

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1415

PAUL GALLAGHER

vs.

ZONING BOARD OF APPEALS OF NAHANT & others.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Shortly after defendants Dierdre Pocase and Matthew Padulo (homeowner defendants) began the landscaping component of constructing their new home in the town of Nahant (town), the plaintiff, Paul Gallagher, the owner of land directly opposite on a private way, requested by e-mail that the town's building inspector enforce the local zoning bylaw. He complained of elevation and grade changes, drainage impacts, and intersection visibility issues due to a "makeshift" retaining wall. The plaintiff received only partial relief from the building inspector, but did not appeal from the building inspector's

¹ Dierdre Pocase and Matthew Padulo. As is our custom, we spell the parties' names as they appear in the complaint. We note, however, that the defendants' submissions and the Land Court judge's order and judgment spell Pocase's first name as "Deirdre."

decision. The issue before us is whether the zoning scheme allowed the plaintiff to file another request for enforcement some nine months later when changes to the topography were more apparent, multiple retaining walls had been installed in different areas of the property without a permit, and the actions previously taken by the building inspector in ordering the private defendants to move the wall near the intersection allegedly had not eliminated the corner visibility zoning infraction.

A judge of the Land Court determined that, with the exception of the absence of a permit for some of the retaining walls, because the plaintiff failed to appeal from the building inspector's response to the first request for enforcement, the town's zoning board of appeals (board) and the Land Court lacked jurisdiction over the second request. The plaintiff appeals. We vacate so much of the judgment as declined to exercise jurisdiction over the plaintiff's second enforcement request regarding grading and corner visibility, and ordered that the board's decision be annulled. We remand the case for further proceedings consistent with this memorandum and order. We affirm the judgment in all other respects.

Background. The homeowner defendants' property is bounded by Wilson Road to the north, Wilson Avenue to the east, and Linda Lane to the west. The plaintiff owns the property across

Wilson Avenue, a narrow lane, from the homeowner defendants' property. The plaintiff's home is very close to the lot line of Wilson Avenue and Wilson Road. Before construction, the homeowner defendants' property sloped downwards from back to front. Pictures contained in the record reveal a gradual slope in the area where the plaintiff's property aligns with the homeowner defendants' property with little to no difference between the defendants' original property elevation and the abutting roads' elevation.

A building permit issued on August 4, 2017, for a new home on the homeowner defendants' property. By e-mail dated September 11, 2017, to the building inspector, the plaintiff complained about the property's newly elevated topography and grading, which he alleged had been raised some four feet at the intersection of Wilson Road and Wilson Avenue; the homeowner defendants' failure to retain the natural character of the landscape as required by the town's zoning bylaw (bylaw); a "makeshift" retaining wall that impaired visibility at the intersection; and the effects of topographical changes on drainage. The building inspector responded by e-mail on September 13, 2017, noting that he had visited the site and opining that the zoning bylaw "allows a retaining wall up to six feet in height which contradicts the mandate to keep the grade as natural as possible." The building inspector also disagreed

with the assertion that drainage on Wilson Avenue would be adversely affected. However, the building inspector promised that, as "to visibility at the corner, I will address that issue with the homeowner and contractor." Though he expressed his disagreement with the building inspector's interpretation of the mandate to retain the landscape's natural character in a follow-up e-mail on September 13, the plaintiff did not appeal from the building inspector's response to the plaintiff's e-mails.

The plaintiff followed up with a formal request for zoning enforcement dated September 25, 2017, again raising issues related to elevation of the grading, retaining walls, and visibility at the corner. On October 6, 2017, the building inspector replied by letter. This time he said that the zoning bylaw requires that the landscape character of a lot shall be preserved in its natural state, "IN SO FAR AS PRACTICABLE," and that because the zoning bylaw allows retaining walls as high as six feet, "only changes in grade greater than [six] feet should not be considered 'NOT PRACTICABLE.'"² He also reported that he had spoken to the homeowner defendants about the plaintiff's

² Contrary to the building inspector's position, we see no conflict between the zoning bylaw provision allowing retaining walls of a certain height and the provision requiring the character of a lot to be preserved in its natural state insofar as practicable. What is practicable for any particular lot does not necessarily turn on the height of the highest allowable retaining wall.

concerns, and they "have agreed to bring the rocks and soil back away from the corner so as to comply with" the corner visibility provision of the bylaw. The building inspector's letter invited the plaintiff to contact his office with any questions, but did not inform the plaintiff of his right to appeal. The plaintiff did not appeal.

Thereafter, the building inspector marked the boundaries of the corner wall and on October 12, 2017, the homeowner defendants moved the rocks in accordance with the building inspector's marking. More site work continued through November 2017, and then resumed in May and June 2018.

Following additional e-mail communications with town officials in June 2018, the plaintiff, through his attorney, filed a second request for zoning enforcement on June 21, 2018. He complained about the dramatic change in grade over the past year and, specifically, that the property "sits much higher than it did before"; that construction of multiple retaining walls had been done without a building permit or special permit; and that the corner wall still violated the setback and height requirements of the bylaw. The building inspector denied the request, finding that there were no zoning violations at the property. The plaintiff appealed to the board, which affirmed the decision of the building inspector.

On appeal to the Land Court, the judge concluded that because the plaintiff's grading and corner visibility concerns were raised in his first zoning enforcement request and the plaintiff did not appeal from the building inspector's October 6, 2017 decision, the board and the court both lacked jurisdiction to entertain the plaintiff's second request on those same issues, and ordered that the board's decision be annulled. Because the retaining walls were unpermitted and were not shown on the site plan submitted with the building permit application, however, the judge concluded that the court had jurisdiction to hear that issue and remanded to the board with instructions to reverse the denial of the plaintiff's request for enforcement related to the retaining walls. The plaintiff moved to amend the judgment, arguing that the judge had erred in declining to exercise jurisdiction over the corner visibility and grading issues. The motion was denied, and the plaintiff appealed.

Discussion. "Summary judgment is appropriate when, 'viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law.'" Regis College v. Weston, 462 Mass. 280, 284 (2012), quoting Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). The plaintiff contends that the judge erred in granting summary

judgment in favor of the defendants, because genuine issues of material fact concerning changed circumstances between his first and second requests for enforcement precluded a determination that he had waived his ability to pursue claims concerning corner visibility and grading. "We review a grant of summary judgment de novo." Regis College, supra.

Section 5.02(G) of the bylaw provides that "[t]he landscape character of a lot shall be preserved in its natural state, insofar as practicable, by minimizing tree and soil removal or filling, and any grade changes shall be in keeping with the general characteristics and appearance of neighboring areas."³ In addition, pursuant to § 5.02(E)(2) of the bylaw, entitled "Traffic Visibility at Corner," no structure or obstruction between a height of three and seven feet above the curb may be erected within twenty-five feet from the point of intersection of intersecting streets.

³ The building inspector is charged with ensuring compliance with each provision of the zoning bylaw and only upon "finding that all . . . provisions set forth in this bylaw . . . have been met in regard to . . . alteration . . . of a . . . lot, the [b]uilding [i]nspector shall grant a permit for the same." The site plan submitted with the application for the building permit for a "[n]ew [two] story modular home" showed that the building inspector would have to approve the proposed elevation changes. The record does not show whether the building inspector specifically did so. The plaintiff did not appeal from the grant of the building permit, and there is no suggestion from the defendants that he should have. Compare Gallivan v. Zoning Bd. of Appeals of Wellesley, 71 Mass. App. Ct. 850, 851 (2008).

The building inspector's October 6, 2017 written response to the plaintiff's formal written request to enforce these sections of the zoning bylaw stated that the wall would be moved back to comply with the corner visibility section of the bylaw; he otherwise took no action, communicating that because the local bylaw allowed walls as high as six feet⁴ in front yards, only changes in grade greater than six feet would be considered with respect to whether it was practicable to preserve the landscape character of the lot. This was an appealable decision from which the plaintiff did not appeal.⁵

"Once someone has requested enforcement by the building inspector, he or she is subject to strict statutory deadlines with regard to any appeals." Barkan v. Zoning Bd. of Appeals of Truro, 95 Mass App. Ct. 378, 385 (2019), citing G. L. c. 40A, § 15. Even the plaintiff concedes that "with respect to the

⁴ In fact, § 5.02(J)(1) of the bylaw limits retaining walls to five feet in front yards, measured from the highest point of the retaining wall above the mean original grade of the ground undisturbed adjoining the retaining wall before construction was commenced.

⁵ We have recently held that, notwithstanding that the communication from a building inspector denying a request for enforcement invites the complainant to contact the department and does not explicitly inform him of a right to appeal, if the letter provides adequate notice that the zoning enforcement officer is refusing an enforcement request, the thirty-day appeal period commences. Fisher v. Presti Family Ltd. Partnership, 100 Mass. App. Ct. 234, 242 (2021). Thus, at the very least, the building inspector's October 6, 2017 letter declining the plaintiff's formal request to enforce the zoning bylaw was an appealable decision.

landscape and grade changes made by the [d]efendants before the [p]laintiff's first enforcement request, the [p]laintiff likely did waive any further challenges to those same conditions by not appealing the [b]uilding [i]nspector's refusal to order that they be changed."

The plaintiff contends, however, that the substantial additional work completed after the plaintiff's first request for enforcement -- much of which was not shown on the site plan that accompanied the application for a building permit and was not the subject of a separate building permit⁶ -- created significant changed circumstances allowing the plaintiff to make another enforcement request.⁷ These changes were detailed in an

⁶ The Land Court judge rejected the homeowner defendants' claim that their original building permit application included reference to retaining walls; the judge concluded that the record showed that the retaining walls had not been constructed at the time of the first enforcement request, they were not included in the original building permit application, and they were constructed without the benefit of a building permit. The judge concluded that the plaintiff's challenge to the retaining walls fell within the second exception described in Connors v. Annino, 460 Mass. 790, 797-798 (2011), and the board erred in concluding that the retaining walls did not violate the bylaw. The defendants did not appeal from this portion of the judge's decision.

⁷ In Fisher, 100 Mass. App. Ct. at 244, we concluded that an aggrieved person is not precluded from bringing successive requests for zoning enforcement challenging ongoing uses of property. We said this "makes sense because uses of real property may evolve or change over time, an aggrieved person may not know of the precise contours, extent, or even existence of all uses of property at the same point in time, and because towns have an ongoing interest in the use of property within their boundaries." Id. We need not decide whether this

affidavit of defendant Pocase. The additional work included: completing the "temporary" wall along the "higher" section of Wilson Road; removing 300 yards of fill from the property; creating tiered walls to accommodate the driveway; moving the retaining wall out to the property line along Wilson Avenue (closer to the plaintiff's property) to hold fill to level up to the rest of the property in order to "reclaim" a four-foot strip of land along that 84-foot boundary; creating a corner wall at the Wilson Avenue and Wilson Road intersection using a single tier of rocks eighteen to twenty-four inches tall; creating a higher front section of wall along Wilson Road out of original large rocks which were moved forward to the property line along Wilson Road; excavating the soil at the property line by two to three feet and then building up two to three feet above the grade of Wilson Road; placing a single line of rocks along the Linda Lane property edge; installing a two to three-foot high wall along the lower section of the property line with Wilson Road; spreading the remaining fill, ultimately creating a two to

analysis applies not only to use violations, but also to successive requests for zoning enforcement addressing a requirement that the natural contours of property be maintained as much as practicable because here, there were such significant changes to the site following the first enforcement request, that we conclude that the second request was proper in any event. Even in instances where successive challenges (for example, of a building permit) are prohibited, see Connors, 460 Mass. at 797-798, where work proceeds without the proper building permits, an enforcement request is proper. Id.

three-foot increase in elevation at the corner of Wilson Road and Wilson Avenue; and creating tiers around the property "[t]o make the finished grade functional." The plaintiff also presented expert deposition testimony that, in some places, the retaining walls exceeded the five-foot limit contained in the bylaw. Although this evidence was challenged by plans submitted by the defendants' expert, on summary judgment, the facts must be viewed in favor of the non-moving party. See Regis College, 462 Mass. at 284.

Aside from the end grade at the property lines, these multiple additional changes, many including tiered grade changes, were not shown on the site plan that accompanied the application for a building permit. These extensive changes went far beyond any minor variation from the original plans. In these circumstances, we conclude that even if, when the plaintiff first sought to have the zoning bylaw enforced, he could have discovered the change in the finished grade at the abutting ways, he could not have discovered the defendants' plan to build the multiple tiers on the property and multiple unpermitted retaining walls. We cannot say on this record that these changes did not bear on whether the lot was preserved in its natural state insofar as practicable or whether grade changes were in keeping with the general characteristics and appearance of neighboring areas. We conclude, therefore, that

the judge erred in deciding that the board and the Land Court lacked jurisdiction over the plaintiff's second enforcement request insofar as alterations made after the first request and not shown on the original site plan created changed circumstances.

Corner visibility. Following the plaintiff's first enforcement request, the building inspector ordered the private defendants to move the wall, which they purportedly did in October 2017. In his second enforcement request, the plaintiff claimed that, nonetheless, the structure continued to violate the corner visibility rule. The judge concluded that failure to appeal from the building inspector's first decision meant that the board and the judge lacked jurisdiction to consider the second enforcement request. We disagree. On October 6, 2017, the building inspector reported in writing to the plaintiff that he had ordered the plaintiff to move the structure to comply with the corner visibility section of the bylaw. The plaintiff was entitled to rely on the building inspector's representation, which indicated that the plaintiff had nothing to appeal because the building inspector had ordered compliance with the bylaw. We discern no impediment in the statutory scheme that prevents the plaintiff from filing a second enforcement request alleging that the new placement of the wall also violates the corner

visibility rule. The question revolves around a different set of facts.

Conclusion. So much of the judgment as declined to exercise jurisdiction over the plaintiff's second enforcement request with regard to alleged violations of bylaw sections 5.02(G) and 5.02(E)(2), and ordered that the board's decision be annulled, is vacated. The case is remanded to the Land Court for further proceedings consistent with this memorandum and order. In all other respects, the judgment is affirmed.

So ordered.

By the Court (Neyman, Singh & Grant, JJ.⁸),



Clerk

Entered: March 17, 2022.

⁸ The panelists are listed in order of seniority.