18-P-467 Appeals Court

ALIKI PISHEV & others[1] vs. CITY OF SOMERVILLE & others.[2]

No. 18-P-467.

Middlesex. December 11, 2018. - July 26, 2019.

Present: Milkey, Sullivan, & McDonough, JJ.

Urban Renewal. Urban Redevelopment Corporation. Limitations, Statute of. Practice, Civil, Standing, Motion to dismiss, Statute of limitations, Motion to amend.

Civil action commenced in the Superior Court Department on August 14, 2015.

Motions to dismiss were heard by Maureen B. Hogan, J., a motion to amend was heard by her, and the entry of judgment was ordered by her.

Philip H. Cahalin for the plaintiffs.
Thaddeus A. Heuer (Jeremy W. Meisinger also present) for the defendants.

[1] Claudia Murrow, Kumar Dangi, Francis Fahey, Dale Prince, Michael Lipinski, Catherine Needham, Judith Medeiros, Nancy Medeiros, James Houghton, Jorge Alves, James Campano, Ricardo Palma, Saul A. Rivera, and Horace Cetoute Denis.

[2] Somerville redevelopment authority and planning board of Somerville.

McDONOUGH, J. In 2012, the defendant city of Somerville (city) and the Massachusetts Department of Housing and Community Development (department) approved the Union Square Revitalization Plan (2012 plan or plan), a twenty-year urban renewal program to redevelop land in Union Square in Somerville (the site). In 2015, a Somerville landowner, plaintiff Aliki Pishev, and the plaintiff taxpayer group (taxpayer group) (collectively, plaintiffs) filed an action in the Superior Court, contesting the plan. By their three-count amended complaint, the plaintiffs alleged that the city, the defendant Somerville Redevelopment Authority (authority), and the planning board of Somerville (collectively, defendants), did not comply with various requirements of the Massachusetts urban renewal law, G. L. c. 121B, §§ 1-60, in approving the 2012 plan. The plaintiffs sought an order declaring the plan invalid and a preliminary injunction restraining the defendants from taking further action to implement it.[3] The defendants filed motions to dismiss, which the judge allowed, ruling that (a) Pishev, whose property is to be taken by eminent domain at an indeterminate date in the future, and who, as such, had standing to seek judicial review of the 2012 plan, had nonetheless failed to

[3] The plan is an exhibit to the second amended complaint, the operative pleading.

timely commence her action within sixty days of the date of final plan approval in 2012, a procedural failing requiring dismissal of her count I claims; and (b) the taxpayer group did not have standing to seek review and were precluded from maintaining their claims under count II of the amended complaint.[4] The plaintiffs appealed from the judgment. We affirm.

Facts. The facts material to the legal questions before us are as follows.

1. The 2012 plan. On August 15, 2012, the authority approved a resolution declaring the site a "[d]ecadent" area as defined by G. L. c. 121B, § 1.[5] The defendant planning board of Somerville then determined that the 2012 plan was properly based on a local survey and was consistent with a comprehensive plan for the city. Subsequently, the city's board of aldermen held a

[4] The judge also dismissed count III of the amended complaint, which alleged that the defendant planning board of Somerville and the zoning board of appeals of Somerville had violated the open meeting law, G. L. c. 39, § 23B. The plaintiffs have waived their right to contest the dismissal of count III by failing to offer any argument respecting this particular count.

[5] The definition of a decadent area, as defined in G. L. c. 121B, § 1, includes: "an area which is detrimental to safety, health, morals, welfare or sound growth of a community because of the existence of buildings which are out of repair, physically deteriorated, unfit for human habitation, or obsolete, or in need of major maintenance or repair."

public hearing regarding the plan on September 19, 2012.[6] The individuals who attended the hearing had an opportunity to comment on the plan. At a special meeting on October 2, 2012, the board of aldermen voted (seven to three) to approve the plan; the mayor of Somerville, on October 4, 2012, also approved the plan. Next, at a special meeting on October 9, 2012, the authority approved the plan and submitted it to the department for its independent review and approval.[7] The 2012 plan, comprised of nearly 160 pages, is a public document created for the public's review, to facilitate public comment and debate during the lengthy approval process before the city and the responsible State agency.

On November 19, 2012, the department approved the plan.[8] Over the nearly three-year period from plan approval to commencement of the Superior Court action, the authority took

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[6] The defendants gave notice of the hearing by publishing the same in a local newspaper, posting it on the city website and on the city hall bulletin board, and mailing written notice to the record owners of properties designated as acquisition parcels.

[7] Section 48 of c. 121B requires the department to review and to approve proposed land uses and financing of an urban renewal plan.

[8] Consistent with 760 Code of Mass. Regs. § 12.02(2) (1996), the 2012 plan includes an explanation of the project area's eligibility for urban renewal, including the authority's finding that the area is decadent as that term is defined in G. L. c. 121B, § 1. The plan also contains the elements required by this regulation, including a comprehensive financial plan.

definite steps to advance the approved urban renewal program, including, among other things, expending more than $8 million in municipal bond funds (a) to acquire by eminent domain certain designated parcels, (b) to relocate owners, and (c) to conduct preparation activities on the site. The city will utilize State and Federal grant funds for implementing the plan.

The 2012 plan concerns approximately 117 acres of land and its public purpose is to stimulate and to facilitate redevelopment of deteriorated and obsolescent conditions, to alleviate traffic congestion, and to eliminate inadequate and incompatible land uses. The plan aims to achieve its goals by acquisition of decadent parcels, spot clearance, conservation, and redevelopment. The plan addresses three types of areas: conservation areas, enhancement areas, and transformation areas. Conservation and enhancement areas will undergo no, or no significant, physical change. It is in the transformation areas where large-scale renewal will occur in phases over time, by redeveloping parcels geared toward automotive and industrial uses into a mix of business and residential uses, such as "office and research [and] development, with retail shops, establishments, and restaurants"; the plan also "calls for additional housing," including affordable units.

2. The plaintiffs. As of 2015, Pishev owned the land and building at 47 Webster Avenue, Somerville (Webster Avenue

property). Her property is located in a transformation area and is slated to be taken by the authority under its eminent domain power, for clearance and redevelopment under the plan. No order of taking had issued for her property as of the filing of this lawsuit. The taxpayer group claims they are taxpayer inhabitants of the city.

The plaintiffs contest the 2012 plan, the authority's findings, and its decisions declaring that the site in question is decadent and that the affected land parcels are eligible to be acquired for urban renewal purposes.[9] The taxpayer group alleges that the defendants are about to raise or to expend money, binding the city, for an unlawful purpose: the implementation of the 2012 plan. The plaintiffs assert that the 2012 plan violates the urban renewal law, G. L. c. 121B, and the regulations promulgated thereunder.

Procedural history. Pursuant to Mass. R. Civ. P. 12 (b) (1) and (6), 365 Mass. 754 (1974), the defendants filed a motion to dismiss the action, on the basis that the plaintiffs

[9] Pishev also attempted to challenge the 2012 plan on behalf of members of a class of landowners whose properties are located in so-called "Transformation Area #1" and designated to be taken under the plan. The judge ruled that Pishev had not alleged sufficient facts to bring a class action, and dismissed so much of count I of the amended complaint that alleged a claim on behalf of said class. Pishev does not challenge this ruling on appeal.

lacked standing.[10] With the motion, the defendants filed two supporting affidavits,[11] which had the effect of placing the burden on the plaintiffs to establish jurisdiction-related facts entitling them to bring an action under G. L. c. 121B. See Callahan v. First Congregational Church of Haverhill, 441 Mass. 699, 710 (2004); General Convention of the New Jerusalem in the United States of Am., Inc. v. MacKenzie, 66 Mass. App. Ct. 836, 837 n.5 (2006), S.C., 449 Mass. 832 (2007); Brown v. Tobyne, 9 Mass. App. Ct. 897, 898 (1980).

When deciding a rule 12 (b) (1) motion, a judge may consider documents and materials that are outside the pleadings but attached to an affidavit. Callahan, 441 Mass. at 710. "[A] 'factual challenge' to subject matter jurisdiction gives no presumptive weight to the averments in the plaintiff[s'] complaint, and requires the court to address the merits of the jurisdictional claim by resolving the factual disputes between the plaintiff[s] and the defendants." Id. at 711. Opposing the motion, the plaintiffs filed counter affidavits, largely to

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[10] The parties agreed to voluntarily dismiss the department.

[11] A motion under Mass. R. Civ. P. 12 (b) (1), "unsupported by affidavit presents a 'facial attack' based solely on the allegations of the complaint, taken as true for purposes of resolving the complaint." Callahan v. First Congregational Church of Haverhill, 441 Mass. 699, 709 (2004), quoting Hiles v. Episcopal Diocese of Mass., 437 Mass. 505, 516 n.13 (2002).

answer a central issue whether Pishev was then the owner of the Webster Avenue property.

On the materials presented, the judge found that Pishev was the landowner, had standing to contest the 2012 plan and, therefore, declined to dismiss Pishev's claims under count I of the amended complaint for lack of standing. As to the taxpayer group, the judge ruled, as a matter of law, that the taxpayer group lacked standing to challenge the 2012 plan and, thus, dismissed count II of the amended complaint.

Subsequently, the defendants filed a second motion to dismiss, pursuant to rule 12 (b) (1) and (6), requesting that the judge dismiss what remained of Pishev's count I claims on the basis that said claims were time barred as a matter of law. The judge allowed the defendants' second motion to dismiss for the reason stated by the defendants.

Standard of review. We review the judge's legal rulings as to the plaintiffs' standing de novo. See Indeck Me. Energy, LLC v. Commissioner of Energy Resources, 454 Mass. 511, 516 (2009) (Indeck). In a declaratory judgment action, under G. L. c. 231A, § 1, which is a component of the present lawsuit, a plaintiff must establish both an actual controversy and legal

standing before the complaint may be heard. See Indeck, supra at 516-517.[12]

Analysis. 1. Plaintiffs' standing. Standing is an issue that may be tested by a rule 12 (b) (1) motion to dismiss. See Indeck, supra at 516. Standing is an "elastic concept[]" whose meaning depends on the particular circumstances. Enos v. Secretary of Envtl. Affairs, 432 Mass. 132, 135 (2000). See Service Employees Int'l Union, Local 509 v. Department of Mental Health, 469 Mass. 323, 329 (2014). A court lacks subject matter jurisdiction over an action, and is without power "to decide the merits of a dispute or claim," if a plaintiff does not have standing to file the lawsuit. HSBC Bank USA, N.A. v. Matt, 464 Mass. 193, 199 (2013).[13] Standing to bring an action contesting

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[12] The inquiry whether an actual controversy exists is closely related to the issue of a party's standing. See South Shore Nat'l Bank v. Board of Bank Incorporation, 351 Mass. 363, 366-367 (1966). "The purpose of both the actual controversy and the standing requirements is to ensure the effectuation of the statutory purpose of G. L. c. 231A, which is to enable a court 'to afford relief from . . . uncertainty and insecurity with respect to rights, duties, status and other legal relations.'" Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins., 373 Mass. 290, 292 (1977), quoting G. L. c. 231A, § 9. It is not enough to show that the dispute stems from an interpretation of a statute; a plaintiff must also be a party who, by virtue of a legally cognizable injury, is a person entitled to seek judicial review of the challenged action or decision of a local agency or board. See Circle Lounge & Grille, Inc. v. Board of Appeal of Boston, 324 Mass. 427, 432 (1949).

[13] "[I]t is not enough that the plaintiff be injured by some act or omission of the defendant; the defendant must

an approved urban renewal plan under G. L. c. 121B "must be determined with reference to the context and subject matter of the statute." Beard Motors, Inc. v. Toyota Motor Distribs., Inc., 395 Mass. 428, 431 (1985). The court, in determining the intent of the Legislature, looks to both the language and the purposes of the particular act. Id. at 431-432. Unless the Legislature has clearly indicated that it intends a broader grant of standing, the Supreme Judicial Court has "generally looked to whether the party claiming to have standing has alleged an injury 'within the area of concern of the statute or regulatory scheme under which the injurious action has occurred.'" Id. at 432. The judge correctly ruled that the taxpayer group failed to make this jurisdictional showing under G. L. c. 121B, based on controlling Massachusetts case law.

a. Chapter 121B's area of concern. The Legislature enacted G. L. c. 121B for the public purpose of improving the physical environment, thus benefiting the health, safety, and welfare of communities in the Commonwealth. G. L. c. 121,

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additionally have violated some duty owed to the plaintiff." Doe No. 1 v. Secretary of Educ., 479 Mass. 375, 386 (2018), quoting Penal Insts. Comm'r for Suffolk County v. Commissioner of Correction, 382 Mass. 527, 532 (1981). In other words, a plaintiff must show that he or she was injured as a result of the defendant's conduct and that the injury suffered falls "within the area of concern of the statute or regulatory scheme" in question. Sullivan v. Chief Justice for Admin. & Mgt. of the Trial Court, 448 Mass. 15, 21-22 (2006), quoting Ginther v. Commissioner of Ins., 427 Mass. 319, 323 (1998).

§ 45.[14] See Mahajan v. Department of Envtl. Protection, 464 Mass. 604, 606 (2013) (elimination of "decadent, substandard, or blighted open" areas is legislative aim under c. 121B); Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Bd. of Lawrence, 403 Mass. 531, 540 (1988) (Order of Elks) (taking of "blighted open area" under c. 121B "is a public purpose").

The Supreme Judicial Court has consistently declined to recognize a private right of appeal in G. L. c. 121B, beyond the constitutionally based exception for a landowner whose property is designated for taking in urban renewal. See St. Botolph Citizens Comm., Inc. v. Boston Redev. Auth., 429 Mass. 1, 11 (1999) (St. Botolph); Order of Elks, supra at 546.

In St. Botolph, supra at 1-6, the Supreme Judicial Court addressed a challenge by the plaintiffs, the members of a neighborhood association, who asserted that the Boston Redevelopment Authority (BRA) had abused its discretion and exceeded its authority respecting a G. L. c. 121B urban renewal plan in Boston. The plaintiffs sought review of the BRA's

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[14] The Legislature declared that the "menace of such decadent, substandard or blighted open areas is beyond remedy and control solely by regulatory process in the exercise of the police power and cannot be dealt with effectively by the ordinary operations of private enterprise without the aids herein provided." G. L. c. 121B, § 45.

decision to permit modifications to be made to the urban renewal plan such that one parcel in the plan could be conveyed to a private developer. St. Botolph, supra at 4-6. The Supreme Judicial Court dismissed the plaintiffs' claims, concluding that they lacked standing to challenge the BRA's administration of an urban renewal plan. Id. at 12-13. In so ruling, the court held that c. 121B "purposely creates no right of appeal from BRA decisions in its capacity as an urban renewal agency." St. Botolph, supra at 11. The court conclusively held, id. at 11-13, that only landowners whose property is designated to be taken have standing to challenge the decisions of a local urban renewal agency and the approval of a G. L. c. 121B urban renewal plan. The court, in St. Botolph and in Order of Elks, articulated two primary reasons for limiting a right of appeal to landowners.

First, G. L. c. 121B provides for a lengthy and robust public approval process, confirming the legislative (or nonjudicial) character of urban renewal. See St. Botolph, 429 Mass. at 11-12; Order of Elks, 403 Mass. at 537. "Decisions to appropriate property for public use and approving urban renewal plans are not judicial or quasi-judicial but are political in nature." Warren v. Hazardous Waste Facility Site Safety Council, 392 Mass. 107, 117 (1984). See Reid v. Acting Comm'r of the Dep't of Community Affairs, 362 Mass. 136, 140 (1972)

("necessity for appropriating property for public use is . . . a legislative" question).[15] Second, a publicly initiated and supervised urban renewal plan requires certainty and finality because such plans involve significant planning and investment, and several years of effort by a municipality to achieve its purpose of eliminating blight and decadent areas.[16] See St.

[15] Urban renewal plans under G. L. c. 121B like the 2012 plan, "are initiated and supervised by public agencies." Boston Edison Co. v. Boston Redev. Auth., 374 Mass. 37, 52 (1977). A local urban renewal agency (e.g., the authority) is responsible for preparing the plan, which must be approved by the municipal officers involved (e.g., the board of aldermen with the approval of the mayor), and, at the State level, by the department. See G. L. c. 121B, §§ 1, 48. Section 48 requires public disclosures and a public hearing before approval by the municipal officers. Proceedings at the department do not require a public hearing unless a request is made by the municipality involved or by at least twenty-five taxpayers. Boston Edison Co., supra at 53. Once the department approves a plan, a local urban renewal agency may act to acquire, clear, and redevelop the parcels of land involved, and take such other action to implement the urban renewal plan. See G. L. c. 121B, §§ 46-48.

[16] The Legislature has authorized a local urban renewal agency to engage in a variety of activities in furtherance of an urban renewal plan. These activities include: "the acquisition, planning, clearance, conservation, rehabilitation or rebuilding of such decadent, substandard and blighted open areas for residential, governmental, recreational, educational, hospital, business, commercial, industrial or other purposes, including the provision of streets, parks, recreational areas and other open spaces." G. L. c. 121B, § 45. In accordance with § 45, all these means of redevelopment are authorized as "incidental" to the purposes of the urban renewal statute and urban renewal plans created in conformity therewith. See Order of Elks, 403 Mass. at 551-552. See also Papadinis v. Somerville, 331 Mass. 627, 632 (1954) (construing former G. L. c. 121, § 26KK). Thus, the particular use to which land taken or acquired for urban renewal purposes is eventually put (or proposed to be put) is secondary to the purpose of the taking.

Botolph, 429 Mass. at 3 (G. L. c. 121B plans "generally expected to take many years to complete").

Like the St. Botolph plaintiffs, the taxpayer group here asserts that the defendants, including the authority, failed to comply with various requirements of G. L. c. 121B. No sufficient causal or connective link exists between the injuries or harms alleged by the taxpayer group, and the legislative decisions made by the municipal defendants, for which the taxpayer group seeks redress. The taxpayer group may not circumvent the settled rule of Order of Elks and St. Botolph by labeling its claims as grounded under G. L. c. 40, § 53, or G. L. c. 231A. "Providing a safeguard to persons whose land is to be taken by eminent domain, to ensure that there is a valid constitutional basis for a taking, is fundamentally different from the right of appeal the [taxpayer group] plaintiffs seek[s]." St. Botolph, 429 Mass. at 12.

On the other hand, it is undisputed that Pishev has legal standing to challenge the 2012 plan and the authority's subsidiary findings that relate to the eligibility of her

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See G. L. c. 121B, §§ 11, 45. More than fifty years ago, the Supreme Judicial Court determined that the "primary responsibility for representing the public interest" in urban renewal projects "and for supervising the execution [of urban renewal plans is] vested in the [local urban renewal agencies)," such as the authority. Commissioner of the Dep't of Community Affairs v. Boston Redev. Auth'y, 362 Mass. 602, 613 (1972).

property to be taken for urban renewal under Order of Elks. Order of Elks, which controls this case, applies when a local urban renewal agency, like the authority, endeavors to take land by eminent domain after the supervising State agency (e.g., the department) has approved the urban renewal plan. 403 Mass. at 537 n.9. The plaintiffs in Order of Elks were the owners of land designated for taking by eminent domain for an urban renewal plan under G. L. c. 121B. 403 Mass. at 534. The Supreme Judicial Court held that, although G. L. c. 121B does not expressly grant a right to appeal from the decisions of local authorities or the department, judicial review was nevertheless proper because the plaintiffs were contesting the public purpose for which their land was being taken, and claiming a violation of their constitutional rights. 403 Mass. at 536-537. See St. Botolph, 429 Mass. at 12.[17] There remains,

[17] Ordinarily, a landowner has no actionable claim of harm or injury based on the public announcement or disclosure of an urban renewal plan. "[T]he circumstances surrounding urban renewal and urban redevelopment require advance planning and disclosure, and even public announcements of proposed action which result in decreases in property values are not by themselves compensable takings." Fram v. Boston, 363 Mass. 68, 72 (1973). See Cayon v. Chicopee, 360 Mass. 606, 609-612 (1971). "Undoubtedly, one purpose in requiring such disclosure is to afford community groups and property owners an opportunity to persuade the taking authority to alter its plans. To hold that such public announcements, even where they result in a decrease in property values, amount to a compensable taking would frustrate the purposes sought to be achieved by requiring disclosure and would hamper the orderly procedures to be

however, the question whether Pishev timely commenced her suit to contest the 2012 plan.

2. Limitations period. The judge correctly ruled that Pishev's claims under count I were time barred as they had been asserted some three years after the plan had been approved. Pishev filed her original complaint on August 14, 2015, approximately nine hundred and ninety-eight days after the property had been designated on November 19, 2012, for taking by eminent domain under the plan. Certiorari actions must be commenced within sixty days after the conclusion of the proceeding being challenged. G. L. c. 249, § 4. Failure to comply with this limitations period under § 4 is a serious misstep requiring dismissal. Pishev may not circumvent the § 4 limitations period for certiorari actions by characterizing her claim as one for declaratory relief.[18] See Pereira v. Commissioner of Social Servs., 432 Mass. 251, 252 n.3 (2000).

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followed in redeveloping blighted areas of the community." Id. at 612.

[18] Nor is there merit to Pishev's contention that she received inadequate notice of the authority's designation of the Webster Avenue property for a taking. It cannot reasonably be disputed that the city sent a notice letter on August 16, 2012, to one Branko Pishev, then record owner of the Webster Avenue property. Aliki Pishev did not become the owner until December 2015, more than three years after the plan was approved. The notice letter was not an order of taking pursuant to G. L. c. 79.

This court's decision in Cumberland Farms, Inc. v. Montague Economic Dev. & Indus. Corp., 38 Mass. App. Ct. 615 (1995), is instructive on this particular point. We held that:

> "A person whose land has been taken by eminent domain does, indeed, have three years from the time that the right to damages has vested to contest the lawfulness of the taking under G. L. c. 79, . . . the chapter in the general laws which deals with eminent domain. . . . The avenues of challenge may not, however, include attacks on the underlying planning process that may have led to the authorization of the taking and the order of taking. If that process is to be contested as so flawed as to be unlawful, the challenge must be made within the time limitations applicable to review in the nature of certiorari."

Id. at 616. Otherwise, considerable public effort and expense would be undermined were the plaintiffs permitted to sue long after the approval of the plan when money has been spent and agreements concluded to implement the plan.[19]

> "The statutory reduction to sixty days of the time in which a party may initiate certiorari review reflects a legislative determination that challenges to governmental proceedings be sufficiently prompt so that neither the public body nor private parties working with it are in significantly changed positions when the [legal suit attacking the plan] is made."

Id. at 623.

3. Denial of motion to further amend complaint. The plaintiffs also contend that the judge improperly denied their

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[19] The Legislature implicitly intended that municipalities be entitled to rely with certainty on a plan approved by the department by authorizing municipalities to proceed "at once" with an urban renewal plan upon approval. G. L. c. 121B, § 48.

motion for leave to amend their complaint for a third occasion. Ordinarily, leave to amend should be freely given, see Mass. R. Civ. P. 15 (a), 365 Mass. 761 (1974), and should not be denied but for "good reason[]." Mathis v. Massachusetts Elec. Co., 409 Mass. 256, 264 (1991). "[A] judge properly may deny a motion to amend because the complaint as amended would fail to state a claim on which relief could be granted." Jessie v. Boynton, 372 Mass. 293, 295 (1977). That was the situation here and the judge properly refused to permit the amendment.

Judgment affirmed.