



COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss.

18 PS 000253 (MDV)

BOXBOROUGH TOWN CENTER, LLC,

Plaintiff,

v.

TOWN OF BOXBOROUGH PLANNING
BOARD, and JOHN MARKIEWICZ, EDUARDO
PONTORIERO, ABBY REIP, HONGBING
TANG and NANCY FILLMORE, as they are
Members of the Town of Boxborough Planning
Board,

Defendants.

ORDER DENYING MOTION TO INTERVENE

In May 2018, plaintiff Boxborough Town Center, LLC (“BTC”) filed in the Permit Session of this Court (*see* G.L. c. 185, § 3A) an eleven-count complaint against defendant Town of Boxborough Planning Board. BTC brought nine of the counts under G.L. c. 40A, § 17, as each is an appeal from the Board’s denial of BTC’s request for an approval, under the Town of Boxborough’s Zoning By-law, of a site plan for a proposed 100-unit elderly-occupancy residential development. A tenth count challenges the Board’s refusal to grant a “stone wall removal permit” under the Town’s general (that is, non-zoning) bylaws to facilitate the same development; the parties agree that the Court is able to review that permit denial under G.L. c. 249, § 4. The last count of BTC’s complaint claims that with respect to both denials, the Board acted out of bias and bad faith, something that (if true) only provides further fodder for review of each denial under the specific statutes that allow such review.

The Court first saw the parties in June 2018. While counsel for each party vigorously defended his client's position, counsel also expressed willingness to explore settlement. The Court gave them time to do that. In July 2018, they reported that they wished to mediate their dispute, although they hadn't selected a mediator. At the parties' request, the Court stayed discovery and ordered them to report every 30 days on the status of their settlement efforts.

In their first report on settlement (filed in August 2018), the parties identified a mediator and expressed confidence that they would meet with him in late September 2018. On September 13, 2018 – having heard that mediation might happen as soon as September 28, 2018, and hoping to join in that mediation – seven residents of Priest Lane in Boxborough, described as a bucolic street that leads to the site of BTC's development, moved under Rule 24(b)(2), Mass. R. Civ. P., to intervene as defendants in this case. Six neighbors claim to be close enough to the site of the development that G.L. c. 40A, § 11 would treat them as "parties in interest" with respect to the Board's proceedings on BTC's site-plan approval application, a status that sometimes gives folks a leg up in establishing standing to file an appeal under *id.* at § 17. See *Martin v. The Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 434 Mass. 141, 145-146 (2001). All of the neighbors cheer the Board's denial of BTC's permits, but they fear that the Board won't sufficiently defend the neighbors' interests in traffic safety, preventing the clear-cutting of mature trees, keeping construction away from their homes, and limiting blasting on the site.

The Board hasn't filed an opposition to the neighbors' motion, but BTC has. BTC argues that there's no need for the Court to allow intervention in advance of mediation or at any other time. BTC submits that the best it can achieve, either in mediation or after further litigation in this Court, is an order remanding the case to the Board for consideration of the issuance of a site-

plan approval with conditions. BTC asserts that on remand, the neighbors “will have the opportunity to participate in any remand hearing, and [will] have the opportunity to appeal any decision granting Site Plan Approval. . . .”

The Court DENIES the neighbors’ motion to intervene, for three reasons. First, as noted at the outset of this Order, BTC’s complaint presents two appeals in one. One appeal centers on the Board’s denial of BTC’s request for a stone-wall removal permit. That appeal proceeds under c. 249, § 4, a statute that provides for a somewhat limited review of certain administrative decisions based on the largely frozen “record” of the Board’s proceedings. *See Durbin v. Board of Selectmen of Kingston*, 62 Mass. App. Ct. 1, 4-10 (2004). The neighbors’ motion to intervene doesn’t mention the wall-removal permit or describe their special concerns (if any) in defending the Board’s denial of that permit. Thus, even if the Court were inclined to allow intervention on BTC’s site-plan approval claims (the real focus of the neighbors’ efforts), given their silence on stone-wall issues, the Court wouldn’t let them intervene as to those issues. *See Frostar Corp. v. Malloy*, 77 Mass. App. Ct. 705, 712 (2010) (applicant for intervention bears the burden of meeting Rule 24’s requirements).

Second, while the neighbors have presented within the meaning of Rule 24(b)(2) a “timely application” to intervene with respect to BTC’s site-plan approval claims, that same rule requires the proposed intervenor to have a “claim or defense” that shares a “question of law or fact in common” with the “main action.” While it is a case that addresses an applicant’s motion to intervene under Rule 24(a)(2), *Prudential Ins. Co. of America v. Board of Appeals of Westwood*, 18 Mass. App. Ct. 632, 634-635 (1984), suggests that someone who wants to intervene to *support* a local board’s decision under c. 40A doesn’t have a “claim” within the meaning of Rule 24, as the proposed intervenor can’t establish (for purposes of c. 40A, § 17) that

he or she is a person “aggrieved” by the decision at issue in the main action. (The neighbors direct the Court to a decision granting permissive intervention in *Winchester Boat Club v. Zoning Bd. of Appeals of Winchester*, Land Court Nos. 17 MISC 204, 17 MISC 272, and 17 MISC 366 (July 26, 2017) (Foster, J.). *Winchester Boat Club* doesn’t discuss *Prudential Ins.* or the factors discussed in the next paragraph that counsel against allowing intervention in this case.)

Third, *Prudential Ins.* notes that, where (a) the relief sought under § 17 by a party who’s been denied a permit is a remand to a local board; (b) abutters seek to intervene in that appeal; (c) the proposed intervenors nevertheless would have the right under § 17 to appeal the board’s decision after remand, were the board to grant a permit on the applicant’s second try; and (d) the permit applicant agrees that the proposed intervenors have such § 17 rights, the prudent course under § 17 is not to allow intervention in the permit applicant’s initial appeal of the board’s decision. That’s precisely the case here: BTC says it seeks only a remand (either by mediation or through litigation) for a second chance at a site-plan approval, and BTC concedes that if it receives that approval, the neighbors have the ability to present their claims under § 17.

Prudential Ins. suggests (albeit in the context of a motion under Rule 24(a)(2)) that denying intervention the first time around, while holding the permit applicant to its concession that the proposed intervenors have the right to appeal later, is “a proper and reasonable accommodation to the [proposed intervenors’] concerns.” *Prudential Ins.*, 18 Mass. App. Ct. at 636.

One final comment. The neighbors contend that “allowing intervention before the anticipated mediation would allow the Priest Lane Neighbors to participate in the mediation. . . .” One doesn’t follow the other. Mediation in this case is an entirely voluntary process: the Court hasn’t ordered mediation and isn’t supervising how or what BTC and Board are mediating. (The Court’s order requiring BTC and Board to report every 30 days on the status of their settlement

efforts serves only one purpose: allowing the Court to determine whether it should continue the current stay of the Court's proceedings.) Had the Court allowed intervention, BTC and the Board would have been free not to include the neighbors in mediation. The flip side is that the Court's denial of the neighbors' motion to intervene doesn't preclude BTC and the Board from including the neighbors in mediation or other settlement efforts, either now or at some later point. This decision shouldn't be read as supporting one outcome or the other.

SO ORDERED.

MSV

By the Court. (Vhay, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: September 25, 2018

A TRUE COPY
ATTEST:

Deborah J. Patterson
RECORDER

