Massachusetts Standing Laws and Zoning Appeals: Standing on Shaky Ground After *Kenner v. Zoning Board of Appeals*

[N]early all the residences are built along the water front of said bay, and facing east, commanding a beautiful view of said bay . . . and its real estate derives almost its whole value from this fact, and from its commanding view of the waters of [the] sound, and the fact that cool breezes which habitually and daily blow . . . over this sound, and thus reach the residences . . . and [provide] relief from summer heat.[1]

I. INTRODUCTION

Zoning laws in the United States came into existence at the turn of the twentieth century and were deemed constitutional under state police power.[2] Since zoning's inception, states have delegated the bulk of zoning authority to local municipalities, and accordingly, this area of the law is quite diverse.[3] The manifold nature of zoning is strikingly evident at the judicial-review level, where courts grapple with upholding zoning's legal underpinnings, while at the same time maintaining deference to local decision-making.[4] The interplay between state and local authorities results in a body of law that can be, at times, contradictory and unpredictable.[5]

To have standing to oppose an act of a local zoning board, Massachusetts law requires a person to be "aggrieved"; however, courts' attempts to define aggrievement have yielded inconsistent results.[6] Recently, in *Kenner v. Zoning*

1. Quintini v. Mayor of Bay St. Louis, 1 So. 625, 625-26 (Miss. 1887).

2. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (declaring state zoning laws constitutional under state police power).

3. *See* MASS. GEN. LAWS ANN. ch. 40A, § 1A (West 2013) (authorizing cities and towns to adopt zoning "ordinances and by-laws" in Massachusetts); JOHN R. NOLON ET AL., LAND USE AND COMMUNITY DEVELOPMENT: CASES AND MATERIALS 140-47 (7th ed. 2008) (highlighting local zoning authority per state-enabling statutes and multifaceted nature of zoning).

4. *See* NOLON ET AL., *supra* note 3, at 1135-67 (noting complex issues resulting from multiple layers of authority).

5. *See id.*

6. *See* ch. 40A, § 17 (granting judicial review to "[a]ny person aggrieved"); *see also* Daniel P. Dain, *New SJC Standing Decision Raises Bar for Abutter Zoning Appeals*, REBA NEWS, July 2011, at 1, 6, http://www.bdlwtg.com/download/July%202011%20REBA%20News%20%20New%20SJC%20standing%20decision%20raises%20bar%20for%20abutter%20zoning%20appeals%20(DPD).pdf (concluding Massachusetts case law regarding standing inconsistent and unpredictable); William V. Hovey & Michael Pill, *Zoning Appeals: Where Do We Stand?*, MASS. LAW. WKLY., July 25, 2011, at 13 (analyzing current confused state of Massachusetts standing laws). Within the context of zoning, standing is a critical issue: "[F]or lawyers who represent property owners and real estate developers, the question of 'standing' may be as important as the

Board of Appeals,[7] the Massachusetts Supreme Judicial Court (SJC) attempted to clarify the standard, but only managed to further shroud standing laws in confusion and ambiguity.[8] In essence, the SJC raised the bar for threshold standing determinations, and in doing so, utilized vague and imprecise language in defining aggrievement.[9] In addition, the SJC created potential disruption in the well-settled area of the law of particularized harm.[10]

The SJC articulated its new standard against the backdrop of a common occurrence in Massachusetts: an abutter opposing a special permit granting a structural-height increase that will effectively block scenic views.[11] First determining that the local bylaws at issue do not protect view-based harms, the court went on to hold that the new standard for determining standing requires that "[t]he adverse effect on a plaintiff must be substantial enough to constitute actual aggrievement such that there can be no question that the plaintiff should be afforded the opportunity to seek a remedy."[12] In addition, the SJC erroneously asserted that in order to achieve standing, a party must not only show that the view-based harm is particularized and specific to her property, but also that the community is harmed as well.[13] Requiring a showing of community harm expressly contradicts the well-settled rule that a plaintiff must offer evidence of harm particular to her—not shared by the community.[14]

terms of a major lease or the provisions of financing documents." Edward S. Hershfield, *Standing in Zoning Cases:* Marashlian v. Zoning Board of Appeals of Newburyport, BOS. B.J. (Jan./Feb. 1997) at 14, 14. In addition, principles of standing implicate concepts of judicial efficiency:

> Although a plaintiff's standing to sue is only a preliminary issue to be decided by the court, its importance as a doctrine of judicial economy is significant in zoning cases. Timing is a crucial factor to the development of property. Without giving some authority to the courts to dismiss zoning appeals cases for want of standing, applicant property owners, although ultimately prevailing in court, will suffer in the end. Communities in need of development will also suffer.

Ross D. Cohen, Note, *Why Require Standing If No One Is Seated? The Need to Clarify Third Party Standing Requirements in Zoning Challenge Litigation*, 42 BRANDEIS L.J. 623, 652-53 (2004).

7. 944 N.E.2d 163 (Mass. 2011).

8. *See id.* at 170 (setting forth court's opinion); *see also* Dain, *supra* note 6, at 1 (examining potential negative effects of *Kenner* on standing); Hovey & Pill, *supra* note 6, at 13 (analyzing current state of Massachusetts standing laws).

9. *See Kenner*, 944 N.E.2d at 170 (providing obscure aggrievement definition); *see also* Dain, *supra* note 6, at 1 (noting ambiguity in *Kenner* standard).

10. *See Kenner*, 944 N.E.2d at 170 (discussing plaintiff's claim of particularized harm). *See generally* Paul D. Wilson, *"I Don't Live Next Door, But I Do Drive by on the Nearby Highway": Recent Developments in the Law of Standing in Court Cases Challenging Land Use Permits*, 39 URB. LAW. 711 (2007) (comparing various jurisdictions' definitional approaches to particularized harm concept).

11. *See Kenner*, 944 N.E.2d at 166-67 (resolving standing issue in relation to facts of case).

12. *Id.* at 170. The court went on to explain that the new standard is intended to avoid inundating courts with litigation from a large number of plaintiffs who are not, "objectively speaking, truly and measurably harmed." *Id.*

13. *See* Kenner v. Zoning Bd. of Appeals, 944 N.E.2d 163, 169-70 (Mass. 2011) (stating plaintiff would need to show both particularized harm and negative impact on neighborhood).

14. *See* Standerwick v. Zoning Bd. of Appeals, 849 N.E.2d 197, 208 (Mass. 2006) (requiring assertion of

This Note will analyze standing laws in Massachusetts primarily through the lens of view-based harm.[15] Part II.A will include an analysis of basic standing principles within the context of zoning in Massachusetts.[16] Part II.B will analyze pre-*Kenner* standards for standing and their implication on Massachusetts standing jurisprudence.[17] Part II.C will explore *Kenner* and its impact on recent Massachusetts appellate decisions.[18] Part III.A will analyze the problems created by the *Kenner* decision, while clarifying the issue of particularized harm.[19] Finally, Part III.B will include a proposed standard that incorporates the courts' goals for standing, while providing a clear and consistent application.[20]

II. HISTORY

A. Standing Laws in Massachusetts: The Basics

Standing laws in Massachusetts are not derived from the state's constitution, but rather originate in practical judicial considerations and limitations.[21] While the fundamental aim of judicial review is ensuring full review of an individual's legal interests, this goal is balanced with the maximization of judicial efficiency.[22] Thus, for a plaintiff to proceed to the merits of her case, she must first satisfy the requisite standing requirements.[23] Due to the emphasis placed on administrative efficiency, standing laws in Massachusetts are arguably somewhat restrictive, and consequently, these constraints impose a substantial hurdle early on in litigation.[24]

injury "different from the concerns of . . . community" for standing); Barvenik v. Bd. of Aldermen, 597 N.E.2d 48, 51 (Mass. App. Ct. 1992) (noting standing arises out of individual injury separate from community), *abrogated by* Marashlian v. Zoning Bd. of Appeals, 660 N.E.2d 369 (Mass. 1996); *see also* Wilson, *supra* note 10, at 712, 719-21 (examining how Massachusetts case law interprets particularized harm standard).

15. *See infra* Part II.B.3.b (explaining role and concept of view-based harm).

16. *See infra* Part II.A (discussing United States history of zoning and Massachusetts standing laws).

17. *See infra* Part II.B (analyzing *Kenner*'s implications on Massachusetts standing laws).

18. *See infra* Part II.C (exploring *Kenner*'s recent impact on Massachusetts appellate cases).

19. *See infra* Part III (examining major issues created by *Kenner* and clarifying particularized-harm issue within context of view-based harm).

20. *See infra* Part III.B (proposing new standing standard to provide consistent, predictable framework in Massachusetts).

21. *See* Mark Bobrowski, *The Zoning Act's "Person Aggrieved" Standard: From* Barvenik *to* Marashlian, 18 W. NEW ENG. L. REV. 385, 393 (1996) (noting lack of provision in Massachusetts Constitution involving standing). The Massachusetts basis for standing laws differs from the federal context, wherein standing laws are derived from the Case or Controversy Clause of the United States Constitution. *See* U.S. CONST. art. III, § 2, cl. 1 (outlining types of cases federal court may hear).

22. *See* Save the Bay, Inc. v. Dep't of Pub. Utils., 322 N.E.2d 742, 748 (Mass. 1975) (highlighting importance of "preserv[ing] orderly administrative processes and judicial review thereof").

23. *See id.* (requiring party to comply with requirements before court "confer[s] standing").

24. *See* Kenner v. Zoning Bd. of Appeals, 944 N.E.2d 163, 170 (Mass. 2011) (holding more stringent standard needed to achieve efficiency end). In *Kenner*, the SJC stated: "The adverse effect on a plaintiff must be substantial enough to constitute actual aggrievement. . . . To conclude otherwise would choke the courts with litigation over myriad zoning board decisions where individuals plaintiffs have not been, objectively

Massachusetts law provides that "[a]ny person aggrieved by a decision" in an administrative appeal, special permit, or variance proceeding may appeal such decision by filing suit in the appropriate court.[25] Standing is conferred on a limited class of persons whose property interests will be affected, as well as any municipal officer or board.[26] Importantly, standing is not just a technicality, but rather is a key element of all proceedings challenging administrative action.[27] However, the person-aggrieved standard is "not to be narrowly construed."[28]

Massachusetts courts convey a historical trend toward progressively tightening standing laws.[29] Prior to 1992, plaintiffs could gain standing under a fairly generous and predictable standard that reflected courts' desires to heed the warning not to narrowly construe such a standard.[30] In 1992, however, in

speaking, truly and measurably harmed." *Id.* *See generally* Bobrowski, *supra* note 21 (examining restrictive nature of Massachusetts standing laws). In addition, Massachusetts recognizes a narrow interpretation of legally cognizable injuries. *See id.* at 395. For example, federal standing laws recognize "[a]esthetic and environmental well-being" as a sufficient protectable interest for standing. *See* Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (emphasizing these interests, in addition to "economic well-being," as important for quality of life). There is no corresponding equivalent to the *Sierra Club* standard in Massachusetts, as standing strictly hinges on economic or pecuniary harm. *See* Bobrowski, *supra* note 21, at 395 (comparing federal standing to Massachusetts standing).

25. *See* MASS. GEN. LAWS ANN. ch. 40A, § 17 (West 2013) (articulating who may bring suit under administrative action). The aggrieved-person standard is used throughout many jurisdictions in the United States. *See* Cohen, *supra* note 6, at 624 ("The word 'aggrieved' appears in the zoning statutes of many states across the country."). Due to the vagueness of the term "aggrieved," however, the standard is not without its critics. *See id.* at 625-26. The American Planning Association has even sought to expand upon the standard in order to bring clarity to zoning disputes. *See* AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE, at ch. 10 (Stuart Meck ed., 2002) [hereinafter GROWING SMART], *available at* http://www.planning.org/growingsmart/guidebook/print/pdf/chapter10.pdf (attempting to clarify and explain land-use decisions).

26. *See* ch. 40A, § 17 (providing standing requirements); *see also* Martin R. Healy, *Judicial Review of Variances and Special Permits*, *in* 1 MASS. ZONING MANUAL § 11.2.4 (5th ed. 2010), *available at* Westlaw ZONEI MA-CLE 11-1 (detailing aggrievement rule for plaintiffs).

27. *See Save the Bay, Inc.*, 322 N.E.2d at 748 ("[W]hether a party has standing to participate in a judicial proceeding is not simply a procedural technicality but rather involves remedial rights affecting the whole of the proceeding."); Barvenik v. Bd. of Aldermen, 597 N.E.2d 48, 52 n.10 (Mass. App. Ct. 1992) (emphasizing policy reasons for standing doctrine), *abrogated by* Marashlian v. Zoning Bd. of Appeals, 660 N.E.2d 369 (Mass. 1996); Green v. Bd. of Appeals, 529 N.E.2d 159, 166 (Mass. App. Ct. 1988) (discussing rights affected by proceeding), *rev'd*, 536 N.E.2d 584 (Mass. 1989).

28. *See* Marotta v. Bd. of Appeals, 143 N.E.2d 270, 274 (Mass. 1957) (recognizing standard's application not narrow).

29. *See generally* Bobrowski, *supra* note 21 (recounting person-aggrieved standard in Massachusetts case law through 1996). The cumulative effect of modern Massachusetts case law has amounted to an overall stricter approach to standing principles, with the possible exception of the *Marashlian* decision in 1996. *See* Marashlian v. Zoning Bd. of Appeals, 660 N.E.2d 369, 375 (Mass. 1996) (determining plaintiffs had standing under broad-based person-aggrieved standard); *infra* notes 30-36 and accompanying text (exploring evolution of Massachusetts case law regarding person-aggrieved standard).

30. *See* Bobrowski, *supra* note 21, at 406-11 (recounting looser standards of pre-1992 decisions). Bobrowski notes that the pre-1992 appeals court decisions point toward a standard that arguably permitted standing even on the basis of noneconomic injury. *See id.* at 411; *see also* Tsagronis v. Bd. of Appeals, 596 N.E.2d 369, 371-72 (Mass. App. Ct. 1992) (permitting injury based on obstruction of view), *rev'd*, 613 N.E.2d

Barvenik v. Board of Aldermen,[31] the appeals court significantly changed course by narrowing the relevant standards, thereby altering "forty-three years of practice and procedure."[32] Before *Barvenik*, there was an "overwhelming likelihood" that nearby neighbors challenging a special permit would be granted standing.[33] In essence, "*Barvenik* and its progeny removed the predictability from standing."[34]

Barvenik's appellate-level standards remained undisturbed until 1996, when the SJC decided *Marashlian v. Zoning Board of Appeals*.[35] In *Marashlian*, the court appeared to liberalize the strict standards of *Barvenik*; however, although critics initially viewed *Marashlian* as a drastic and confusing liberalization of standing laws, its scope ultimately proved to make only minor adjustments to the existing body of law.[36]

893 (Mass. 1993); Paulding v. Bruins, 470 N.E.2d 398, 399 (Mass. App. Ct. 1984) (determining plaintiffs had standing due to vegetation damage); Butts v. Zoning Bd. of Appeals, 464 N.E.2d 108, 112 (Mass. App. Ct. 1984) (allowing injury based on total loss of water view).

31. 597 N.E.2d 48 (Mass. App. Ct. 1992), *abrogated by* Marashlian v. Zoning Bd. of Appeals, 660 N.E.2d 369 (Mass. 1996).

32. *See* Bobrowski, *supra* note 21, at 411-12 (noting appeals court decided to "firmly reject[] any suggestion . . . that noneconomic harm alone is a sufficient basis for standing."). Importantly, the *Barvenik* court held that a plaintiff

> must provide specific evidence demonstrating a reasonable likelihood that the granting of a special permit will result . . . in his property or legal rights being more adversely affected by the activity authorized by the permit than (a) they are by present uses and activities or (b) they would be as a result of the uses and activities permitted as of right on the defendant's locus.

Barvenik, 597 N.E.2d at 51. Commentator Edward S. Hershfield stated the effect of *Barvenik* as a

> long, but relatively recent, line of cases in which that court has held that subjective and unspecified fears provide no basis for aggrievement and that legitimate zoning-related concerns must be based on specific evidence showing that the plaintiff's interest will be more adversely affected by the challenged project than by a "by right" project.

Hershfield, *supra* note 6, at 15 (noting outcome of *Barvenik* in 1992).

33. *See* Bobrowski, *supra* note 21, at 387-88 (discussing predictability of standing pre-*Barvenik*).

34. *Id.* at 387.

35. 660 N.E.2d 369 (Mass. 1996).

36. *See generally id. Marashlian* effectively reversed the *Barvenik* rule that required a comparison of a proposed injury with an injury that would result from a by-right project. *Id.* at 373-74. Some viewed the decision as a relaxation of the standing requirement, especially in relation to the plaintiff's evidentiary burden when the claim has been challenged; others, however, pointed out that in the practical sense, any change resulting from *Marashlian* was insignificant. *Compare* Hershfield, *supra* note 6, at 27 ("[T]he *Marashlian* decision lowered the threshold for evidence that plaintiffs must submit to withstand a standing challenge."), *with* Bobrowski, *supra* note 21, at 435 ("*Marashlian* can hardly be said to liberalize standing."). There was an immediate reaction to *Marashlian*; "commentator William V. Hovey summarized that the . . . decision shows the very confused state of the law regarding who is an aggrieved person for purposes of challenging a variance . . . ." Bobrowski, *supra* note 21, at 432 (internal quotation marks omitted). As Bobrowski points out, however, *Marashlian* in actuality only slightly changed the "evidentiary focus attending injury in fact" by reducing the *Barvenik* requisite balancing test—comparing as-of-right uses to the negative effect of the proposed use—to "a mere factor" for consideration. *Id.* at 431-33.

*B. Standards for Standing: Pre-*Kenner

1. The Rebuttable Presumption

The SJC has interpreted the notice provision of chapter 40A, section 11 of the Massachusetts General Laws to provide a rebuttable presumption of standing to those individuals who are parties in interest.[37] When a party initially seeks zoning relief, the board of appeals must adhere to various procedural requirements, including giving notice to parties in interest—a category of individuals residing within a specified area of neighboring parcels of land; essentially, abutters to abutters within 300 feet of the subject parcel.[38] This presumption of standing may be challenged by the defendant, who must offer evidence to support the challenge.[39] In the event of a supported challenge, the jurisdictional issue of standing is to be decided based on all the evidence, with no residual benefit to the plaintiff from the presumption.[40]

Once the presumption has been properly rebutted, the plaintiff bears the burden of proof on the issue of standing.[41] This requires that the plaintiff put

37. *See* MASS. GEN. LAWS ANN. ch. 40A, § 11 (West 2013) (outlining zoning relief notice requirements); *see also* Marotta v. Bd. of Appeals, 143 N.E.2d 270, 273 (Mass. 1957) (applying scope of statute's notice requirement to aggrieved-person standard); Bobrowski, *supra* note 21, at 407 (addressing "parties in interest" category of zoning appeals litigation).

38. *See* ch. 40A, § 11 (requiring board give notice to parties in interest). As defined, the "parties in interest" are considered to be "(1) abutters, (2) owners of land directly opposite the locus on any street, and (3) abutters to abutters within 300 feet of the project line. 'Parties in interest' are entitled to notice of the planning board's hearings." Harvard Square Def. Fund, Inc. v. Planning Bd., 540 N.E.2d 182, 186 n.7 (Mass. App. Ct. 1989) (internal citation omitted). A party who is not considered a party in interest may nevertheless establish standing by a showing of a plausible claim of a definite violation of a private right, property interest, or legal interest. *See id.* at 184.

39. *See* Marinelli v. Bd. of Appeals, 797 N.E.2d 893, 896 (Mass. 2003) (discussing sufficient manner to rebut presumption of standing). "It is not enough simply to raise the issue of standing in a [zoning] proceeding . . . . The challenge [to the presumption] must be supported by evidence." Valcourt v. Zoning Bd. of Appeals, 718 N.E.2d 389, 393 (Mass. App. Ct. 1999); *see also Marashlian*, 660 N.E.2d at 372; Watros v. Greater Lynn Mental Health & Retardation Ass'n., 653 N.E.2d 589, 592-93 (Mass. 1995); Barvenik v. Bd. of Aldermen, 597 N.E.2d 48, 50 n.7 (Mass. App. Ct. 1992), *abrogated by* Marashlian v. Zoning Bd. of Appeals, 660 N.E.2d 369 (Mass. 1996). The evidence "must be of a type that is credible and sufficient to rebut the particular claims of injury." 81 Spooner Rd., LLC v. Zoning Bd. of Appeals, 936 N.E.2d 895, 903 (Mass. App. Ct. 2010).

40. *See Barvenik*, 597 N.E.2d at 50 (clarifying state of presumption upon successful rebuttal). The consideration of a plaintiff's position

> does not require that the factfinder ultimately find a plaintiff's allegations meritorious. To do so would be to deny standing, after the fact, to any unsuccessful plaintiff. Rather, the plaintiff must put forth credible evidence to substantiate his allegations. In this context, standing becomes, then, essentially a question of fact for the trial judge.

Marashlian, 660 N.E.2d at 372 (citing Bedford v. Trs. of Bos. Univ., 518 N.E.2d 874, 877 (Mass. App. Ct. 1988)). The aggrieved-person standard is a matter of degree and "call[s] for the exercise of discretion rather than the imposition of an inflexible rule." Paulding v. Bruins, 470 N.E.2d 398, 399 (Mass. App. Ct. 1984) (quoting Rafferty v. Sancta Maria Hosp., 367 N.E.2d 856, 859 (Mass. App. Ct. 1977)).

41. *See* Standerwick v. Zoning Bd. of Appeals, 849 N.E.2d 197, 208 (Mass. 2006) (outlining shift in burden of proof after rebuttable presumption sufficiently challenged).

forth "direct facts" pertaining to aggrievement, and not mere "speculative personal opinion" that the zoning decision will cause her harm.[42] In other words, the evidence must be both quantitatively and qualitatively sufficient.[43] Quantitatively, there must be sufficient evidence of a specific factual nature, in order to adequately set forth "perceptible harm."[44] In the qualitative sense, "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"; mere personal opinion, conjecture, and hypothesis are inadequate to confer standing.[45]

2. Particularized Injury: The "Special and Different" Standard

An accepted and widespread rule of standing—in various legal contexts—is that the harm suffered by the plaintiff must be particularized to her, separate and apart from the concerns of the community.[46] Under the common law, plaintiffs must demonstrate that the harm complained of is a private injury,

42. *Barvenik*, 597 N.E.2d at 51. The practical outcome of such a rigorous evidentiary burden for standing is that plaintiffs are, in essence, required to procure evidence from experts who can show that the plaintiff's alleged injury will, in all likelihood, actually occur. *See* Butler v. City of Waltham, 827 N.E.2d 216, 222 (Mass. App. Ct. 2005) (indicating plaintiffs hired traffic expert to show particularized injury in effort to gain standing). Although using expert testimony is not a formal requirement for standing laws, it is highly unlikely a plaintiff will gain standing without this type of objective basis. *Compare Barvenik*, 597 N.E.2d at 54 n.13 ("[W]e do not intend to suggest that plaintiffs asserting zoning aggrievement can never succeed . . . without producing expert witnesses on their behalf."), *with* Bobrowski, *supra* note 21, at 416-17 ("The issues deemed technical in the trial court cover considerable ground in virtually every zoning appeal. While the court stops short of requiring expert testimony, a prudent plaintiff is left with little option.").

43. *See Butler*, 827 N.E.2d at 222 (discussing ingredients of "credible evidence").

44. *See* Marashlian v. Zoning Bd. of Appeals, 660 N.E.2d 369, 373 (Mass. 1996) (retaining specificity requirement to obtain standing).

45. *Butler*, 827 N.E.2d at 222; *see* Monks v. Zoning Bd. of Appeals, 642 N.E.2d 314, 315 (Mass. App. Ct. 1994) (outlining sufficiency of evidence of proposed injuries). In all, a review of standing based on all the evidence does not require that the fact finder ultimately find a plaintiff's allegations meritorious. *See Marashlian*, 660 N.E.2d at 372 (defining standard after defendant's successful rebuttal of plaintiff's presumption). To do so would be to deny standing, after the fact, to any unsuccessful plaintiff. *See id.* Rather, the plaintiff must put forth credible evidence to substantiate her allegations. *See id.* Standing, then, becomes essentially a question of fact for the trial judge. *See id.*

46. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-63 (1992) (requiring party seeking review suffer personal injury); Miles v. Idaho Power Co., 778 P.2d 757, 762-63 (Idaho 1989) (maintaining party must allege interest other than one common to similarly situated ratepayers); Brown v. Todd, 53 S.W.3d 297, 305 (Tex. 2001) ("The United States Supreme Court has 'consistently stressed that a plaintiff's complaint must establish that he has a "personal stake" in the alleged dispute' and that the injury suffered is 'concrete and particularized.'" (quoting Raines v. Byrd, 521 U.S. 811, 819 (1997))); Hunt v. Bass, 664 S.W.2d 323, 324 (Tex. 1984) ("Standing consists of some interest peculiar to the person individually and not as a member of the general public."); *cf.* William V. Dorsaneo, III, *The Enigma of Standing Doctrine in Texas Courts*, 28 REV. LITIG. 35, 70 (2008) (advocating doctrines of standing and capacity should be "sensibly harmonized"). "The party who invokes the power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). *See generally* Hope M. Babcock, *The Problem with Particularized Injury: The Disjuncture Between Broad-Based Environmental Harm and Standing Jurisprudence*, 25 J. LAND USE & ENVTL. L. 1 (2009) (arguing against using general particularized injury in context of environmental impact).

particular to an individual.[47] Requiring a private injury is derived from constitutional principles, and "[t]he Supreme Court has noted that this factual injury requirement is necessary to preserve the separation of powers by limiting courts to their historical function of resolving only the rights of individuals."[48] While some critics debate both the constitutionality and the appropriateness of such a standard—usually within the context of environmental concerns—the particularized-injury standard is, nevertheless, a fundamental tenet of standing law.[49]

In Massachusetts and other jurisdictions, particularized injury has long been a prerequisite to standing in zoning appeals.[50] A plaintiff must provide evidence to show a violation of a private right, property interest, or legal interest "that is different from that suffered by the community generally."[51] In

47. David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 HARV. ENVTL. L. REV. 79, 94 (2004) (placing particularized-injury notion of standing in context of law of nuisances).

48. F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 275 (2008) (introducing basis of particularized-injury standard).

49. *See generally* Babcock, *supra* note 46 (criticizing use of particularized-injury standard); Cassuto, *supra* note 47 (opposing requirement that plaintiff as opposed to environment suffer injury).

50. *See, e.g.*, Bell v. Zoning Bd. of Appeals, 709 N.E.2d 815, 817 (Mass. 1999) (requiring particularized injury) (citing Barvenik v. Bd. of Aldermen, 597 N.E.2d 48, 51 (Mass. App. Ct. 1992), *abrogated by* Marashlian v. Zoning Bd. of Appeals, 660 N.E.2d 369 (Mass. 1996)); Travis v. Fenton, 782 N.E.2d 1136, 1136 (Mass. App. Ct. 2003) (denying standing where no demonstration that injury to plaintiff differs from that to community); Nickerson v. Zoning Bd. of Appeals, 761 N.E.2d 544, 547 (Mass. App. Ct. 2002) (stating plaintiff's injury must be "particularized"); Avin v. Bd. of Zoning Appeal, 747 N.E.2d 758, 758 (Mass. App. Ct. 2001) (observing plaintiff did not establish specific facts required for standing); Rinaldi v. Bd. of Appeal, 741 N.E.2d 77, 79 (Mass. App. Ct. 2001) (noting standing requirement in relation to zoning appeal); Cohen v. Zoning Bd. of Appeals, 624 N.E.2d 119, 122 (Mass. App. Ct. 1993) (recognizing "specific evidence" needed); Harvard Square Def. Fund, Inc. v. Planning Bd., 540 N.E.2d 182, 184 (Mass. App. Ct. 1989) (reviewing standing requirements); Waltham Motor Inn, Inc. v. LaCava, 326 N.E.2d 348, 353 (Mass. App. Ct. 1975) (noting "general civic interest in the enforcement of the zoning ordinance" insufficient for standing). Jurisdictions other than Massachusetts also impose the particularized-injury standard in zoning cases. *See* Cohen, *supra* note 6, at 647 ("Reviewing the statutory and common law of various jurisdictions, a . . . general observation[] of the 'aggrieved person' standard can be made. . . . [T]he term 'aggrieved,' as used in zoning law, connotes a harm suffered above and beyond that which has been suffered by the general public."). In addition to Connecticut, Georgia, Maryland, and Massachusetts—to name a few—all contain the particularized-injury standard in their respective bodies of zoning law. *See id.* at 643-45.

51. *See Rinaldi*, 741 N.E.2d at 79 (citing Bell v. Zoning Bd. of Appeals, 709 N.E.2d 815, 817 (Mass. 1999), *abrogated by* Marashlian v. Zoning Bd. of Appeals, 660 N.E.2d 369 (Mass. 1996)); *see also Harvard Square Def. Fund, Inc.*, 540 N.E.2d at 184 (examining particularized-injury standard). Standing in zoning cases is derived from the general scheme set out by chapter 40A of the Massachusetts General Laws, wherein there are critical lines of separation drawn between remedies for harmed private individuals and a harmed public. *See* Green v. Bd. of Appeals, 529 N.E.2d 159, 166 (Mass. App. Ct. 1988) (recalling difference in remedies), *rev'd*, 536 N.E.2d 584 (Mass. 1989). As expounded by the court in *Green*, an individual appealing a zoning decision "is suing to protect his private property interests from the indirect, allegedly detrimental effect of the project contemplated by the special permit or variance." *Id.* By contrast, "[t]he *enforcement* proceeding . . . is the statutory replacement for the traditional mandamus action, by which residents and citizens generally, having no standing in their own right to proceed against violators of the law, could compel public officials charged with the responsibility of enforcing the law to do so." *Id.* (emphasis added).

other words, the plaintiff's injury must be "special and different."[52] In addition, the particularized injury must be based in fact, and may not be the result of mere speculation or conjecture.[53]

3. Protectable Interests

The aggrieved-person standard only protects those interests that the various zoning laws seek to protect.[54] Therefore, yet another component of standing to appeal zoning-board decisions is the requirement that the specified zoning consideration be one that is protected under either chapter 40A of the Massachusetts General Laws, or local bylaws set forth by the municipal authority in the plaintiff's community.[55] Accordingly, standing is limited to those with "legitimate" zoning concerns, such as parking problems, increased traffic, or potential for litter.[56] Without such a stated zoning consideration, which must then be supported by evidence, the plaintiff will be unable to gain standing and, as a result, will be unsuccessful in contesting the zoning decision.[57]

Massachusetts courts have opted to recognize, as a general matter, only a narrow category of protected zoning-related injuries.[58] While the federal-court

52. *See Nickerson*, 761 N.E.2d at 547 ("particularized" and "special and different" injury required for plaintiff rather than injury to community); Barvenik v. Bd. of Alderman, 597 N.E.2d 48, 51 (Mass. App. Ct. 1992) ("[The] injury [must be] special and different from the concerns of the rest of the community."), *abrogated by* Marashlian v. Zoning Bd. of Appeals, 660 N.E.2d 369 (Mass. 1996); *see also Travis*, 782 N.E.2d at 1136 (denying standing where plaintiff fails to demonstrate injury different from community as "prerequisite for standing").

53. *See supra* Part II.B.1 (clarifying sufficient level of objectiveness required by Massachusetts standing laws).

54. *See* Healy, *supra* note 26, § 11.5.2(f) ("Even if a plaintiff can show some injury, he or she is not a 'person aggrieved' unless the injury proved is within the 'scope of concern' of the zoning provisions at issue."). Essentially, in order to satisfy the person-aggrieved standard, "the plaintiff must have a legal right to complain of the injury alleged." *Id.*

55. *See* MASS. GEN. LAWS ANN. ch. 40A (West 2013) (providing general zoning scheme and procedural requirements); *see also* Kenner v. Zoning Bd. of Appeals, 944 N.E.2d 163, 169 (Mass. 2011) ("The right or interest asserted by a plaintiff claiming aggrievement must be one that [chapter 40A] is intended to protect." (citing Standerwick v. Zoning Bd. of Appeals, 849 N.E.2d 197, 204 (Mass. 2006))).

56. *See Barvenik*, 597 N.E.2d at 51 (noting permissible interests protected by general zoning scheme in Massachusetts).

57. *See supra* note 55 (detailing standing requirement of protectable interests under applicable zoning schemes).

58. *See* Barvenik v. Bd. of Alderman, 597 N.E.2d 48, 51 (Mass. App. Ct. 1992), *abrogated by* Marashlian v. Zoning Bd. of Appeals, 660 N.E.2d 369 (Mass. 1996). *Barvenik* states that the plaintiff

> must provide specific evidence demonstrating a reasonable likelihood that the granting of a special permit will result, if not in a diminution in the value of his property, at least in his property or legal rights being more adversely affected by the activity authorized by the permit than (a) they are by present uses and activities or (b) they would be as a result of the uses and activities permitted as of right on the defendant's locus.

Id. at 51; *see* Bobrowski, *supra* note 21, at 387 (reiterating appeals court "equat[es] injury with diminution in

system expands the reach of potential interests to include noneconomic injury suffered by a plaintiff, the SJC has chosen instead to entertain only those zoning considerations that implicate a definite economic or pecuniary interest.[59] As a general rule, Massachusetts courts do not confer standing on those who wish to challenge a zoning decision solely on the basis of such aesthetic considerations as views, neighborhood appearance, neighborhood ambiance, or architectural styles.[60] The reason for this is suggested in *Save the Bay, Inc. v. Department of Public Utilities*,[61] wherein the court states that standing "is not simply a procedural technicality but rather involves [broad] remedial rights . . . . [W]hether a party is properly before a tribunal to invoke its judicial powers affects the good order and efficiency with which the matter proceeds."[62] Although there are myriad conceivable legitimate zoning interests and economic and pecuniary injuries that may be raised, their full recitation here is unnecessary.[63] Two harms in particular—diminution in property value and visual impact—are examined in some detail below for purposes of this Note.[64]

a. Diminution in Property Value

A plaintiff may not plead injury solely on the basis of diminution in property value.[65] While the diminution in a property's value is considered an economic injury, and thus potentially protected by Massachusetts zoning laws, such diminution must be shown to be "derivative of or related to cognizable interests

value").

59. *See Barvenik*, 597 N.E.2d at 51 n.9 (noting federal standing laws more expansive than in Massachusetts). Federal laws potentially find harm to noneconomic interests that do not implicate private legal rights or property interests. *See id.*; *see also* Grp. Ins. Comm'n v. Labor Relations Comm'n, 408 N.E.2d 851, 857 (Mass. 1980) (pointing to broad federal standing laws); Mass. Ass'n of Indep. Ins. Agents & Brokers v. Comm'r of Ins., 367 N.E.2d 796, 800-01 (Mass. 1977) (extending standing to agents and brokers, rather than just insurers); S. Shore Nat'l Bank v. Bd. of Bank Incorporation, 220 N.E.2d 899, 901-02 (Mass. 1966) (conferring standing where competitive position threatened); *supra* note 30 (discussing pre-1992 appellate court cases suggesting noneconomic harm sufficient basis for standing).

60. *Barvenik*, 597 N.E.2d at 51 (holding aesthetic considerations "insufficient bases" for aggrievement). Concerns "involving the expression of aesthetic views and speculative opinions, do not establish a plausible claim of a definite violation of a private right, property interest, or legal interest sufficient to bring any . . . plaintiff[] within the zone of standing." Harvard Square Def. Fund, Inc. v. Planning Bd., 540 N.E.2d 182, 185 (Mass. App. Ct. 1989).

61. 322 N.E.2d 742 (Mass. 1975) (reasoning standing requirement necessary to promote efficiency of judicial system).

62. *Id.* at 748.

63. *See supra* Part II.B.3 (setting forth general rules regarding protectable interests under applicable zoning schemes).

64. *See infra* Part II.B.3.b (discussing limited option of gaining standing in context of view-based harm).

65. *See, e.g.*, Standerwick v. Zoning Bd. of Appeals, 849 N.E.2d 197, 207 (Mass. 2006) ("A claim of diminution of property values must be derivative of or related to cognizable interests protected by the applicable zoning scheme."); Circle Lounge & Grille v. Bd. of Appeal, 86 N.E.2d 920, 922-23 (Mass. 1949) ("An owner has no strictly private right in the enforcement of zoning regulations . . . ."); Tranfaglia v. Bldg. Comm'r, 28 N.E.2d 537, 541 (Mass. 1940) (stating zoning laws not designed for preservation of economic value of property).

protected by the applicable zoning scheme."[66] It is important to observe that although diminution in property value is a potentially recoverable injury under the state's zoning laws, it is not a necessary requirement for standing.[67] In a similar vein to the standards noted above, when a plaintiff claims a diminution in property value, she must establish that diminution with specific and direct evidence.[68]

b. Visual Concerns

Generally, visual concerns are deemed to be within the broad category of aesthetic considerations, and accordingly, are an insufficient basis for aggrievement.[69] In recent years, however, Massachusetts courts have decided to carve out a narrow exception to this general rule, as it pertains specifically to diminished views.[70] Essentially, the courts allow aggrieved-person standing on this basis when the local zoning bylaw explicitly provides for the protection of views.[71] However, the case law is not clear on precisely what the bylaw must

66. *See Standerwick*, 849 N.E.2d at 207; *see also* Cent. St., LLC v. Zoning Bd. of Appeals, 868 N.E.2d 1245, 1250 (Mass. App. Ct. 2007) (determining diminished property values derivative of infringement of frontage requirement); Tsagronis v. Bd. of Appeals, 596 N.E.2d 369, 371 (Mass. App. Ct. 1992), *rev'd*, 613 N.E.2d 893 (Mass. 1993). Zoning regulations are "not designed for the preservation of the economic value of property, except in so far as that end is served by making the community a safe and healthy place in which to live." *Tranfaglia*, 28 N.E.2d at 541.

67. *See* Dwyer v. Gallo, 897 N.E.2d 612, 617 (Mass. App. Ct. 2008) (stating diminution in property value of the property "not a sine qua non of standing"); *see also* Healy, *supra* note 26, § 11.5.2(f) ("[W]here plaintiff can show cognizable harm, the fact that she cannot show a diminution in her property's value . . . is not dispositive.").

68. *See* Sheppard v. Zoning Bd. of Appeal, 903 N.E.2d 593, 596 (Mass. App. Ct. 2009) (holding plaintiff's own allegation of diminished value insufficient without more support).

69. *See, e.g.*, Sheehan v. Zoning Bd. of Appeals, 836 N.E.2d 1103, 1107 (Mass. App. Ct. 2005) (recognizing visual-impact concerns not sufficient to confer standing); Denneny v. Zoning Bd. of Appeals, 794 N.E.2d 1269, 1273 & n.8 (Mass. App. Ct. 2003) (holding anticipation of aesthetic deterioration does not establish standing); Barvenik v. Bd. of Aldermen, 597 N.E.2d 48, 51 (Mass. App. Ct. 1992) (reasoning possible impairment of aesthetics or appearance insufficient basis for aggrievement), *abrogated by* Marashlian v. Zoning Bd. of Appeals, 660 N.E.2d 369 (Mass. 1996); Harvard Square Def. Fund, Inc. v. Planning Bd., 540 N.E.2d 182, 185 (Mass. App. Ct. 1989) (holding matters involving "expression of aesthetic views and speculative opinions" not plausible for standing claim).

70. *See, e.g.*, Martin v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 747 N.E.2d 131, 136 (Mass. 2001) (determining tower visible from almost every window of plaintiff's home provided basis for standing); *Sheehan*, 836 N.E.2d at 1107 (affording standing where bylaw created "additional protected environmental, harbor view, and conservation interests"); Monks v. Zoning Bd. of Appeals, 642 N.E.2d 314, 316 (Mass. App. Ct. 1994) (holding standing proper pursuant to bylaw protecting "visual character or quality of the neighborhood").

71. *See supra* note 70 (listing cases where bylaw created protection for visual impacts). In *Martin*, for example, the applicable bylaw stated: "'Special Permits shall be granted . . . after consideration of the following preferred qualities, among other things: . . . . (c) Visual Consequences. (1) Views from public ways and developed properties should be considerately treated in the site arrangement and building design.'" *Martin*, 747 N.E.2d at 136 n.14 (quoting section 7.4.2 of Belmont's zoning bylaws). In *Monks*, the bylaw at issue read: "'[A] special permit [will be issued] . . . after a finding by the board that . . . the proposed structure will not in any way detract from the visual character or quality of the adjacent buildings, the neighborhood or the town as a whole.'" *Monks*, 642 N.E.2d at 315 (quoting section 300.09 of Plymouth's zoning bylaws).

state in order to give views protected status, and consequently, the degree to which diminished views can provide a basis for standing is a "battleground issue in zoning litigation."[72]

C. *The* Kenner *Line of Cases*

1. *The* Kenner *Decision*

In *Kenner v. Zoning Board of Appeals*,[73] the SJC sought to further tighten the scope of standing laws in Massachusetts.[74] The court demonstrated concern over standing laws becoming exceedingly permissive and accordingly attempted to fashion a heightened standard that would avoid "chok[ing] the courts with litigation over myriad zoning board decisions."[75] Although trial courts are the "legitimate gatekeepers" of zoning litigation, the revised standard the courts must adhere to is an imprecise one.[76] In addition, the *Kenner* decision may have made changes to the doctrine of particularized injury, as well as the existing standards of view-based harm, as discussed below.[77]

a. *The Facts*

The Chatham Zoning Board of Appeals granted a special permit to Louis and Ellen Hieb in June 2006.[78] The permit would allow the Hiebs to reconstruct their existing property in a manner that would utilize pilings, so as to lift the house above the flood plain.[79] The result would render the house seven feet taller than its existing height and the plaintiffs, Brian and Carol Kenner, brought an appeal in the Massachusetts Land Court contesting the issuance of the permit.[80] The Kenner property is located directly across the

72. Dain, *supra* note 6, at 6.

73. 944 N.E.2d 163 (Mass. 2011).

74. *See generally* Dain, *supra* note 6 (examining *Kenner*'s impact on standing law in Massachusetts). According to Dain, every three to four years the SJC reexamines standing laws as they relate to "project-opponent" zoning appeals, with *Kenner* being the latest addition. *See id.*

75. *See Kenner*, 944 N.E.2d at 170 (attempting to avoid litigation by those not "truly and measurably harmed"). *See generally* Dain, *supra* note 6 (tracking court's apparent rationale in fashioning heightened standard). In creating the person-aggrieved standard, the Massachusetts legislature decided "courts should not be available as a quasi-super-zoning body." *Id.* In this sense, the *Kenner* court was aiming to reign in the current scope of standing laws and reinstate the fundamental structure of zoning regulation. *See generally Kenner*, 944 N.E.2d 163.

76. *See* Dain, *supra* note 6, at 1 (noting practical impact of raised standard for zoning-appeal standing).

77. *See Kenner*, 944 N.E.2d at 167-70 (considering issue of standing "based on obstruction of ocean view").

78. *Id.* at 166.

79. *See* Dain, *supra* note 6, at 1.

80. *See* Kenner v. Zoning Bd. of Appeals, 944 N.E.2d 163, 166 (Mass. 2011) (outlining results of proposed reconstruction of Hieb property). The basis of the appeal included loss of water views, diminution in property value, blockage of light and "ocean breezes," and neighborhood traffic issues. *Id.* The Hiebs challenged the Kenners' standing with rebuttal evidence including architectural drawings, photographs, and testimony by an engineer. *Id.* at 168 (outlining manner in which Hiebs sought to rebut presumption of

road from the Hieb property, and is situated such that the Hieb property lies between the Atlantic Ocean and the Kenner property.[81] The primary bases for the Kenners' appeal were loss of water views and diminution in property value stemming from the increased height of the Hieb property.[82]

The Massachusetts Land Court judge concluded that the Kenners lacked standing to bring suit after the Hiebs successfully rebutted their presumption.[83] The basis of his conclusion was that the Kenners failed to present "credible evidence to substantiate their particularized claims" of injury on the issue of diminution in property value.[84] As to the contention of water-view loss, the judge conceded this was a protectable interest and constituted "individualized harm"; however, he concluded that the extent of loss of views was de minimis and thus "not sufficient to confer standing."[85] The Kenners appealed the decision to the Massachusetts Appeals Court, where it was reversed in an unpublished memorandum.[86]

b. The SJC's Interpretation

In considering the Kenners' contention regarding view-based harm, the court looked primarily toward a 2001 case wherein the SJC recognized an exception to the general prohibition against view-based zoning concerns.[87] Under this exception, claims of view-based harm are permitted when the local zoning bylaws specifically protect views; however, the court there did not articulate what, exactly, a municipal bylaw must say in order to convert the protection of

standing).

81. *Id.* The Kenner property is located on a slight incline from the Hieb property. *See* Dain, *supra* note 6, at 1 (providing additional details regarding Kenner and Hieb properties at issue).

82. *See Kenner*, 944 N.E.2d at 166-67.

83. *See id.*; *supra* note 80 and accompanying text (examining evidentiary basis of Hiebs' challenge); *see also supra* note 39 and accompanying text (detailing standard for challenging standing in zoning claims).

84. *Kenner*, 944 N.E.2d at 166. In addition, the land-court judge dismissed the contentions of traffic issues and blockage of light and "ocean breezes" as both "speculative" and "generalized"—or in other words, insufficiently particularized to the Kenners. *Id.*

85. *Id.* at 167 (recounting basis of land-court decision). The land-court judge found the claim of diminished views to constitute a particularized injury because the Chatham zoning bylaw states that the board "shall consider, among other things, the '[i]mpact of scale, siting and mass on neighborhood visual character, including views, vistas and streetscapes.'" *See id.* at 169 (quoting applicable Chatham zoning bylaw).

86. Kenner v. Zoning Bd. of Appeals, 944 N.E.2d 163, 166 (Mass. 2011) (outlining procedural history of case). The appeals court reversed the decision on the basis that the land court should have ended its analysis once it found the acceptable claim of aggrievement—loss of water views. *See generally* Kenner v. Zoning Bd. of Appeals, No. 09-P-551, 2010 WL 335577 (Mass. App. Ct. 2010), *vacated*, 944 N.E.2d 163 (Mass. 2011).

87. *See Kenner*, 944 N.E.2d at 169 (citing Martin v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 747 N.E.2d 131 (Mass. 2001)). As previously noted, courts in general have held that aesthetic or view-based harms are not the concern of zoning. *See supra* Part II.B.3.b. However, the *Martin* court carved out an exception to this general rule, which depends on whether a town, through the language in its bylaws, decides to protect "Visual Consequences." *See* Martin v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 747 N.E.2d 131, 136 (Mass. 2001).

views into a local zoning concern.[88] At first, the *Kenner* court seemed to indicate that the general language of Chatham's bylaw—protecting neighborhood views as opposed to views from private homes—afforded a plaintiff standing on this basis.[89] The court then went on to clarify that such language might afford standing so long as the plaintiff could show not only a particularized injury to his property, *but also* "detrimental impact on the neighborhood's visual character."[90] Confusingly, however, the court states later in the opinion, "the Kenners' view of the ocean is not an interest protected by the town of Chatham's zoning bylaw."[91] This discrepancy becomes important when the court concludes that the Kenners' claim of diminution in property value fails because views are not a protected zoning interest in Chatham.[92]

Finally, the *Kenner* court created a heightened standard with which to measure the degree of harm suffered by a plaintiff appealing a zoning decision.[93] Essentially, the court held that a differentiation must be made between a mere "impact" on a plaintiff from a proposed project, and a risk of actual injury.[94] The new standard was articulated as the following: "The adverse effect on a plaintiff must be substantial enough to constitute actual aggrievement such that there can be no question that the plaintiff should be afforded the opportunity to seek a remedy."[95] The court's rationale for tightening the standard was to maximize efficiency and prevent the inundation of zoning cases in the Massachusetts court system.[96]

88. *See Martin*, 747 N.E.2d at 136; Dain, *supra* note 6 (noting while *Martin*'s bylaw language successfully conferred standing on plaintiffs, court did not clarify contours of what particular language will "transform" visual considerations into protectable interest); *see also supra* note 71 (setting forth specific language of *Martin*'s local bylaw); *supra* Part II.B.3.b (discussing Massachusetts standing law as it pertains to visual concerns). The *Martin* court found it sufficient that the bylaw simply took into consideration the "visual consequences" of any proposed structure. *See Martin*, 747 N.E.2d at 136 & n.14.

89. *See Kenner*, 944 N.E.2d at 169; *see also supra* note 85 (quoting Chatham zoning bylaw).

90. *Kenner*, 944 N.E.2d at 169-70.

91. *Id*. at 171. It is important to note that this statement would mean that the Chatham bylaw's language is insufficient to confer standing because of a view-based impact. *See id.*

92. Kenner v. Zoning Bd. of Appeals, 944 N.E.2d 163, 171 (Mass. 2011). The court pointed out that diminution in property value may provide a basis for standing "only where it is 'derivative of or related to cognizable interests protected by the applicable zoning scheme.'" *See id.* (quoting Standerwick v. Zoning Bd. of Appeals, 849 N.E.2d 197, 207 (Mass. 2006)). Accordingly, the diminution here was held not to apply because it was derived from loss of views—an interest apparently not protected by the Chatham zoning scheme. *See id*. The court also agreed with the land-court judge that even if the views were protected, the degree of loss was de minimis, and therefore any diminution in value would be correspondingly so. *See id.*

93. *See id.* (setting forth standard).

94. *See id.* at 170 ("[T]he analysis is whether the plaintiffs have put forth credible evidence to show that they will be injured or harmed by proposed changes to an abutting property, not whether they simply will be 'impacted' by such changes."); *see also* Dain, *supra* note 6, at 6 (discussing *Kenner*'s distinction between "impact" versus "actual injury").

95. *Kenner*, 944 N.E.2d at 170.

96. *See id.* ("To conclude otherwise would choke the courts with litigation over myriad zoning board decisions where individual plaintiffs have not been, objectively speaking, truly and measurably harmed.").

2. *The* Marhefka *and* Schiffenhaus *Decisions*

Marhefka v. Zoning Board of Appeals[97] was decided almost exactly two months after *Kenner*.[98] In *Marhefka*, the Massachusetts Appeals Court considered a case involving a plaintiff's loss of water views.[99] The town of Sutton's applicable zoning bylaws regulated both density of use and acceptable dimensions of lots.[100] In setting such lot space requirements, the bylaws used the phrase "visual buffer" when describing the word "yard."[101] The court reasoned that the bylaws' "extensive" regulation of density and dimensions of lots represented an aim to "preserve open space"; therefore, when coupled with the "visual buffer" wording in the definition of "yard," this underlying goal permitted the inference that the town of Sutton intended to protect the zoning interest of water views.[102] It is important to note that there was no indication that the Sutton zoning bylaw made explicit reference to the protection of views.[103] The court's attenuated conclusion, notwithstanding the absence of explicit protection of views, stands at odds with general principles of standing laws in Massachusetts, as well as with *Kenner*.[104]

Third and final in the pertinent *Kenner* line of cases is *Schiffenhaus v. Kline*.[105] Here, the issue pertained to the proposed alteration of a nonconforming lot in the town of Truro.[106] In regard to standing, the court

97. 947 N.E.2d 1090 (Mass. App. Ct. 2011).

98. *See generally id.* (providing *Marhefka* decided on May 13, 2011 and *Kenner* decided on March 11, 2011).

99. *See id* at 1091-92 (summarizing procedural history and issues before court). Sutton's zoning board of appeals granted a variance to Roseanne LaBarre and John Scott that allowed them to build a garage on their property. *Id.* at 1091. The plaintiffs, Robert and Linda Marhefka, challenged the grant on the basis of loss of view of an adjacent pond. *Id.* at 1091-92. The land-court judge concluded that the plaintiffs failed to establish a basis for standing, because they did not allege a violation of an interest protected by the Sutton bylaw. *Id.* at 1091-92. The injury claimed by the plaintiffs, loss of view, was considered to be an insufficient basis for standing by the judge, because views are not explicitly protected under the bylaw. *Id.* at 1091; *see infra* notes 100-02 (describing potential interests protected by bylaw and quoting bylaw language). The plaintiffs appealed the decision for review. *Marhefka*, 947 N.E.2d at 1092.

100. *Marhefka*, 947 N.E.2d at 1094. The Sutton bylaw "extensively" regulates both the density of use and the dimensions of lots; for example, the applicable zone allows maximum lot coverage of ten percent, and fifty-foot minimum of front and rear setback. *Id.* at 1091, 1094.

101. *See id.* at 1094. The bylaw describes a "yard" as: "'An undeveloped, naturally vegetated and/or landscaped strip . . . along the full length of a lot line on the same lot as a permitted structure and/or use . . . . Said yard is intended to provide aesthetic value as well as serve as a spatial and *visual buffer* between lots.'" *Id.* (emphasis added) (quoting Sutton's local zoning bylaw).

102. *See id.* ("The view injury . . . relates to protected density and dimensional interests. The by-law identifies open space and describes 'yard' in such a manner as to make protection of view an implicit [protected] interest."); *see also* Dain, *supra* note 6, at 1, 6 (noting reasoning of court in *Marhefka*).

103. *See* Marhefka v. Zoning Bd. of Appeals, 947 N.E.2d 1090, 1094 (Mass. App. Ct. 2011) (detailing text of bylaw).

104. *See supra* Part II.B.3 (discussing various protectable zoning interests recognized in Massachusetts). *See generally* Kenner v. Zoning Bd. of Appeals, 944 N.E.2d 163 (Mass. 2011) (disfavoring implications and inferences in its more rigorous standard).

105. 947 N.E.2d 1133 (Mass. App. Ct. 2011).

106. *Id.* at 1136. The codefendant, Donald Kline, obtained a building permit for work on his property

determined that because the defendants failed to proffer sufficient evidence rebutting the presumption of aggrievement, the plaintiffs retained standing.[107] More significantly, the court stated as the rule the *Kenner* court's suggestion that plaintiffs may establish standing on the basis of loss of view, if they can show both a particularized harm to their property *and* a "detrimental impact" to the community's "visual character."[108] The court explained that the zoning bylaws "incorporate by reference" Truro's comprehensive plan, which contains broad protection of views language; accordingly, if the plaintiffs demonstrate a particularized injury to their property and a "'detrimental impact on the neighborhood's visual character,'" they may gain standing.[109]

III. ANALYSIS

A. An Examination of Kenner

I will now analyze the key components of *Kenner* in order to effectively shed light on the inconsistencies found in recent appellate decisions.[110] Fundamentally, the most problematic part of *Kenner* is centered on the zoning issue of view-based harm.[111] Within this central matter, the SJC's treatment of the basic zoning principle of particularized injury is implicated, thereby causing evident ripple effects in subsequent case law.[112] In addition, and perhaps less

from the Truro board of appeals. *Id.* at 1134. Under the Truro bylaws, a conforming property may have "a single family residence and a 'habitable studio.'" *Id.* at 1134-35 (quoting phrase from Truro bylaws). Kline's property had contained a small house "for many years" that predated the current dimensional requirements; therefore, the property was considered lawfully nonconforming. *Id.* at 1136 (meaning small house lawful although property did not conform to zoning bylaw). Kline wished to convert the existing house into a "'habitable studio.'" *Id.* The land-court judge concluded not only that the defendants failed to rebut the plaintiffs' presumption of standing, but also that the plaintiffs "cannot base a claim of aggrievement on impairment of view." *Id.* at 1135. The defendants appealed the decision. *Id.*

107. *Id.* The court then went on to observe that because standing is a "prerequisite for judicial review," the defendants could still challenge the judge's finding on remand, "based as it is on the defendants' failure to rebut the presumption." *Id.*

108. *See id.* at 1135-36 (quoting Kenner v. Zoning Bd. of Appeals, 944 N.E.2d 163, 170 (Mass. 2011)); *see also supra* Part II.C.1.b (discussing *Kenner*). The court focused on the land-court judge's conclusion that the plaintiffs may not base a claim of aggrievement on impairment of views due to the fact that the issue of standing on remand may be in contention. *Schiffenhaus*, 947 N.E.2d at 1135. It also addressed a variety of additional legal principles and doctrines not pertinent to the analysis here, and thus omitted as beyond the scope of this Note. *See id.* at 1136-37 (discussing legal doctrines of mootness and alteration).

109. *Schiffenhaus*, 947 N.E.2d at 1135-36 (quoting Kenner v. Zoning Bd. of Appeals, 944 N.E.2d 163, 170 (Mass. 2011)). The Truro comprehensive plan "contains the following statement: 'Long and broad *vistas*, *sights* of harmonious and distinctive architecture, and *views* of historic and culturally important sites are part of the heritage of Truro. *These resources need to be cared for and preserved* . . . .'" *Id.* (quoting Truro's comprehensive plan).

110. *See generally* Kenner v. Zoning Bd. of Appeals, 944 N.E.2d 163 (Mass. 2011); *Schiffenhaus*, 947 N.E.2d 1133; Marhefka v. Zoning Bd. of Appeals, 947 N.E.2d 1090 (Mass. App. Ct. 2011).

111. *See generally* Schiffenhaus v. Kline, 947 N.E.2d 1133 (Mass. App. Ct. 2011); *Marhefka*, 947 N.E.2d 1090.

112. *See generally Marhefka*, 947 N.E.2d 1090 (making inappropriate inferential step in reasoning to allow claim of loss of views); *see also Schiffenhaus*, 947 N.E.2d at 1135-36 (stating particularized-injury

importantly, *Kenner*'s attempt to articulate a new general standard for standing laws in Massachusetts has created potential confusion for courts and practitioners.[113] The court appeared to intend to ratchet up the standard, but then failed to convey the manner in which this potentially increased standard is to be measured.[114]

1. Kenner*'s Potentially Erroneous Treatment of Particularized Injury and Its Effects*

The most troubling aspect of *Kenner* arises when the court addresses the issue of what language a zoning bylaw must use in order to render diminished views, or view-based harm, a protectable zoning interest.[115] Prior case law, to that point, was unclear on this front, and it appears that the *Kenner* court sought to clarify the requisite standard.[116] In doing so, however, the SJC potentially altered a well-settled and uncontroversial principle of basic standing law: the standard of particularized injury.[117] I say "potentially" because at least one critic has voiced the opinion that it would seem as though the court then went on to inconspicuously "reverse course" towards the end of the opinion.[118] If this reversal definitively represented the holding of the case, the matter would end there; however, at least one appellate decision has instead stated the *Kenner* court's initial reinterpretation of the existing particularized-injury standard as the rule.[119]

standard as rule); Dain, *supra* note 6, at 6 ("Since *Kenner* was decided, there have already been two Appeals Court standing decisions concerning views that demonstrate that further guidance from the SJC may be needed.").

113. *See Kenner*, 944 N.E.2d at 170 ("The adverse effect on a plaintiff must be substantial enough to constitute actual aggrievement such that there can be no question that the plaintiff should be afforded the opportunity to seek a remedy."). This ambiguous articulation of the standard, which lacks any meaningful or practical directives, is, arguably, confusing for those seeking to apply the standard. *See id.*

114. *See id.* (utilizing subjective language in articulating standard for plaintiff to seek remedy).

115. *See id.* at 169-70 (considering case law where visual harm found as protectable interest).

116. *See* Dain, *supra* note 6, at 1 (noting court left unclear what bylaws must say to transform protected views into local zoning concern). *See generally* Martin v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 747 N.E.2d 131 (Mass. 2001) (considering when view-based protection affords standing in zoning appeals); Sheehan v. Zoning Bd. of Appeals, 836 N.E.2d 1103 (Mass. App. Ct. 2005) (evaluating standing where bylaw created protection for harbor view and aesthetic interests); Monks v. Zoning Bd. of Appeals, 642 N.E.2d 314 (Mass. App. Ct. 1994) (allowing standing where bylaw conditioned grant on not detracting from visual character or neighborhood quality).

117. *See* Kenner v. Zoning Bd. of Appeals, 944 N.E.2d 163, 169-70 (Mass. 2011) (incorporating possible additional component of showing community harm to particularized-injury standard).

118. *See* Dain, *supra* note 6, at 6 (noting apparent change in court's conclusions); *see also Kenner*, 944 N.E.2d at 171 ("[T]he Kenners' view of the ocean is not an interest protected by the town of Chatham's zoning bylaw . . . .").

119. *See* Schiffenhaus v. Kline, 947 N.E.2d 1133, 1135-36 (Mass. App. Ct. 2011) (quoting *Kenner*'s first iteration of what plaintiff must show to gain standing); *see also supra* notes 90-91 and accompanying text (discussing potentially conflicting statements in *Kenner*); *infra* notes 128-29 and accompanying text (pointing out *Schiffenhaus*'s use of *Kenner*'s language that effectively alters particularized-injury standard). Because *Schiffenhaus* has stated the rule as such, it is likely that more courts will follow suit. *See Schiffenhaus*, 947

It is well settled that in order for a plaintiff to gain standing, she must have suffered an injury that was particular to her, "special and different" from the greater community.[120] The *Kenner* court even recites this oft-quoted language at the outset of its view-based-harm analysis.[121] Nevertheless, in an abrupt about-face, the SJC then went on to state that for a plaintiff to achieve standing, based on the Chatham zoning bylaw, she "would need to show a particularized harm to the plaintiff's own property *and* a detrimental impact on the neighborhood's visual character."[122] This conclusion might have been derived from the court's possible decision to require language in the local bylaws regarding protection of views for both private properties and the general community in order to render diminished views a protectable interest.[123] In yet another shift, the court then unobtrusively tucks the following statement in at the end of the opinion: "[T]he Kenners' view of the ocean is not an interest protected by the town of Chatham's zoning bylaw."[124]

Taken together, these statements generate considerable confusion, prompting the question of whether the court actually intended to require the plaintiff to show both individual and community harm in order to gain standing, or whether the court was speaking hypothetically.[125] Additionally, the question remains as to whether the court's goal was to require both individual and community language in a local zoning bylaw in order to effectively render view-based harm as a protectable interest.[126] Although the latter question has not yet arisen since *Kenner*, the former was certainly presented in at least one

N.E.2d at 1135-36 (relying on *Kenner*'s particularized-injury statement for standing).

120. *See* Standerwick v. Zoning Bd. of Appeals, 849 N.E.2d 197, 208 (Mass. 2006) (quoting Barvenik v. Bd. of Aldermen, 597 N.E.2d 48, 51 (Mass. App. Ct. 1992) (noting standing arises out of individual injury separate from community), *abrogated by* Marashlian v. Zoning Bd. of Appeals, 660 N.E.2d 369 (Mass. 1996)); *see also supra* Part II.B.2 (analyzing particularized-injury standard in Massachusetts standing laws). Many jurisdictions throughout the United States specifically utilize the particularized-injury standard in the context of standing. *See* Cohen, *supra* note 6, at 642-47 (highlighting particularized-injury standard and outlining various jurisdictions using standard).

121. *See Kenner*, 944 N.E.2d at 167 ("'Once the presumption is rebutted, the burden rests with the plaintiff to prove standing [i.e. aggrievement], which requires that the plaintiff "establish—by direct facts and not by speculative personal opinion—that his injury is special and different from the concerns of the rest of the community."'" (quoting Standerwick v. Zoning Bd. of Appeals, 849 N.E.2d 197, 208 (Mass. 2006) (quoting Barvenik v. Bd. of Aldermen, 597 N.E.2d 48 (Mass. App. Ct. 1992)))).

122. *See Kenner*, 944 N.E.2d at 169-70 (emphasis added) (citing Monks v. Zoning Bd. of Appeals, 642 N.E.2d 314, 316 (Mass. App. Ct. 1994)).

123. *See* Kenner v. Zoning Bd. of Appeals, 944 N.E.2d 163, 169-70 (Mass. 2011). This conclusion is, however, decidedly unclear; the court's reasoning in *Kenner* is not explicit, and it is not apparent whether the court is fashioning a language requirement in a local zoning bylaw, altering the existing particularized-injury standard, or speaking altogether hypothetically. *See id.* at 167-71.

124. *See id.* at 171 (stating overall conclusions of case).

125. *See supra* text accompanying notes 122-24 (discussing inconsistency between statements of SJC in *Kenner*).

126. *See Kenner*, 944 N.E.2d at 169-71 (analyzing Chatham's zoning bylaws in relation to existing case law); *see also supra* text accompanying notes 122-24 (noting unclear and inexplicit nature of court's reasoning).

appellate court decision—*Schiffenhaus*.[127] In *Schiffenhaus*, the court stated the rule—as they interpreted it—that "plaintiffs 'would need to show a particularized harm to [their] own property and a detrimental impact on the neighborhood's visual character.'"[128] Thus, it would appear that courts might not interpret *Kenner* as expounding in the abstract; but rather as stating a definitive rule—one that fundamentally alters the established standard of particularized harm.[129]

This apparent alteration of the standard of particularized harm creates the practical difficulty of attempting to prove "harm" to the general community—a decidedly nebulous task.[130] Indeed, myriad questions arise: What is the scope of the "community"? How does one prove "harm" felt by multiple persons? What forms of evidence would be required to prove such a claim?[131] Moreover, there is also the issue of fundamental error to such an alteration; the particularized-injury standard is derived from the Massachusetts zoning scheme's separation of individual aggrievement from concerns of the community.[132]

2. The New Kenner *Standard*

The SJC in *Kenner* expressed an implicit desire to articulate a general standard for standing that would avoid "chok[ing] the courts with litigation."[133]

127. *See generally* Schiffenhaus v. Kline, 947 N.E.2d 1133 (Mass. App. Ct. 2011) (pointing to language in *Kenner* stating need for particularized and community harm).

128. *See id.* at 1135-36 (quoting Kenner v. Zoning Bd. of Appeals, 944 N.E.2d 163, 170 (Mass. 2011)). The rule of standing as it pertains to particularized injury was not dispositive in *Schiffenhaus*, and accordingly, had no immediate repercussions. *See id.* The court was informing the parties that on remand, and in the future, a plaintiff would have to show both private injury and harm to the community. *See id*.

129. *See id.* (stating, but not discussing, *Kenner* quote as rule for standing).

130. *See* Kenner v. Zoning Bd. of Appeals, 944 N.E.2d 163, 169-70 (Mass. 2011) (stating "rule" as requiring plaintiff to show both harm to herself and community). Courts routinely take into account practical considerations when interpreting zoning laws—because they are fundamentally a local concern—and as a result, remain cognizant of factors that would invite excess litigation and reduce judicial efficiency. *See* MASS. GEN. LAWS ANN. ch. 40A, § 1A (West 2013) (authorizing cities and towns to adopt zoning "ordinances and by-laws" in Massachusetts); *see also* Save the Bay, Inc. v. Dep't of Pub. Utils., 322 N.E.2d 742, 748 (Mass. 1975) (highlighting importance of "preserv[ing] orderly administrative processes and judicial review thereof"); NOLON ET AL., *supra* note 3, at 140-47 (detailing how state statutes provide local zoning authority); Bobrowski, *supra* note 21, at 393 ("In Massachusetts, the doctrine of standing originates in practical, rather than constitutional, considerations.").

131. *See* Dain, *supra* note 6, at 6 (accounting for potential difficulties in proving harm to general community).

132. *See* Green v. Bd. of Appeals, 529 N.E.2d 159, 166 (Mass. App. Ct. 1988), *rev'd*, 536 N.E.2d 584 (Mass. 1989) (expounding difference between individual and community aggrievement); *supra* note 51 (discussing critical lines of separation drawn between individual and public remedies); *see also* Dain, *supra* note 6, at 1 (commenting "hard to discern" SJC's reasoning regarding proving individual and public harm); *supra* Part II.B.2 (reviewing particularized-injury standard).

133. *See Kenner*, 944 N.E.2d at 170. Perhaps the predicted outcome of *Marashlian*'s so-called liberalized approach came to fruition, thereby prompting the SJC's reigning in the standing standard. *See* Hershfield, *supra* note 6, at 27 ("Unfortunately, this lower standard may encourage frivolous appeals. If this occurs,

Utilizing different language from prior cases, the court stated that "[t]he adverse effect on a plaintiff must be substantial enough to constitute actual aggrievement such that there can be no question that [she] should be afforded the opportunity to seek a remedy."[134] Likely in response to the lingering issue generated by *Marashlian* of what exactly constitutes "perceptible harm," the court attempted to draw a key distinction between mere "impacts" and actual injury or harm, with only the latter providing a permissible basis for standing.[135]

Although at least one commentator has opined that *Kenner* was attempting to heighten the standard in an effort to curtail litigation, there is the remote possibility that the court was simply trying to rearticulate the existing standard in a more descriptive manner.[136] The first statement made by the court more strongly supports a conclusion that the SJC was increasing the standard; however, its further clarification on the issue sounds similar, albeit worded differently, to the standards that were already in place.[137] Specifically, the court stated that plaintiffs must "put forth credible evidence to show that they will be injured or harmed by proposed changes . . . [and] not whether they simply will be 'impacted' by such changes."[138]

In addition, the facts in *Kenner* elucidated that the loss of view suffered by the plaintiffs was, in fact, de minimis, and thus has a bearing on a determination of the SJC's intent.[139] The court's language describing the

Marashlian will have the adverse impact on the development of the law which [the dissent] feared."). The aggrieved-person standard is not without its critics—primarily due to its vague nature. *See* Cohen, *supra* note 6, at 625-26 ("Legal commentators have acknowledged that an aggrieved person standard is ambiguously broad."); *see also* GROWING SMART, *supra* note 25, at 10-76 to 10-78 (attempting to bring clarity to aggrieved-person standard).

134. *See Kenner*, 944 N.E.2d at 170 (articulating standard for standing).

135. *See id.*; Marashlian v. Zoning Bd. of Appeals, 660 N.E.2d 369, 373 (Mass. 1996) (requiring "specific facts to establish perceptible harm"); *see also* Dain, *supra* note 6, at 6 ("That a proposed project may block a view is an impact from the project, but more is needed to establish an injury."); Hershfield, *supra* note 6, at 27 (posing question regarding *Marashlian* and its perceptible standard).

136. *See* Dain, *supra* note 6, at 6 ("Clearly, this standard raised the bar for plaintiffs to establish standing in zoning litigation."). A different view would be that the *Kenner* court was responding to the ambiguity present in *Marashlian*'s perceptible harm standard, and was seeking to clarify what is meant by the term "perceptible." *See Marashlian*, 660 N.E.2d at 373 (articulating perceptible harm standard). This is unlikely, as it would seem that a mere impact is analogous to a perceptible harm, whereas *Kenner*'s requirement is that the alleged injury rise to a level above a mere impact. *See* Kenner v. Zoning Bd. of Appeals, 944 N.E.2d 163, 170 (Mass. 2011). Nevertheless, it is important to consider that the perceptible harm standard still requires an actual injury; it may be argued that a mere impact is not an injury at all. *See infra* notes 139-40 and accompanying text (examining practical meaning of shifted standard relying on impact analysis).

137. *See Kenner*, 944 N.E.2d at 170 (indicating possible increased standard); *see also infra* note 140 (discussing existing standard of level of injury).

138. *Kenner*, 944 N.E.2d at 170 (restating injury standard in simplified terms).

139. *See id.* at 171 (analyzing standing based on diminution in property value); *see also supra* Part II.C.1.a (examining SJC's affirmance of lower court's finding impact on views as de minimis). The court was arguably pointing out that the loss of views was so minimal that it merely constituted an "impact," and not an actual harm or injury. *See Kenner*, 944 N.E.2d at 171.

standard could simply be a reiteration of the existing standard that requires actual harm or injury, and not just an impact, in order to gain standing.[140] To be sure, in the event that the *Kenner* language is interpreted by courts to mean that the standard has been heightened, attempting to apply the vague and subjective standard of "no question that the plaintiff should be afforded the opportunity to seek a remedy" would, in the practical sense, be problematic for both courts and practitioners.[141]

B. Proposed Standing Model on the Basis of View-Based Harm

After examining the ambiguities present in the *Kenner* decision in light of subsequent appellate-level confusion, further clarification from the SJC is undoubtedly necessary.[142] The court should pursue a course of action that not only reasonably accounts for various practical and prudential concerns, but is also in line with certain settled and uncontroversial aspects of standing law.[143] Essentially, the ambiguity of *Kenner* amounts to, in the interpretive sense, a perpetual straddling of the line on each issue addressed; thus, I will suggest which side of the line the courts should fall when considering each matter.[144]

1. Reinstate the Particularized Harm Standard

First and foremost, it is critical that the existing particularized-injury standard remain unaltered.[145] Because there is no discernible reason to enlarge the scope of harm or injury to include harm to the greater community, the SJC should reiterate that the usual standard remains in force.[146] To state otherwise would create both practical and prudential problems for those involved in the

140. *See generally, e.g.*, Martin v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 747 N.E.2d 131 (Mass. 2001) (conferring standing where towering church steeple visible from most of plaintiff's property); Rogel v. Collinson, 765 N.E.2d 255 (Mass. App. Ct. 2002) (holding plaintiff had standing where odors and dust caused palpable harms); Rinaldi v. Bd. of Appeal, 741 N.E.2d 77 (Mass. App. Ct. 2001) (declining standing where proposed changes unlikely to cause significant traffic increase and parking loss); Butts v. Zoning Bd. of Appeals, 464 N.E.2d 108 (Mass. App. Ct. 1984) (deciding plaintiff had standing where new structure completely blocked ocean view).

141. *See Kenner*, 944 N.E.2d at 170; *see also* Dain, *supra* note 6, at 6 ("[T]he newly articulated standard does raise some questions, such as what it means for there to be 'no question' that the plaintiff should be afforded the opportunity to be in court.").

142. *See generally* Kenner v. Zoning Bd. of Appeals, 944 N.E.2d 163 (Mass. 2011); Marhefka v. Zoning Bd. of Appeals, 947 N.E.2d 1090 (Mass. App. Ct. 2011); Schiffenhaus v. Kline, 947 N.E.2d 1133 (Mass. App. Ct. 2011). The SJC should relieve the confusion by ruling on the standard. *See* Dain, *supra* note 6, at 1 (commenting clarification from SJC necessary).

143. *See supra* Part II (analyzing established standing principles in Massachusetts jurisprudence).

144. *See Kenner*, 944 N.E.2d at 166-72 (providing court's ambiguous opinion); *see also infra* Part III.B (outlining proposed standard for standing).

145. *See supra* Part II.B.2 (discussing established particularized-injury standard in context of Massachusetts standing laws).

146. *See* Dain, *supra* note 6, at 6 (noting no rational reason for SJC to add such component to particularized-injury standard).

judicial system.[147] Importantly, even if the court explicitly limited the alteration to the narrow category of view-based harm, thereby reducing potential prudential concerns, there remain practical difficulties—for example, what exactly might constitute "harm" to the community, and how does one define the outer limits of "community"?[148]

There is no reasonable justification for creating these types of practical difficulties—for not only courts, in attempting to interpret the new rule, but also practitioners, in attempting to litigate their client's interests.[149] The particularized-injury standard is not controversial, nor riddled with difficulties; rather it is broadly applicable to *all* standing principles—not just within zoning laws.[150] To arbitrarily reconfigure such a standard within a narrow subset of cases would be both detrimental and unnecessary.[151]

2. Require Particularized Language in Zoning Bylaws

The general rule for standing in Massachusetts remains that view-based interests are not protectable interests under its zoning regime.[152] Accordingly, courts should keep relatively narrow the exception carved out by the SJC, which permits protection of such an interest in the event that a town's bylaw

147. *See supra* Part III.A.1 (introducing notion of altering particularized-injury standard). Importantly, judicial efficiency and practical considerations inform courts' actions in regard to zoning laws. *See* Save the Bay, Inc. v. Dep't of Pub. Utils., 322 N.E.2d 742, 748 (Mass. 1975); Bobrowski, *supra* note 21, at 393 (noting Massachusetts standing doctrine originates in practical considerations); *see also supra* note 130 and accompanying text (elucidating concept that courts minimally intervene on zoning-appeal process because zoning reserved as local matter).

148. *See* Dain, *supra* note 6, at 6 (highlighting similar concerns regarding SJC's proposed heightened standard). Even if one can effectively and efficiently prove harm to the community—in addition to proving private injury—the private-action remedy is an inappropriate avenue for community-based harm; the zoning scheme of chapter 40A of the Massachusetts General Laws provides a separate mode of recovery for harmed communities. *See* Green v. Bd. of Appeals, 529 N.E.2d 159, 166 (Mass. App. Ct. 1988) (clarifying important distinction between private causes of action and remedial process available to community), *rev'd*, 536 N.E.2d 584 (Mass. 1989); *see also* MASS. GEN. LAWS ANN. ch. 40A (West 2013) (detailing different remedies); *supra* note 132 and accompanying text (analyzing incorrectness of applying community-based standard to private cause of action).

149. *See* Hershfield, *supra* note 6, at 14 (noting importance of standing issues for legal practitioners); *see also supra* Part II.B.2 (discussing established particularized-injury standard in context of Massachusetts standing laws).

150. *See supra* Part II.B.2 (detailing established particularized-injury standard in context of Massachusetts standing laws). It is worth noting that in the area of environmental concerns, the concept of particularized harm does present unique problems for those wishing to litigate, impliedly, on behalf of the community. *See generally* Babcock, *supra* note 46 (exploring standing issues in environmental-harm litigation); Cassuto, *supra* note 47 (highlighting incoherencies with standing doctrine in relation to environmental law); *supra* note 49 and accompanying text (noting uncontroversial nature of particularized harm with exception of environmental context).

151. *See supra* Part II.B.2 (discussing established particularized-injury standard in context of Massachusetts standing laws).

152. *See supra* note 69 and accompanying text (articulating general rule of Massachusetts standing laws disallowing visual concerns as basis for standing).

makes specific reference to visual considerations.[153] A town that merely makes reference to the impact of the visual character on a community as a whole is not necessarily inviting the possibility of disputes regarding blockage of view suffered by private landowners.[154] Therefore, I would suggest that a plaintiff should only be allowed to avoid the general rule if her town's zoning bylaws contain specific language protecting views from private developed properties.[155] As a result, localities would be afforded the ability to protect visual interests of their choosing.[156]

IV. CONCLUSION

In *Kenner*, the SJC returned to the ever-changing issue of standing in Massachusetts zoning cases. While this particular area of law has historically engendered ambiguity, the SJC's latest attempt to disentangle key principles, both in the matters of visual impact and the underlying standing doctrine, has decidedly achieved the opposite result. Between the inconsistent language in *Kenner* causing contradictory appellate decisions and possible deviation from the well-settled particularized-injury principle, the SJC has rendered even greater confusion for trial courts and plaintiffs. More importantly, it will be difficult for attorneys to recommend a suitable course of action to their clients. Accordingly, it is vital that the SJC clarify the scope of its holdings in *Kenner*, while keeping in mind the practical effect of its decisions.

Beth Lidington

153. *See supra* note 70 and accompanying text (noting exception to general rule excluding view-based harm); *supra* Part II.B.3.b (analyzing treatment of view-based harm in context of zoning standing laws).

154. *See* Kenner v. Zoning Bd. of Appeals, 944 N.E.2d 163, 169 (Mass. 2011) (noting Chatham zoning bylaws permit zoning board to consider impact on neighborhood visual character, including views).

155. *See generally* Martin v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 747 N.E.2d 131 (Mass. 2001) (holding view-based harm legitimate zoning concern where protected by local bylaw states).

156. *See, e.g.*, *Martin*, 747 N.E.2d at 146-47 (implying importance of locality's choice in protecting certain interests); Circle Lounge & Grille v. Bd. of Appeal, 86 N.E.2d 920 (Mass. 1949) (relying on scope of locality's zoning bylaws); Monks v. Zoning Bd. of Appeals, 642 N.E.2d 314 (Mass. App. Ct. 1994) (permitting plaintiffs to establish standing within scope of protection created by local bylaw).