [plaintiff] in taking his appeal to the board in the first instance, neither defendant questioned the board’s jurisdiction in the board’s initial consideration of the appeal…”).
show that there are no material facts in dispute in order to have the court address his or her challenge to standing. Disputes over the conclusions to be inferred from each party’s evidence, however, do not necessarily require a trial.

In zoning appeals, the determination of whether there is a factual dispute that would preclude summary judgment is tightly intertwined with the evidentiary standard required for standing. For example, a plaintiff may not have provided the type or quality of evidence (i.e., competent expert evidence or sworn evidence based on personal knowledge) needed to show the claimed harm. A plaintiff may have provided detailed factual information and expert opinion but still may not have provided factual support for all necessary aspects of its claimed aggrievement. In such cases, summary judgment in the defendant’s favor is appropriate even though there may exist material factual disputes.

The determination of whether there is a material factual dispute is especially difficult where the case involves two qualified experts whose opinions contradict each other. The parties should focus the judge on what is fact and what is opinion, because where two qualified experts’ conclusions on undisputed facts disagree, it would appear that plaintiff has presented a plausible claim of harm.

2. Admissible evidence on summary judgment

Plaintiffs and defendants should be diligent in reviewing the evidence the other party submits under rule 56. It is usual for a summary judgment motion and the opposition on the issue of standing to be supported by affidavits and deposition transcripts. Rule 56(c) requires that “[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” These requirements apply as well to other evidence that may be submitted and considered by the judge regarding a plaintiff’s aggrievement.

In Standerwick v. Zoning Bd. of Appeals, Avalon properly supported its motion for summary judgment on each element and issue of plaintiffs’ standing with admissible affidavits and excerpts from plaintiffs’ deposition testimony and interrogatory answers. A civil engineer opined favorably for the proposed development’s impacts on local water and sewer service and storm water management. A traffic engineer stated that there would be no unacceptable levels of traffic problems created by the proposed development. As for the remaining claims of aggrievement (light, noise, diminution of property values, decreased privacy, change of rural character of the neighborhood and increased crime), Avalon relied on the plaintiffs’ failure to produce evidence during discovery and argued under Kourouvacilis v. General Motors Corp. that the plaintiffs had no likelihood of proving those claims of aggrievement at trial.

A motion to strike is a tactical tool that effectively brings to the court’s attention the inadequacies of a party’s evidence submitted in support of, or to challenge standing. In Standerwick, for example, the developer moved to strike the plaintiffs’ affidavits on the grounds that they were insufficient as expert affidavits, and that claims of diminution of value do not, as a matter of law, confer standing under chapter 40B. More importantly, however, the court may, in its discretion, rely on any facts uncontested by any evidence submitted on summary judgment, unless a party moves to strike the objectionable evidence proffered by the opposing party. By using proscia motions to strike statements that are hearsay or lack personal knowledge of the affiant or deponent, a party can weaken the opponent’s evidence and increase the likelihood he or she will be successful in sustaining his or her burden.

Even more effective may be an attack on the reliability of a party’s expert opinion. Motions to strike an expert’s conclusions based on the expert’s qualifications or methods used to form the opinion can leave the plaintiff or defendant without evidence to support his or her position. A plaintiff who successfully strikes the defendant’s expert testimony, in whole or in part, may obviate the need for the court to determine standing on all the evidence offered. For a successful defendant, the court will not have to determine whether there is a factual dispute necessitating a trial.

E. Standing Based on “All the Evidence” — the Court’s Role

The determination of whether the plaintiff is aggrieved is usually not easy for the court. This is especially true when the court is faced with determining a plaintiff’s standing based on “all the evidence,” that is, both the defendant and plaintiff have produced admissible evidence and the defendant’s evidence is sufficient to warrant a “finding contrary to the presumed fact.” The ultimate determination based on all the admissible evidence assesses the qualitative and quantitative nature of the plaintiff’s evidence, that is, the “credible evidence.” Notwithstanding the plaintiff’s evidentiary burden, under the standard for summary judgment, the court must not weigh any of the evidence or judge its credibility. Whether the plaintiff’s evidence is credible in the context of summary judgment, however, is often presented in a relative or comparative context. Therefore, the court is faced with the task of carefully viewing the facts and balancing these two standards.

The SJC’s decision in Jepson demonstrates such a comparative


286. Id. at 24.

287. Id. at 24.

288. 410 Mass. 706, 714 (1991) ("A motion [for summary judgment] must be supported by one or more of the materials listed in rule 56 (c) and, although that supporting material need not negate, that is, disprove, an essential element of the claim of the party on whom the burden of proof at trial will rest, it must demonstrate that proof of that element at trial is unlikely to be forthcoming.").


290. Id.


294. Of course, at trial, motions in limine are similarly used to exclude experts, as well as objections to preclude evidence and motions to strike testimonial evidence.


focus on the plaintiff’s evidence. In *Jepson*, the plaintiff provided competent, factual evidence of recent developments accompanied by flooding in the area that was adjacent to his property and the property of the proposed project that was the subject of the zoning decision. Based on “all the evidence,” the plaintiff had standing despite the defendant’s expert opinion that there would be no negative impacts from the project and the fact that the local decision imposed conditions on the project directed at alleviating flooding. The SJC stated the fact “[t]hat flooding can be controlled, or alleviated, has no bearing on standing as long as [the plaintiff] ‘put forth credible evidence to substantiate his allegations.’”

In *Michaels v. Zoning Board of Appeals of Wakefield*, the Appeals Court showed that the prohibition against weighing the parties’ evidence is not only applicable in considering summary judgment. In that case, the land court dismissed the plaintiff’s section 17 appeal after trial due to lack of standing. The Appeals Court affirmed the land court’s conclusion, but cautioned the judge against “contrast[ing] the testimony of the plaintiffs’ experts with the testimony of the experts the defendants had called.” The Appeals Court further detailed the trial court’s role when reviewing “all the evidence” by stating:

> That is not to say … that a fact finder would be prohibited from using the testimony of a defense expert to determine whether any reasonable person could rely on the testimony of the plaintiff’s expert. The question whether any reasonable person could rely on a particular opinion is very different from the question of which competing opinion is entitled to greater weight.

The Appeals Court characterized the determination of standing as truly evidentiary in nature when it compared the process to *Commonwealth v. Lanigan* and commented that “… is a gatekeeper question and requires consideration solely of the quantity and quality of evidence the plaintiffs have presented.”

Although the plaintiff and defendant each have a burden to produce evidence to support their respective positions on standing, it is the evidence that the plaintiff relies on that drives the determination of whether he or she is aggrieved. The Appeals Court’s statement in *Michaels* further clarifies the application of the “credible evidence” standard that governs this determination, but this time the procedural guidance is for the court. Nonetheless, there is a lesson in *Michaels* for the litigants in a zoning appeal. The land-use lawyer should always keep the court focused on the stage of litigation and the procedures and standards involved in sustaining standing to challenge a zoning appeal. One must understand and be able to correlate the specific facts of a zoning appeal to the standing requirement of considering “all the evidence” and the necessary finding of “credible evidence,” and to identify when the evidence is being improperly weighed or judged under the civil standard of proof by a preponderance of the evidence. The legal principles can be hard to distinguish, which is especially true where the evidence is provided by experts and a “battle of the experts” ensues.

**Conclusion**

From this review of the growing body of case law, it is clear that the SJC’s decision in *Standerwick* has revived the discussion of what facts constitute aggrievement sufficient to support a claim of standing. It may have also created some uncertainty for a plaintiff and defendant on a case-by-case basis as to how much evidence is needed to win the fight over standing. The cases demonstrate that, although there is now a heightened focus on the use of experts, the litigants should not overlook the obvious factual support that can be garnered and presented in admissible form by the proponent or opponent of a project.

Ultimately, it seems that *Standerwick* has intensified the focus on the procedural rules that govern the parties’ prosecution or defense of an appeal of a local zoning board decision. It is important for land-use lawyers to be ever vigilant in analyzing the claims of, or challenges to, standing at every stage of litigation. *Standerwick* also demonstrates that a plaintiff who sits on the presumption of standing by not producing evidence to support claims of aggrievement exposes himself or herself to the risk of not being heard on the merits of an appeal.

*Standerwick*’s progeny should be carefully monitored by land-use lawyers and municipalities for further changes in the legal standards regarding standing, and thus, the ability of individual plaintiffs and defendants to influence development of the landscapes of the cities, towns, farmlands and open spaces of Massachusetts.