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MARK BOBROWSKI*

INTRODUCTION

The Massachusetts Zoning Act provides that "any person aggrieved" by a decision of a permit or special permit granting authority may appeal the decision by bringing an action in the appropriate court. Complaints take the form of an administrative appeal, the appeal of a special permit decision, or some combination thereof. Plaintiffs are limited to "any municipal officer or board" and to persons whose


1. See MASS. GEN. L. ch. 40A, § 17 (1994), which provides in pertinent part:

Any person aggrieved by a decision of the board of appeals or any special permit granting authority . . . whether or not previously a party to the proceeding, or any municipal officer or board may appeal to the . . . court . . . by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk.


3. For the definitions of "permit granting authority" and "special permit granting authority," see MASS. GEN. L. ch. 40A, § 1A (1994).

4. See §§ 7, 8, 15, 17. Section 8 also establishes that a "person aggrieved" may commence an administrative appeal (of an adverse decision by the building inspector or the zoning administrator) by appropriate action before the board of appeals. Id. The term "person aggrieved" has the same meaning in this context. Green v. Board of Appeals, 404 Mass. 571, 573, 536 N.E.2d 584, 586 (1989).


7. Id. The standing of municipal boards or officers is generally not disputed, and is outside the scope of this Article. For cases in which board standing has been controversial, see Dowling v. Board of Health, 28 Mass. App. Ct. 547, 548, 552 N.E.2d 866, 867 (1990) (holding that board of health does not have standing in a zoning dispute);
property interests will be affected. These persons are said to have "standing" to bring the action.

Prior to 1992, there had developed a "small but reasonably coherent body of case law . . . explicating the standards for determining aggrievement under [Massachusetts General Laws chapter 40A, section 17]." Generally, standing turns on the issue of "injury." An aggrieved person is, first and foremost, "one whose legal rights have been infringed." In essence, there must be a showing of some special injury by the party claiming standing to set him or her apart from the general public. For obvious reasons, frustrated permit applicants have little difficulty demonstrating the requisite injury; if a zoning permit has been denied or stringent conditions imposed, "legal rights" have assuredly been called into question. But what of other parties, particularly neighbors hostile to a development proposal targeting nearby land? The case law prior to 1992 suggested, in two dozen reported challenges, that abutters and close neighbors were entitled to standing. In fact, the court developed "presumptions" to benefit close neighbors. More remote parties were required to demonstrate a stake in the outcome to qualify as plaintiffs, without the benefit of any presumption.

In 1992, this "reasonably coherent" system for allocating standing came to a halt. The Massachusetts Appeals Court, in Barvenik v. Board of Aldermen, reviewed the test for standing as it had been applied to situations involving close neighbors appealing a zoning decision. The court set out two controversial expectations. First, the court demanded rigorous proof of the "special and different" injury necessary for standing. In this regard, Barvenik's evi-
dentary demands, particularly those requiring a showing that the plaintiff has suffered an "injury in fact," closely tracked the ruling of the United States Supreme Court in *Lujan v. Defenders of Wildlife (Lujan II)*, decided only six weeks earlier. When standing is contested, particularly in the context of a motion for summary judgment or during the course of trial, *Barvenik* (and *Lujan II*) insist upon more than mere "speculative personal opinion" or "[s]ubjective and unspecific fears" to show injury. *Barvenik* requires that a plaintiff provide:

specific evidence demonstrating a reasonable likelihood that the [decision] 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 . . . locus.

In a series of cases following *Barvenik*, the appeals court has carefully explained the scope of this evidentiary burden.

In equating injury with diminution in value, the appeals court made its second expectation clear. Standing, for close neighbors, is limited to those with "legitimate" zoning-related concerns—traffic increases, parking problems, or the potential for litter—that may cause diminution in value or economic harm. Aesthetic considerations, including neighborhood appearance, incompatible architectural styles, and the diminution of neighborhood ambiance, "are all considered insufficient bases for aggrievement."

The result was an unintended revolution in practice and procedure in land use law. Simply put, *Barvenik* and its progeny removed the predictability from standing. Decisions reported prior to


16. *Lujan II* was decided on June 12, 1992. *Lujan II*, 504 U.S. at 555. *Barvenik* was decided on August 3, 1992. *Barvenik*, 33 Mass. App. Ct. at 129, 597 N.E.2d at 48. In a telephone interview on December 6, 1995, Justice Laurence, the author of *Barvenik*, indicated that *Lujan II* had played a considerable role in his decision. Telephone Interview with Justice Laurence, Massachusetts Appeals Court (Dec. 6, 1995). Indeed, the case is extensively quoted in *Barvenik*, and in later decisions in the *Barvenik* line.


19. See discussion infra part IV.


21. *Id.*
1992 indicated an overwhelming likelihood that close neighbors challenging a permit decision would be granted access to the court.\textsuperscript{22} A survey of trial court decisions from 1993 to 1995 indicates that this was no longer true: in the post-\textit{Barvenik} trial courts, close neighbors were routinely dismissed from zoning disputes.\textsuperscript{23} As a result, a challenge to standing became de rigueur. \textit{Barvenik} did nothing if not encourage a full-scale war at an early stage in the litigation over the standing of neighbors with obvious costly consequences.

In \textit{Marashlian v. Zoning Board of Appeals},\textsuperscript{24} decided in 1996, the Supreme Judicial Court of Massachusetts belatedly attempted to rein in the runaway \textit{Barvenik} ruling. The court's divided opinion\textsuperscript{25} held that a finding by a trial judge as to standing should not be overturned unless clearly erroneous.\textsuperscript{26} \textit{Barvenik}'s lack of deference to this standard was thereby corrected. The court also quarreled with \textit{Barvenik}'s statement of the threshold for injury in fact, and reduced that test to a mere factor for consideration.\textsuperscript{27} Other important aspects of \textit{Barvenik} were left intact.

This Article will trace the changes worked by the \textit{Barvenik} line of cases as the rulings percolated through the system from the trial courts to the Massachusetts Supreme Judicial Court. Part I will explore basic concepts of the doctrine of standing. The decisions of the United States Supreme Court and the Supreme Judicial Court of Massachusetts will be reviewed in order to place \textit{Barvenik} and \textit{Marashlian} in proper perspective. Part II will examine the procedural issues surrounding the doctrine, detailing the evidentiary expectations of the court as the issue is raised at various times in proceedings. Part III will look at the doctrine of standing as it was applied in pre-\textit{Barvenik} zoning decisions. Part IV will take a close look at the \textit{Barvenik} line of cases, all emanating from the Massachusetts Appeals Court. Trial court decisions following \textit{Barvenik} will also be inventoried in this section. Part V will review \textit{Barvenik}'s reception at the Supreme Judicial Court, with a thorough discussion and critique of the \textit{Marashlian} decision. Finally,

\begin{itemize}
  \item \textsuperscript{22} See discussion infra part III.
  \item \textsuperscript{23} See discussion infra part IV.B.
  \item \textsuperscript{24} 421 Mass. 719, 660 N.E.2d 369 (1996).
  \item \textsuperscript{25} \textit{Marashlian} was a four to three decision. Justices Liacos, Wilkins, Abrams, and Fried formed the majority, with Justices O'Connor, Greaney, and Lynch in dissent. \textit{Id}.
  \item \textsuperscript{26} \textit{Id.} at 725, 660 N.E.2d at 374.
  \item \textsuperscript{27} \textit{Id.} at 724, 660 N.E.2d at 373.
\end{itemize}
I. THE CONCEPT OF STANDING

The doctrine of standing has evolved in both the federal and state courts. The United States Supreme Court has repeatedly honed its test for standing to attack administrative action, particularly as that standard is applied to parties who are not the objects of the administrative decision-making. The approach of the United States Supreme Court has been, in part, borrowed by the Supreme Judicial Court of Massachusetts, which has its own interpretation of the doctrine. In order to appreciate the Massachusetts Appeals Court's position in Barvenik, which owes no small debt to precedent, it must be viewed in these parallel contexts. These contexts also enable a more reasoned critique of the Marashlian decision.

A. The Federal Context

Article III of the United States Constitution limits the power of the federal courts to the resolution of "cases" and "controversies." Several administrative law doctrines—including ripeness, mootness, political question, and standing—trace their purpose to Article III. These doctrines relate "in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitu-

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29. "Ripeness . . . is concerned primarily with the institutional relationships between courts and agencies, and the competence of the courts to resolve disputes without further administrative refinement of the issues." Ticor Title Ins. Co. v. Federal Trade Comm'n, 814 F.2d 731, 735 (D.C. Cir. 1987). Ripeness looks to "the fitness of the issues for judicial determination and the hardship of the parties that would result from granting or denying review . . . . \[I\]n essence, it asks whether he may be attempting to short circuit the administrative process or whether he has been reasonably diligent in protecting his own interests." Id. The leading Supreme Court decision on the issue of ripeness is undoubtedly Abbott Lab. v. Gardner, 387 U.S. 136 (1967).
30. "A justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (citations omitted).
31. The political question doctrine suggests that certain matters are inherently political in nature and ought not to be the subject of judicial review. The doctrine applies in a variety of circumstances, nicely summarized in the leading case of Baker v. Carr, 369 U.S. 186 (1962).
tional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." The case or controversy doctrine, and its corollary rules, help to ensure the separation of powers upon which the federal government is founded.

The Supreme Court has called standing the "most important of these doctrines." It is not a "mere pleading requirement[ ] but rather an indispensable part of the plaintiff's case."

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

Standing has been routinely used within the federal system to accomplish these and other objectives. The doctrine of standing imposes a threshold jurisdictional requirement for would-be plaintiffs; in order to gain access to the court in an administrative dispute, the plaintiff must demonstrate the existence of a case or controversy.

34. Allen, 468 U.S. at 750.
37. Richard J. Pierce, Jr. et al., Administrative Law and Process § 5.4, at 129 (2d ed. 1992). This administrative law hornbook suggests that standing serves several objectives unrelated to the constitutional rationale. Id. Standing, it is alleged, is sometimes used by the Supreme Court
(1) to avoid deciding issues it does not want to decide;
(2) to allow it to decide issues it does not want to decide;
(3) to avoid deciding issues that it believes should be decided by other branches of government;
(4) to avoid deciding issues that should be decided by state governments;
(5) to reflect implicitly the subjective values the Court assigns to various constitutional and statutory rights;
(6) to limit the ability of judges to become involved in policy disputes that are governed only by vague constitutional standards; and
(7) to avoid judicial involvement in cases where the plaintiff's claim has little merit.
Id.
38. Access to the federal courts is generally obtained, as to administrative mat-
A key aspect of the "case or controversy" requirement is a showing of injury in fact. Economic harm, of course, has long been acknowledged as sufficient injury in fact. Agency action which directly interferes with a property right or causes diminution in value would present the type of injury required for standing. But the United States Supreme Court has not limited standing to those suffering economic injury. The Court has also ruled, most notably in *Sierra Club v. Morton*, that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." Thus, standing may be awarded where the requisite injury in fact is "aesthetic, conservational, and recreational."

Undoubtedly, the high water mark of standing came in *United States v. Students Challenging Regulatory Agency Procedures*. The decision, commonly known as *SCRAP*, has come to serve as the most notorious example of the expansive federal concept of injury in fact. A group of law students successfully claimed standing by alleging that a general rail rate hike would result in the increased use of nonrecyclable goods as compared to recyclable goods, causing more refuse to be discarded in the national parks of the Washington, D.C. area, and diminishing their enjoyment of these public parks. The students were ruled to have suffered the requisite aesthetic and conservational harm for standing to challenge the rate increase.

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40. 405 U.S. 727 (1972).
41. *Id.* at 734.
44. See *id.* at 688-89.
45. *Id.* at 689-90. The Supreme Court has suggested that *SCRAP* is limited to its procedural context, which involved the review of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976). In *Simon*, the Court hinted that while the complaint in question "withstood a motion to dismiss, . . . it might not have survived challenge on a motion for summary
Since *SCRAP*, the Supreme Court has systematically imposed a more stringent view of standing without modifying the *Sierra Club* formulation of injury in fact.46 Instead, the Court has demanded a nexus between the claimed injury and the government action being challenged.47 A plaintiff claiming standing in the federal courts must show

the irreducible constitutional minimum of . . . three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "re­dress[ed] by a favorable decision."48

In addition, the Supreme Court has sometimes imposed a fourth element to assess standing. In *Association of Data Processing Service Organizations, Inc. v. Camp*,49 the Court ruled that plaintiffs must assert an interest that is arguably "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."50 The "zone of interests" test has been interpreted to require some showing that "the interest asserted by a party in the particular instance is one intended by Congress to be protected or regulated by the statute under which suit is brought."51 The test has gone unmentioned in many Supreme Court decisions on standing.52 However, in several recent decisions, the Court has revived the


46. The Court has repeatedly cited the *Sierra Club* standard with approval. See *Lujan I*, 504 U.S. 555, 562-63 (1992) (“Of course, the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for [the] purpose of standing.”). See also Hudson v. McMillian, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring).


48. *Lujan II*, 504 U.S. at 560-61 (third, fourth, fifth and sixth alterations in original) (footnote and citations omitted).


50. *Id*. at 153.


52. The "zone of interests" test was virtually dormant in the period immediately following *Data Processing*, inspiring influential Professor Kenneth Culp Davis to sug-
issue.53

The nexus and redressibility requirements imposed by post-SCRAP decisions, along with the revival of the zone of interests test, has significantly tightened access to the federal courts, particularly when the plaintiff is not the object of the governmental action at issue. In *Lujan II*, the Court noted that "[w]hen . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else . . . standing is not precluded, but it is ordinarily 'substantially more difficult' to establish."54 This is due, in the federal context, precisely to the nexus and redressibility standards.55 The threshold for injury in fact remains quite low; the Court has fashioned the new tests to ensure that plaintiffs will raise more than the "adjudication of generalized grievances"56 prohibited by Article III.

B. The Massachusetts Context

In Massachusetts, the doctrine of standing originates in practical, rather than constitutional, considerations. The Massachusetts Constitution has no counterpart to Article III's Case or Controversy Clause.57 Thus, standing has evolved as a prudential limitation, created by the court, to serve a variety of objectives in the review of administrative decisions.

[W]hether a party is properly before a tribunal to invoke its judicial powers affects the good order and efficiency with which the

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55. See id.
56. Id. at 575.
57. However, Part I, Article XXX of the Massachusetts Constitution clearly spells out the need for separation of powers, and the doctrine of standing does peripherally promote this goal. Article XXX states:

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

MASS. CONST. pt. 1, art. XXX.

Under the auspices of Article XXX, the Supreme Judicial Court of Massachusetts has refused to decide moot questions or abstract propositions. See, e.g., *Caputo v. Board of Appeals*, 330 Mass. 107, 111, 111 N.E.2d 674, 677 (1953) (citation omitted). *See also* *Razin v. Razin*, 332 Mass. 754, 124 N.E.2d 269 (1955).
matter proceeds . . . . The multiplicity of parties and the increased participation by persons whose rights are at best obscure will, in the absence of exact adherence to requirements as to standing, seriously erode the efficacy of the administrative process. We do not say that increased citizen participation is bad. On the contrary, such interest ensures full review of all issues. However, to preserve orderly administrative processes and judicial review thereof, a party must meet the legal requirements necessary to confer standing.58 In this regard, the doctrine of standing shares the stage with the doctrines of mootness,59 ripeness,60 and exhaustion of administrative remedies,61 which are all designed to promote the efficient administration of justice.

Standing is, however, more than a procedural technicality. The Supreme Judicial Court of Massachusetts has emphasized that the question of whether a party has standing to participate in a judicial review “involves remedial rights affecting the whole of the proceeding.”62 The Appeals Court of Massachusetts asserted, in Barvenik v. Board of Aldermen, that standing is “a vital element of all proceedings challenging administrative action.”63

In keeping with the federal framework for standing, the Supreme Judicial Court has insisted upon some injury to set plaintiffs apart from the general public. In order to gain access to the court,64 the plaintiff must show harm to a legal right or protected interest.65 The Supreme Judicial Court has never embraced the loose federal test for injury in fact. The legal right or interest cited by the plaintiff must involve harm to economic or pecuniary

64. Access to the court for the review of administrative decisions by agencies of the Commonwealth is generally available pursuant to MASS. GEN. L. ch. 30A, § 14 (1994), which provides in pertinent part: “Any person . . . aggrieved by a final decision of any agency in an adjudicatory proceeding, whether such decision is affirmative or negative in form, shall be entitled to a judicial review thereof . . . .” Id.
concerns. 66

One commentator has suggested that "[t]here appears to be no Massachusetts standing to secure judicial review of administrative agency decision where the Supreme Judicial Court has recognized and accorded standing where any merely non-economic injury was at issue." 67 Sierra Club, with its recognition of "aesthetic and environmental well-being" as sufficient injury for standing, 68 has no counterpart in Massachusetts. Apparently, the Supreme Judicial Court does not intend to allow SCRAP to creep into Massachusetts case law; standing turns on economic or pecuniary harm. 69

The Supreme Judicial Court has also imposed a local version of the "zone of interests" test in assessing standing disputes. In Massachusetts Association of Independent Insurance Agents and Brokers, Inc. v. Commissioner of Insurance, 70 the court ruled that injury alone was not enough: "A party has standing when it can allege an injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred." 71 The reliance on Data Processing is obvious. 72 The Supreme Judicial Court has routinely ruled that injuries attributable to business competition are outside the zone of interests of various statutes. 73

It is worth noting that the Supreme Judicial Court of Massachusetts has not adopted the nexus and redressibility prongs of the federal test for standing. In effect, the Massachusetts concept seems frozen in time before the Data Processing era of the federal

67. 40 ALEXANDER J. CELLA, MASSACHUSETTS PRACTICE SERIES § 1675, at 229 n.5 (1986).
69. Professor Cella has referred to the Supreme Judicial Court's reluctance to expand its concept of injury in fact as "cramped, constructed [sic], and niggardly" and has chided the court for its failure to "offer a full and complete explanation" for the difference with the federal doctrine. 40 CELLA, supra note 67, § 1675 at 230.
71. Id. at 293, 367 N.E.2d at 799.
72. See supra notes 49-50 and accompanying text for a discussion of Data Processing.
doctrine. Injury in fact is economic or pecuniary in nature; this harsh standard for access negates the need for the nexus and redressibility tests developed by the United States Supreme Court. The zone of interests test operates, as it does in the federal system, to provide an additional, if infrequent, barrier to access.

II. Procedural Aspects of Standing

Barvenik and its progeny are also controversial because of their pronouncements regarding the evidentiary burdens associated with establishing or challenging standing at various stages of litigation. Simply put, more is expected of a party claiming standing at a summary judgment hearing than at a proceeding under Rule 12; more again is expected at the trial stage than at the pretrial stage. The United States Supreme Court has indicated that when standing is contested, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." The Barvenik line is better understood after a closer look at the devices by which standing may be contested.

A. Some General Considerations

The doctrine of standing has both a prudential and a constitutional function in litigation. The prudential component ensures the efficient administration of justice; the constitutional component promotes the separation of powers called for by Article III (at the federal level) and by Article XXX (of the Massachusetts Constitution). The doctrine's importance is reflected in the procedural flexibility attached to it by the federal and Massachusetts courts.

Initially, the trial courts are "obligated to determine that [plaintiffs have] adequate standing to present their . . . challenges." The court may not rely on mere technical compliance offered by the parties. "Bald assertions, or concessions, of counsel [will] not suffice. Standing is a mixed question of fact and law. To the extent that it is a question of fact, the court must find the facts

75. As to the controversy, see Halley, supra note 13, at B3.
and recite them in a fashion that will accommodate appellate review.\textsuperscript{78} Consequently, the trial court has the power to dismiss the matter, upon motion, for lack of standing.\textsuperscript{79} Even where standing is stipulated by counsel,\textsuperscript{80} or where no objection to standing is raised,\textsuperscript{81} the trial court may accomplish this result sua sponte.\textsuperscript{82}

The appellate level shares in this responsibility to police the court system, and has powers similar to those of the trial court. The United States Supreme Court stated in \textit{FW/PBS, Inc. v. City of Dallas}\textsuperscript{83} that every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it."\textsuperscript{84}

The parties, too, have clearly delineated roles. The party claiming standing bears the burden of proof when the issue is contested.\textsuperscript{85} "[S]tanding cannot be 'inferred argumentatively from averments in the pleadings,' but rather 'must affirmatively appear in the record.'"\textsuperscript{86} The party opposing standing has an opportunity

\textsuperscript{78} Id. (footnote omitted).
\textsuperscript{80} Church of Scientology, 777 F.2d at 606.
\textsuperscript{81} Id.
\textsuperscript{83} 493 U.S. 215 (1990).
\textsuperscript{86} FW/PBS, 493 U.S. at 231 (citations omitted).
to raise the issue at any time during the proceedings. A challenge
to standing can even be raised by a party for the first time at the
appellate level.

With these practical considerations in mind, the federal and
Massachusetts courts, in assessing standing, have routinely stated
what the evidentiary expectations of the plaintiff are at various
stages of the litigation. In order to add perspective to Barvenik and
its progeny, a detailed review of these devices is in order.

B. Rule 12(b)

Rule 12(b) of the Massachusetts Rules of Civil Procedure
states, in relevant part, that "[e]very defense, in law or fact, to a
claim for relief in any pleading . . . shall be asserted in the respon­
sive pleading thereto if one is required, except that the following
defenses may at the option of the pleader be made by motion: (1)
Lack of jurisdiction over the subject matter; . . . (6) Failure to state
a claim upon which relief can be granted."

In Lujan II, the United States Supreme Court summarized the
plaintiff's evidentiary obligations at this stage of the proceedings by
stating that "[a]t the pleading stage, general factual allegations of
injury resulting from the defendant's conduct may suffice, for on a
motion to dismiss we 'presum[e] that general allegations embrace
those specific facts that are necessary to support the claim.' "

"When a defendant challenges standing via a motion to dismiss,
'both the trial and reviewing courts must accept as true all material
allegations of the complaint, and must construe the complaint in
favor of the complaining party.'"

87. See, e.g., Powder River Basin Resource Council v. Babbitt, 54 F.3d 1477, 1484
(10th Cir. 1995); Board of County Comm'rs v. W.H.I., Inc., 992 F.2d 1061, 1063 (10th
Cir. 1993); Barvenik v. Board of Aldermen, 33 Mass. App. Ct. 129, 131 n.6, 597 N.E.2d
48, 50 n.6 (1992).

88. Prudential-Bache, 412 Mass. at 248, 588 N.E.2d at 642. The court noted that
"a party may not argue for the first time on appeal that an opponent lacks standing to
raise a constitutional issue that was presented below without any objection to the
party's standing." Id. (citing Aronson v. Commonwealth, 401 Mass. 244, 247, 516
N.E.2d 137, 139 (1987), cert. denied, 488 U.S. 818 (1988)). This, apparently, is one of
the few limitations in raising the issue of standing.

89. MASS. R. CIV. P. 12(b). For purposes of this discussion, reference to Rule
12(b) shall be deemed reference to the identical federal and state rules.

90. Id.

Lujan I is an equally important decision in the genre of standing.

92. Sanner v. Board of Trade, 62 F.3d 918, 925 (7th Cir. 1995) (quoting Warth v.
Seldin, 422 U.S. 490, 501 (1975)).
The United States District Court for the Northern District of Illinois had a recent opportunity to explain the general standards governing a Rule 12(b) motion to dismiss:

A motion to dismiss pursuant to Rule 12(b)[ ] does not test whether the plaintiff will prevail on the merits but instead whether the claimant has properly stated a claim. . . . The court must accept as true all well-plead factual allegations and draw all reasonable inferences in favor of the plaintiff. However, the court need not strain to find favorable inferences which are not apparent on the face of the complaint. Similarly, the court is not required to accept legal conclusions either alleged or inferred from pleaded facts. Finally, the complaint need not specify the correct legal theory nor point to the right statute to survive a Rule 12(b) motion to dismiss, provided that "relief is possible under any set of facts that could be established consistent with the allegations." The complaint must, however, state either direct or inferential allegations concerning all material elements necessary for recovery under the chosen legal theory.93

These standards apply whether a motion to dismiss for lack of standing is brought pursuant to Rule 12(b)(1) or 12(b)(6).94

Notwithstanding the similarities between motions to dismiss pursuant to Rules 12(b)(1) and 12(b)(6), there are considerable differences between them, the chief of which is explained within Rule 12(b):

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.95

In essence, the submittal of affidavits and other matters outside the pleadings converts the motion to dismiss into a motion for summary judgment.96 Without such submittals, the general standards appli-

94. Sanner, 62 F.3d at 923-25.
95. FED. R. CIV. P. 12(b).
96. For a wealth of decisions addressing the issue of standing pursuant to a motion brought under Rule 12(b)(6), see Humane Soc’y v. Brown, 901 F. Supp. 338, 345-46 (Ct. Int’l Trade 1995), and the cases cited therein.
cable to Rule 12(b) motions remain in force.

On the other hand, a Rule 12(b)(1) motion is not converted into a motion for summary judgment by the submittal of extra pleading materials. One of the important distinctions between a dismissal pursuant to Rule 12(b)(1) and a dismissal pursuant to 12(b)(6) is that under 12(b)(1) "the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction to hear the action."

The United States Court of Appeals for the Fifth Circuit has recently explained the district court’s procedural requirements under a Rule 12(b)(1) motion:

[T]he district court must give the plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of the motion to dismiss. Thus, some courts have refused to grant such a motion before a plaintiff has had a chance to discover the facts necessary to establish jurisdiction. Other courts have refused to uphold such a motion where—absent an incurable defect in the complaint—the plaintiff has had no opportunity to be heard on the factual matters underlying jurisdiction. And, although [Rule] 43(e) allows factual motions to be heard on the basis of affidavits alone, a judge may be required to hear oral testimony where the facts are complicated and testimony would be helpful. . . . Insofar as the defendant’s motion to dismiss raises factual issues, the plaintiff should have an opportunity to develop and argue the facts in a manner that is adequate in the context of the disputed issues and evidence.

The Supreme Judicial Court of Massachusetts has taken the same basic view of Rule 12(b)(1) motions.

C. Rule 56

Rule 56(c) of the Massachusetts Rules of Civil Procedure

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98. 2A JAMES W. MOORE, MOORE’S FEDERAL PRACTICE § 12.07 [2.—1], at 12-49 to 12-50 (2d ed. 1995) (footnotes omitted).
101. MASS. R. CIV. P. 56(c). For purposes of this discussion, reference to Rule 56(c) and (e) shall be deemed a reference to both the federal and state rules, which have only slight differences in style.
states, in relevant part, that a party is entitled to summary judgment in his or her favor if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."102 Rule 56(e) provides that:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.103

In *Lujan v. National Wildlife Federation (Lujan I)*,104 the United States Supreme Court explained its expectations under Rule 56:

"[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Where no such showing is made, "[t]he moving party is 'entitled to a judgment as a matter of law' because the nonmov­ing party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof."105

Furthermore, it is

clear that Rule 56 does not require the moving party to *negate* the elements of the nonmoving party's case; to the contrary, "re-

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102. *Id.*. The federal counterpart shares the same language. *See Fed. R. Civ. P. 56(c).*

103. *Mass. R. Civ. P. 56(e).* The federal rule differs only slightly. *Fed. R. Civ. P. 56(e) provides:*

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

*Id.*


105. *Id.* at 884 (citations omitted) (second alteration in original) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)).
The Massachusetts Appeals Court endorsed the United States Supreme Court’s decision in *Lujan II*, when it emphasized the evidentiary burden on the plaintiff to come forward with evidence regarding standing. 107 “In response to a summary judgment motion . . . the plaintiff can no longer rest on such ‘mere allegations,’ but must ‘set forth’ by affidavit or other evidence ‘specific facts,’ which for purposes of the summary judgment motion will be taken to be true.” 108 When affidavits accompany the motion, the court is free to scrutinize these submittals to ensure that each and every element of standing is proven. 109 Thus, in both *Lujan* decisions, the Supreme Court rejected standing for the plaintiffs because their affidavits contained no facts showing the imminent required injury. 110 These standards with regard to summary judgment are consistent with the Massachusetts Supreme Judicial Court’s interpretation of Massachusetts Rule of Civil Procedure 56. 111

D. Post-pleadings

When the issue of standing is contested after the pleading stage, the party asserting standing has the burden of proof. The United States Supreme Court has noted that “at the final stage, [this claim] (if controverted) must be ‘supported adequately by the evidence adduced at trial.’” 112 Generally, in civil matters, the party

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106. *Id.* at 885 (quoting *Celotex*, 477 U.S. at 323).


108. *Lujan II*, 504 U.S. at 561 (citation omitted).

109. See, e.g., *Lujan I*, 497 U.S. at 888. In *Lujan I*, the Court concluded that “[i]n ruling upon a Rule 56 motion, ‘a District Court must resolve any factual issues of controversy in favor of the non-moving party’ only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied.” *Id.* In a standing contest, the plaintiff bears the burden of alleging specific facts to demonstrate injury: “The object of this provision is not to replace the conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.” *Id.*

110. *Id.* at 885-89; *Lujan II*, 504 U.S. at 563-64.


with the burden of proof "must persuade the fact finder that its contention is more probably true than false."\textsuperscript{113} This is the classic formulation of the "preponderance of the evidence standard."\textsuperscript{114}

E. Conclusion

Taken together, these procedural devices make it clear that the issue of standing may be raised at any point in the proceedings. The burden of persuasion operates on a sliding scale, more forgiving at the early stages, more stringent at trial. Thus, even where the trial court has made a Rule 12 or Rule 56 determination of standing, the issue may be reassessed at the trial stage.\textsuperscript{115} Plaintiffs maintain a continuing obligation to demonstrate their requisite stake in the outcome. Failure to prove standing may result, even at the appellate stage, in dismissal of the action.

III. Pre-Barvenik Standing Under the Zoning Act

In zoning, adjudicatory decisions are made by administrative agencies. Thus, the standing of the plaintiff to contest a decision is

\textsuperscript{113} Hon. Paul J. Liacos et al., Handbook of Massachusetts Evidence § 5.2.1, at 198 (6th ed. 1994).

\textsuperscript{114} Sargent v. Massachusetts Accident Co., 307 Mass. 246, 250, 29 N.E.2d 825, 827 (1940).

After the evidence has been weighed, that proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.

\textit{Id.}

In Barvenik v. Board of Aldermen, 33 Mass. App. Ct. 129, 132 n.8, 597 N.E.2d 48, 51 n.8 (1992), Justice Laurence raised the issue of the proper burden of persuasion in a standing contest. He noted that "[n]o case has clearly articulated the measure of the plaintiffs' burden in proving the requisite aggrievement." \textit{Id.} He went on to suggest, without so holding, that the preponderance of the evidence standard might be appropriate. \textit{Id.}

It is likely that the preponderance of the evidence standard suffices in this regard. The alternative "clear and convincing evidence" standard has been imposed primarily in other contexts. \textit{See} Liacos et al., supra note 113, §§ 5.2.2-.2.6 at 200-06. If a trial court decision is appealed, the reviewing court is limited to the evidence in the trial court record. Since the courts have not articulated a standard with regard to the quantum of evidence required to survive a post-trial standing challenge, it is unclear what the measure would be. Because the burden of proof lies with the plaintiff, and because a reviewing court may address the issue of standing sua sponte, a plaintiff may be unable to meet the burden, regardless of the quantum of proof required, if the issue is addressed for the first time at the appellate level.

a relevant consideration. As far back as the 1933 codification of the Zoning Enabling Act, only "persons aggrieved" have been permitted to maintain an action in the appropriate courts.

The first decision of the Massachusetts Supreme Judicial Court to explore the nuances of the "person aggrieved" requirement was *Circle Lounge & Grille, Inc. v. Board of Appeal*. The Supreme Judicial Court fashioned a two-part approach to the question of standing. First, a person aggrieved must be "one whose legal rights have been infringed." In essence, the party claiming standing must show some special injury. The appeals court stated this test more succinctly in *Harvard Square Defense Fund, Inc. v. Planning Board*:

"Individual or corporate property owners acquire standing by asserting a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest." As a general principle, pre-*Barvenik* decisions honored the warning that "[t]he words 'person aggrieved' . . . are not to be narrowly construed."

120. Id. at 492-93, 540 N.E.2d at 184.

On the other hand, the court has proposed several rules to limit standing. Parties claiming injury in fact may be restricted by the linear limitation intimated in *Boston Edison Co. v. Boston Rede. Auth.*, 374 Mass. 37, 63 n.17, 371 N.E.2d 728, 746 n.17 (1977) (the court expressed "grave doubts about granting standing to any person whose property interest is approximately 1800 feet . . . away from the site" in issue). The court has been consistently hostile to standing for corporations without a demonstration of some harm to corporate legal rights. An unincorporated association cannot gain standing to be a party to a lawsuit. *Harvard Square Defense Fund*, 27 Mass. App. Ct. at 496 n.9, 540 N.E.2d at 186 n.9. Several cases have involved ad hoc "citizens groups" seeking standing to challenge permit decisions. See, e.g., id. at 496, 540 N.E.2d at 185-86; Chongris v. Board of Appeals, 17 Mass. App. Ct. 999, 999, 459 N.E.2d 1245, 1246 (1984); Amherst Growth Study Comm., Inc. v. Board of Appeals, 1 Mass. App. Ct. 826, 827, 296 N.E.2d 717, 718 (1973). "[A] statement of organizational purpose cannot clothe a civic association with aggrieved person status." *Chongris*, 17 Mass. App. Ct. at 999, 459 N.E.2d at 1247. The organization must locate individual plaintiffs with aggrieved per-
The second prong of the standing test requires an analysis of the “peculiar legal rights . . . intended to be given to the plaintiff by the statute permitting an appeal.” 122 Few decisions turn on this second prong, but several cases hold that the prevention of injury from business competition is not within the purposes of the Zoning Act. 123 Similarly, the court has held that the Zoning Act does not protect “a proprietor in a less restricted zone . . . [from] the introduction into a more restricted zone of any use permitted in the zone in which the proprietor’s property is located.” 124 The court has taken an ad hoc approach to other claims. 125 This inquiry is roughly equivalent to the “zone of interest” test announced by the United States Supreme Court in Association of Data Processing Service Organizations v. Camp. 126

\[\text{122. } \text{Circle Lounge, 324 Mass. at 431, 86 N.E.2d at 923.}\]
\[\text{124. } \text{Circle Lounge, 324 Mass. at 432, 86 N.E.2d at 923. The plaintiff, located in a business district, objected to a variance granted to construct a restaurant on nearby residentially-zoned property. The restaurant would have been allowed in the business district. The court stated that:}\]
\begin{quote}
The residence zone . . . was established to protect that zone against business and manufacturing uses. It was not established to protect the plaintiff’s restaurant, which is located in a business zone. The residence zone was designed to protect residence against business. It was not designed to protect business against business. Therefore it would be an anomaly to confer upon the plaintiff peculiar legal rights against a business of a kind permitted in the zone where its property is.
\end{quote}
\[\text{Id.}\]
\[\text{125. } \text{See Reeves v. Board of Zoning Appeal, 16 Mass. App. Ct. 1011, 1012, 455 N.E.2d 447, 449 (1983) (holding that possible future injury under a Cambridge rent control ordinance does not render plaintiff a person “aggrieved” under the Zoning Act).}\]
\[\text{126. } \text{397 U.S. 150, 153 (1970). } \text{Camp holds that if the interest the plaintiff seeks to protect is “arguably within the zone of interests” that Congress intended to protect or regulate by the relevant statute, then the plaintiff is an appropriate person to com-}\]
The key inquiry is the claimed injury.127 In the absence of any specific evidence on the question, the court has relied on two rules of reason. "Parties in interest," as set forth in Massachusetts General Laws, chapter 40A, section 11, enjoy a presumption of standing.128 The statute defines a "party in interest" as "the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list."129 Additionally, a nearby owner of property lying in the same or in a substantially similar type of zoning district enjoys a similar presumption of injury when seeking to uphold the character of the district.130

Where a presumption exists, it must be placed in its proper perspective. "If the issue is contested, and any additional evidence is offered, the point of jurisdiction will be determined on all the evidence with no benefit to the plaintiffs from the presumption as such."131 The court has stated that the presumption "recedes if the issue is contested."132 When this occurs, the burden of proof is on the party claiming standing.133 In general, "[a] trial judge's findings of aggrieved person status are entitled to deference."134

The survey which follows is not intended to be a comprehen-
plain of the injury and has standing. *Id.* at 153. See *supra* part I discussing the *Camp* decision.


sive summary of all zoning and standing cases in the years between *Circle Lounge* and *Barvenik*. Some cases mention the issues without discussion. Others end up in a remand. Readers versed in zoning law will undoubtedly agree that the major decisions have been included.

A. Parties in Interest

Those contests involving parties in interest reported from the pre-*Barvenik* era yielded fairly predictable results. Parties in interest were generally vindicated by the Massachusetts Appeals Court. In ten of the fourteen reported cases, “aggrieved person” status was accorded.

In most of the favorable decisions, standing was awarded because the proposed development had a direct impact on a protected right or interest. In others, it is unclear whether the party in interest was awarded standing because of direct harm or because they sought to preserve the integrity of their residential zoning districts. In several of these decisions, the court evaluated the plaintiffs’ standing despite the defendants’ failure to present sufficient evidence, or in several cases any evidence, contesting the issue. This would, of course, leave the presumption of the plaintiffs’ standing in place. In eight of these ten decisions, standing was upheld

after trial.\textsuperscript{140} Of the two remaining decisions, one was before the Massachusetts Appeals Court after the granting of a motion to dismiss\textsuperscript{141} and the procedural status of the other case\textsuperscript{142} is neither common nor likely to be repeated.

There were four reported decisions in which parties in interest were not granted standing.\textsuperscript{143} Three of these decisions involved circumstances in which the court reasonably concluded that the nature of the injury had more to do with business competition than a protected right or interest.\textsuperscript{144} The other, \textit{Baxter v. Board of Appeals},\textsuperscript{145} is instructive. The special permit under attack authorized six dwelling units. The plaintiffs' claims were summarized by the court:

\begin{quote}
[F]irst, that the locus, although long filled in, had once been subject to tidal action; was, therefore, tideland; and that a license had not been obtained for revised use, conformably with G.L. c. 91, § 18. . . . A second concern, on the part of one of the plaintiffs, was about fish smells from a proposed fish store on the locus, but a fish store was permissible as a matter of right . . . . Other concerns of the plaintiffs fell in the category of planning opinions, e.g., “Well I don't like the way it's laid out over there and it shouldn't be, I don’t think,” and, “[w]ell, cutting out the
\end{quote}


\textsuperscript{142} \textit{Butts}, 18 Mass. App. Ct. at 250, 464 N.E.2d at 110 (“The history of the litigation is lengthy and complicated procedurally.”).


\textsuperscript{145} 29 Mass. App. Ct. 993, 562 N.E.2d 841 (1990). The court was not comfortable with the description of the plaintiffs as "aggrieved persons" because there was "considerable obscurity" in the records as to their receipt of statutory notice. \textit{Id.} at 994, 562 N.E.2d at 842. Nonetheless, the court did acknowledge the rebuttable presumption on the plaintiffs' behalf. \textit{Id.}
views of other people in the park . . . " and "[s]houldn't be so dense." 146

The lower court ruled, after trial, that these claims were insufficient. The appeals court agreed.

B. Legitimate Interest in Preserving the Integrity of the District

A second presumption of standing exists for those persons with a "legitimate interest in preserving the integrity of the district," 147 whether or not they suffer a distinct injury. 148 The presumption is available only to plaintiffs who reside in the same district as the project they oppose. 149 In the years since its origin, only four reported decisions have turned exclusively on this presumption. 150 In all of the decisions, the plaintiffs were awarded standing. 151

C. No Presumption

In all five reported decisions falling chronologically between Circle Lounge and Barvenik, plaintiffs who were without the benefit of either presumption were denied standing. 152 In four of these decisions, plaintiffs were, or were part of, ad hoc citizen associations seeking zoning enforcement. 153 In the fifth decision, Green v.

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146. Id. at 994-95, 562 N.E.2d at 842. Any practitioner active in the representation of abutters will recognize these remarks.


150. But see supra note 138.


152. This figure includes neither Circle Lounge itself, nor Godfrey v. Building Comm'r, 263 Mass. 589, 593, 161 N.E. 819, 821 (1928), a fairly ancient case. One is tempted to add to this figure the original plaintiffs dismissed from the action in Rafferty. See Rafferty, 5 Mass. App. Ct. at 625-26, 367 N.E.2d at 857.

Board of Appeals, a single plaintiff sought enforcement of a zoning by-law. Clearly, the “party in interest” and “integrity of the district” presumptions were critical to the issue of standing during this time frame.

D. Conclusion

Standing in the pre-Barvenik era appears quite predictable. Of the eighteen situations reviewed by the court in which plaintiffs enjoyed the benefit of a presumption, fourteen resulted in decisions upholding standing. In two of the four cases in which presumptive standing was rebutted and standing denied, the plaintiffs were business competitors of the defendant permittee; in another, the plaintiff operated a nonconforming use in a residential district. On the other hand, in all of the reported decisions in which plaintiffs were without presumptive standing, the court determined that the matter should be dismissed.

A closer look reveals a few surprising considerations. First, in all seven decisions in which plaintiffs sought to uphold the integrity of the district in which they resided, they were successful; this was true whether they were parties in interest (three cases) or more remotely situated neighbors (four cases). In each case, the district in question was residentially zoned. The court gave great leeway to those within the same district seeking to maintain its character.

Second, in many of the presumptive standing decisions involving injury in fact, the defendants simply failed to submit enough evidence to rebut the presumption. In Paulding v. Bruins and Butts v. Zoning Board of Appeals, the court did not comment on the defendants’ evidence at all, asserting only that the plaintiffs had met their evidentiary burden. In Baxter v. Board of Appeals, the anomaly of the pre-Barvenik era, it was not the strength of the defendant’s evidence as much as the plaintiffs’ weak showing that carried the day. Only Bedford v. Trustees of Boston University, of

the cases involving injury in fact, was a true contest.

Third, notwithstanding the Massachusetts Supreme Judicial Court’s strict view, some of the appeals court decisions hint at a softening of the rule requiring economic or pecuniary harm. Not every party in interest claimed economic or pecuniary injury. For example, the plaintiff in Tsagronis v. Board of Appeals \(^{160}\) claimed loss of view, as did the plaintiff in Butts.\(^{161}\) The plaintiffs in Paulding cited “fears of erosion, flooding, and damage to the trees on their lot.”\(^{162}\) These claims are reminiscent of the “aesthetic, recreational or conservational” injury endorsed by the United States Supreme Court in Sierra Club, but roundly rejected by the Supreme Judicial Court of Massachusetts in its standing decisions.\(^{163}\)

These SCRAP-like intrusions into the case law occur without elaboration by the appeals court. Was the appeals court consciously endorsing noneconomic harm as grounds for standing in a zoning dispute? Or were these simply instances in which the defendants’ evidentiary presentations opened the door for plaintiffs? The latter position has more support in a close reading of the cases. This is confirmed in Barvenik, which makes it clear that the more expansive federal view of standing has no place in the Commonwealth.\(^{164}\)

IV. Barvenik and Its Progeny

In a series of cases commencing with Barvenik v. Board of Aldermen, the Massachusetts Appeals Court fundamentally altered forty-three years of practice and procedure.\(^{165}\) Barvenik makes two

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\(^{162}\) Paulding, 18 Mass. App. Ct. at 709, 470 N.E.2d at 399. The drainage claim probably fits within the concept of economic harm, but damage to vegetation is more of an aesthetic injury.

\(^{163}\) See Sierra Club v. Morton, 405 U.S. 727 (1972). See also discussion supra part I.B analyzing the Massachusetts Supreme Judicial Court decisions.


key contributions to the doctrine of standing. First, *Barvenik* firmly rejects any suggestion in *Tsagronis*, *Paulding* or *Butts* that noneconomic harm alone is a sufficient basis for standing. Second, the decision signals that plaintiffs will be required to demonstrate standing by appropriate proof at every stage in the proceedings. These two themes are consistently repeated by the Massachusetts Appeals Court in the decisions of the *Barvenik* line.

*Barvenik* involved a typical spat between neighbors and a successful permit applicant. Plaintiffs were various landowners living near the site of a former school, which was to be converted to 114 housing units for the elderly, as authorized by a special permit issued by the Board of Aldermen. The site was zoned for multi-family use. The plaintiffs resided in a single family residence district; they complained that the development of the site would create a general increase in traffic and noise, change the character and appearance of the neighborhood, and result in drainage problems. 

After a seven-day trial, the land court upheld the standing of five of the plaintiffs to contest the special permit, but affirmed the local decision for the permittees on its merits.

The appeals court ruled that it need not reach the merits of the case because the plaintiffs were without standing to contest the matter. The court noted that the plaintiffs, as parties in interest, were entitled to a presumption of aggrieved person status. Additionally, the court reiterated the consequences of a contest:

> Once a defendant ... offers evidence to support the challenge ... the jurisdictional issue is to be decided on the basis of the evidence with no benefit to the plaintiff from the presumption. The plaintiff then has the burden of proof on the issue of standing.

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167. The standing of the plaintiffs was challenged by the defendants in pretrial motions, without success. *Id.* at 131 n.6, 597 N.E.2d at 50 n.6. In its post-trial decision, the lower court ruled that five abutter plaintiffs had standing, but that the remaining plaintiffs did not.

168. *Id.* at 130, 597 N.E.2d at 50. Defendants "extensively briefed the issue" on appeal. "Plaintiffs' brief on appeal did not discuss the subject of standing." *Id.* at 131 n.6, 597 N.E.2d at 50 n.6. This certainly did not improve the plaintiff's chances.

169. *Id.* at 131, 597 N.E.2d at 50. Because the plaintiffs resided in a different (and not substantially similar) zoning district, the second presumption, favoring those seeking to uphold the integrity of the district, was not available. *Id.* at 139, 597 N.E.2d at 55.
Satisfaction of that burden requires proof that the plaintiff is one of the limited class of individuals who are entitled to challenge a zoning board's exercise of discretion.\textsuperscript{170}

Here, however, the tone of the court significantly departed from past standing decisions. First, the court gave short shrift to most of the plaintiffs' claimed injuries, stating that "[s]ubjective and unspecific fears about the possible impairment of aesthetics or neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood feeling, or the loss of open or natural space are all considered insufficient bases for aggrievement under Massachusetts law."\textsuperscript{171} The court characterized these concerns as "sincere," but concluded that it was "angst insufficient" for standing.\textsuperscript{172}

In contrast, the court identified "legitimate zoning-related concerns, including possible vehicular traffic increases, anticipated parking problems, and the potential for litter."\textsuperscript{173} In order to prove the special and different kind of injury necessary for standing, a plaintiff must show that these legitimate zoning-related concerns 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.\textsuperscript{174}

Otherwise, even a party in interest lacks standing.

\textit{Barvenik}'s purge of noneconomic injuries from standing has some troubling aspects. The appeals court's contention that aesthetic harm is "considered [an] insufficient bas[i]s for aggrievement under Massachusetts law" is, no doubt, grounded in the decisions of the Supreme Judicial Court reviewed in Part I of this Article.\textsuperscript{175} However, it fails to account for 1975 Massachusetts Acts 808, sec-

\begin{itemize}
\item \textsuperscript{170} \textit{Id.} at 131-32, 597 N.E.2d at 50-51 (footnotes omitted).
\item \textsuperscript{171} \textit{Id.} at 132-33, 597 N.E.2d at 51. \textit{See also id.} at 134 n.11, 597 N.E.2d at 52 n.11. The court took pains to distinguish the Commonwealth's doctrine of standing from "more expansive" federal law. \textit{Id.} at 132 n.9, 597 N.E.2d at 51 n.9.
\item \textsuperscript{172} \textit{Id.} at 135, 597 N.E.2d at 52-53.
\item \textsuperscript{173} \textit{Id.} at 133, 597 N.E.2d at 51.
\item \textsuperscript{174} \textit{Id.} The court offered no legal precedent for its alternative measures of injury in the absence of diminished value. They are grounded in common sense, in that a plaintiff cannot complain of injury where the new activity would be less onerous than the existing use and less onerous than uses available as of right.
\item \textsuperscript{175} \textit{Id.} at 132-33, 597 N.E.2d at 51. \textit{See also id.} at 134 n.11, 597 N.E.2d at 52 n.11. \textit{See discussion supra} part I.
\end{itemize}
tion 2A, which states that zoning may be used to accomplish aesthetic goals:

This section is designed to suggest objectives for which zoning might be established which include, but are not limited to, the following: — to lessen congestion in the streets; to conserve health; to secure safety from fire, flood, panic and other dangers; to provide adequate light and air; to prevent overcrowding of land, to avoid undue concentration of population; to encourage housing for persons of all income levels; to facilitate the adequate provision of transportation, water, water supply, drainage, sewage, schools, parks, open space and other public requirements; to conserve the value of land and buildings, including the conservation of natural resources and the prevention of blight and pollution of the environment; to encourage the most appropriate use of land throughout the city or town, including consideration of the recommendations of the master plan, if any, adopted by the planning board and the comprehensive plan, if any, of the regional planning agency; and to preserve and increase amenities by the promulgation of regulations to fulfill said objectives. Said regulations may include but are not limited to restricting, prohibiting, permitting or regulating:

1. uses of land, including wetlands and lands deemed subject to seasonal or periodic flooding;
2. size, height, bulk, location and use of structures, including buildings and signs except that billboards, signs and other advertising devices are also subject to the provisions of sections twenty-nine through thirty-three, inclusive, of chapter ninety-three, and to chapter ninety-three D;
3. uses of bodies of water, including water courses;
4. noxious uses;
5. areas and dimensions of land and bodies of water to be occupied or unoccupied by uses and structures, courts, yards and open spaces;
6. density of population and intensity of use;
7. accessory facilities and uses, such as vehicle parking and loading, landscaping and open space; and
8. the development of the natural, scenic and aesthetic qualities of the community.176

Section 2A has been cited as a guide to the legitimate exercise of the zoning power.177 Nowhere does section 2A subordinate

176. 1975 MASS. ACRS 808, § 2A.
The zoning act's "person aggrieved" standard

noneconomic to economic objectives. In fact, the Supreme Judicial Court of Massachusetts has ruled that the police power is properly exercised even when the sole governmental objective is aesthetic in nature.

It is open to contention that, by legitimizing economic harm and ignoring aesthetic injury, the court has lost sight of the changes to zoning law dating from the mid-1970s. Why does "potential for litter" constitute a legitimate zoning-related concern while "impairment of aesthetics or neighborhood appearance" does not? Both share equal billing in section 2A. Is it because the court sees a link between litter and the diminution of property values that is not apparent when considering aesthetic impacts? This approach ignores a wealth of case law that points in the opposite direction. For example, in Chorzempa v. City of Huntsville, the Alabama Court of Criminal Appeals upheld a municipal junkyard ordinance grounded in aesthetics and economics, stating that "current authorities recognize neighborhood aesthetics to be integrally bound to property values and to be relevant considerations in zoning when they bear in a substantial way upon land utilization." Similarly, in State ex rel. Columbia Tower, Inc. v. Boone County, the court ruled that aesthetic considerations were "inextricably entwined with property values." Recent commentary indicates that the diminution in prop-


178. Section 2A may serve to distinguish zoning from other administrative contexts in which standing is an issue. In Boston Edison Co. v. Boston Redevel. Auth., 374 Mass. 37, 46, 371 N.E.2d 728, 737 (1977), quoted in Harvard Square Defense Fund, Inc. v. Planning Bd., 27 Mass. App. Ct. 491, 493 n.5, 540 N.E.2d 182, 185 n.5, review denied, 405 Mass. 1204, 542 N.E.2d 602 (1989), the court noted that "when an issue involves an area of law governed by a specific statute with a standing requirement, that issue is governed by the standing requirements of the particular statute and not by a general grant of standing." The court cited the Zoning Act as an example of such a "specific statute." Boston Edison, 374 Mass. at 46, 371 N.E.2d at 737.


Property value caused by aesthetic harm can readily be quantified. Barvenik's dismissal of aesthetic harm without explanation fails to account for the trend linking aesthetics with property values.

Barvenik's second contribution to the doctrine of standing is its clear statement of the Massachusetts Appeals Court's evidentiary expectations. The "plaintiff must establish—by direct facts and not by speculative personal opinion—that his injury is special and different." The plaintiff must "offer more than conjecture and hypothesis. He must provide specific evidence demonstrating a reasonable likelihood" of injury. Citing Lujan II, Justice Lawrence calibrated his evidentiary expectations to the stage of litigation.

The court also commented on the need for expert testimony to prove legitimate zoning-related concerns:

As a cautionary observation, we do not intend to suggest that plaintiffs asserting zoning aggrievement can never succeed, once their standing is contested, without producing expert witnesses on their behalf. The need for expert testimony depends, as in all cases, upon the trial judge's discretionary determination whether or not the subject matter is beyond the scope of the common knowledge, experience and understanding of the trier of fact without expert assistance. Here, the judge acknowledged the value of expert testimony with respect to the issues of traffic and water distribution and expressly noted that the issues of water pressure, site drainage, storm drainage, and landscaping were "technical questions" and "specialized matters."

The issues deemed technical in the trial court cover considerable ground in virtually every zoning appeal. While the court stops short

183. See, e.g., George P. Smith II & Griffin W. Fernandez, The Price of Beauty: An Economic Approach to Aesthetic Nuisance, 15 Harv. Envtl. L. Rev. 53 (1991). "'[T]here is] no lack of data for making adjustments based on aesthetic factors. View and proximity to a noxious use are just other variables in the marketplace the measurement of which is no more subjective than many other factors commonly valued.'" Id. at 76 (quoting Interview with Arnold S. Tesh, Chairman of the Capital Region Chapter of the American Society of Real Estate Counselors, in Washington, D.C. (Sept. 17, 1990)).


186. Id. at 133, 597 N.E.2d at 51.

187. Id. at 133 n.9, 597 N.E.2d at 51 n.9.

188. Id. at 138 n.13, 597 N.E.2d at 54 n.13 (citation omitted).
of requiring expert testimony, a prudent plaintiff is left with little option.

The evidentiary expectations of the court come to life in its review of the trial testimony of the plaintiffs.189 In a long footnote, the court dismissed the testimony of the five abutters as "the expression of aesthetic views and speculative opinions."190 The first plaintiff's fear of traffic impacts was not limited to the project in question; it related to any project "up in that area."191 The second plaintiff objected primarily to the appearance and density of the elderly housing proposal.192 Another was concerned about neighborhood character.193 For the fourth plaintiff, loss of the site as recreational land and noise were key.194 The last neighbor cited neighborhood character and unsubstantiated traffic concerns.195 The court conceded that one of the plaintiffs alluded to a fear of increased water drainage onto his site, "a fear which, if substantiated, have constituted cognizable injury on which to base standing."196 However, the defendant's uncontested expert testimony regarding drainage demonstrated that run-off would not be a problem.197

*Barvenik* evokes two reactions. The first is that the decision is consistent with evidentiary and doctrinal precedent in the area of standing.198 *Barvenik* purges noneconomic injury from standing in keeping with the Supreme Judicial Court's rule.199 It states, in reliance on *Lujan II*, the same evidentiary burden on plaintiffs as does the United States Supreme Court. The other reaction is the source of its controversy. Simply put, *Barvenik* restores an intellectual

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189. The court also discussed the amount and nature of the evidence necessary to destroy the plaintiff's presumption of aggrievement. *Id.* at 132 n.7, 597 N.E.2d at 50 n.7. The court cited various standards without endorsing any particular one. *Id.*


192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 137, 597 N.E.2d at 54.

197. *Id.* at 138, 597 N.E.2d at 54.

198. The one caveat would be Justice Laurence's test for injury, which was never based on precedent, and which was rejected by the Supreme Judicial Court of Massachusetts in *Marashlian*. See *Marashlian v. Zoning Bd. of Appeals*, 421 Mass. 719, 660 N.E.2d 369 (1996). See also discussion infra part V.

199. For a discussion criticizing this rule, see *supra* notes 175-84 and accompanying text.
rigor to the issue of standing. As Part III of this Article reviews, reported challenges in the pre-Barvenik era were rare. Plaintiffs generally survived because defendants either failed to contest the issue or did so insufficiently. Only ten days before Barvenik, the Massachusetts Appeals Court upheld the standing of a plaintiff whose only evidence of injury—diminution of value caused by loss of view, no less—was his own testimony. In this complacent atmosphere, where presumptions reigned, it is understandable that Barvenik represented a shocking change in tone.

A. Subsequent Decisions by the Massachusetts Appeals Court

The Massachusetts Appeals Court remained remarkably consistent in its approach to the issue of standing in the three years following Barvenik. The court was presented with opportunities to explore the issue in various contexts: motions to dismiss pursuant to Rule 12(b)(1), motions for summary judgment, and, like Barvenik, at the post-trial stage. The decisions since Barvenik were notable chiefly for their contributions to evidentiary issues. The important aspects of these later decisions are reviewed below.

In Jaffe v. Zoning Board of Appeals, the court examined the standing of Thomas and Luan White, who had complained to the board that certain zoning violations existed on the Jaffes' property. The board agreed with the Whites, and the Jaffes appealed. The property of the Whites was located in a single-family residence district; the Jaffes resided in a district zoned for multi-family use. The distance between the two premises was 480 feet, with seven houses separating the parties. On the Jaffes' motion for summary judgment, the trial court ruled that the Whites were without standing to bring the action because they did not own property in the same district.

Only nine months earlier, in Barvenik, the Massachusetts Appeals Court had noted that "no cases have yet recognized standing in such plaintiffs." Now, a different panel of the appeals court ruled that, while no presumption benefitted the Whites, standing

200. See supra notes 155-59 and accompanying text.
203. Id. at 930, 612 N.E.2d at 694.
was not barred if they could demonstrate the requisite injury. The Whites submitted no affidavits from experts. Instead, Thomas White's affidavit alleged that noise emanating from the Jaffes' premises and an increase in pedestrian traffic had caused diminution in his property values. The court ruled that the claim of increased pedestrian traffic, regardless of its effect on values, "may have an impact on a party's property interest so as to give him standing." Thus, the Whites barely satisfied the evidentiary threshold required at the summary judgment stage. The matter was remanded for trial.

Cohen v. Zoning Board of Appeals is the Massachusetts Appeals Court's definitive post-Barvenik treatment of standing in the context of a trial court's summary judgment. The panel wrestled with a multi-party appeal of a special permit. The special permit authorized the construction of a shopping center in an area zoned "arterial commercial." The plaintiffs were the owners of two nearby parcels, both within the same district as the subject parcel. One of the plaintiffs' parcels, home to a Dunkin' Donuts, abutted the site. A supermarket was planned for development on the non-abutting vacant parcel. On cross motions for summary judgment, the judge of the land court ruled that the abutting plaintiffs did not have the requisite injury for standing. The judge also held that the non-abutting plaintiffs were precluded from standing by virtue of their business competition with the permittee.

The trial court, and the appeals court on review, relied on the United States Supreme Court's Lujan II ruling to measure the plaintiffs' claims. The court first ruled that the defendants' evi-

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205. Jaffe, 34 Mass. App. Ct. at 931, 612 N.E.2d at 695. However, the Jaffes noted, in their appellate brief, that the Whites live across the street from Boston College and dormitories which house approximately 900 students. Brief for Appellants at 9, Jaffe, 34 Mass. App. Ct. 929, 612 N.E.2d 693 (No. 91-P-183).

206. Jaffe, 34 Mass. App. Ct. at 931, 612 N.E.2d at 695. The court suggested that if diminution in value were White's only complaint, he may not have presented sufficient evidence to withstand summary judgment. Id.


208. Id. at 620, 624 N.E.2d at 120.

209. Id. at 620, 624 N.E.2d at 121.

210. Id. at 621 n.3, 624 N.E.2d at 121 n.3. The appeals court did not reach the issue of whether a business competitor is always precluded from status as an aggrieved person.

dence, consisting of deposition transcripts, was sufficient to destroy the plaintiffs' presumption of standing. The plaintiffs, in turn, alleged that traffic impacts from the proposed shopping center would adversely affect their properties.\footnote{212} They submitted an affidavit from a professional traffic engineer to buttress their claim of injury. The appeals court, as did the land court before it, shredded the affidavit. The engineer predicted that the proposed shopping center would cause "increased delays in traffic flow, a reduced ability of patrons of Dunkin' Donuts to make left turns ... and a likelihood that, because of lines of vehicles on [the] street, . . . patrons will be impeded from getting in or out of the Dunkin' Donuts parcel."\footnote{213} The court characterized this affidavit as focusing on the impact of traffic on "patrons of the Dunkin' Donuts parcel."\footnote{214} The prediction was flawed because it did not identify injury to the owners of the parcel.\footnote{215} Over the plaintiffs' argument that the court was imposing too stringent a Rule 56 standard,\footnote{216} the trial court was af-

\begin{itemize}
  \item In addition to raising traffic as grounds for standing, the plaintiffs made two lesser claims. They alleged that they were aggrieved by the failure of the shopping centers to conform to the site grading and topography requirements of the zoning by-law. \textit{Cohen}, 35 Mass. App. Ct. at 620, 624 N.E.2d at 121. Furthermore, as land owners in the same district, they claimed that they were entitled to standing because they sought to preserve the integrity of the district. This latter contention came too late in the game. \textit{Id.} at 624, 624 N.E.2d at 123. In any event, the plaintiffs did not identify the interest they sought to protect. \textit{Id.} at 624 n.5, 624 N.E.2d at 123 n.5.
  \item \textit{Id.} at 623, 624 N.E.2d at 122.
  \item \textit{Id.}.
  \item \textit{Id.}.
  \item The plaintiffs' appellate brief noted that "[t]he opinion of an expert is not to be dismissed as a 'generalized assertion of opinion' so long as it is 'sufficiently substantial ... to raise an apparent issue of fact' and if so, it will suffice to avoid summary judgment." Brief for Appellants at 22 n.7, \textit{Cohen}, 35 Mass. App. Ct. 619, 624 N.E.2d 119 (No. 93-P-785) (quoting \textit{Noble} v. Goodyear Tire and Rubber Co., 34 Mass. App. Ct. 397, 403, 612 N.E.2d 250, 254, \textit{review denied}, 415 Mass. 1105, 616 N.E.2d 469 (1993)). The footnote continued by paraphrasing \textit{Noble}:
    \begin{quote}
      The Court in \textit{Noble} held that in opposing a motion for summary judgment a plaintiff need not show a "perfect case": "[a] reasonable measure of doubt may be tolerated because 'all doubts as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment.'"
    \end{quote}
    \textit{Id.} at 22-23 n.7 (citing \textit{Noble}, 34 Mass. App. Ct. at 402, 612 N.E.2d at 254 (alteration in original) (citations omitted)).
  \item The plaintiffs' brief makes many of the same arguments as those rejected by the Supreme Court in \textit{Lujan I} and \textit{Lujan II}. Justice Blackmun dissented in both decisions. In \textit{Lujan I}, he wrote:
    \begin{quote}
      The requirement that evidence be submitted is satisfied here . . . . There remains the question whether the allegations in these affidavits were sufficiently precise to satisfy the requirements of Rule 56(e). The line of demarcation between "specific" and "conclusory" allegations is hardly a bright one. . . .
    \end{quote}
\end{itemize}
firmed. "In the circumstances, the general and conclusory allegations of the affidavit cannot be transformed by inference into genuine triable issues."\(^{217}\)

Two of the Massachusetts Appeals Court's post-\textit{Barvenik} standing decisions invited further appellate review.\(^{218}\) In the first, \textit{Watros v. Greater Lynn Mental Health and Retardation Ass'n},\(^{219}\) the appeals court ruled that abutters to a proposed home for mentally handicapped persons were not aggrieved. The appeals court, noting that matters outside the pleadings had been presented to the trial judge at the hearing, erroneously characterized the defendant's motion to dismiss pursuant to Rule 12(b)(1) as a motion for summary judgment.\(^{220}\) The court, citing \textit{Barvenik} and \textit{Lujan II}, then applied the tougher standards associated with Rule 56 to find that the plain-

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The question, it should be emphasized, is not whether the [plaintiff] has \textit{proved} that it has standing to bring this action, but simply whether the materials before the [trial court] established "that there is a genuine issue for trial," concerning the [plaintiff's] standing. In light of the principle that "[o]n summary judgment the inferences to be drawn from the underlying facts contained in [evidentiary] materials must be viewed in the light most favorable to the party opposing the motion," I believe that the evidence before the [trial court] raised a genuine factual issue as to [the plaintiff's] standing to sue. \textit{Lujan I}, 497 U.S. 871, 902-03 (1989) (Blackmun, J., dissenting) (fourth and fifth alterations in original) (citations omitted). \textit{See also Lujan II}, 504 U.S. 555, 589-93 (1992) (Blackmun, J., dissenting).


\(^{218}\) The Massachusetts Appeals Court has also rendered three lesser decisions in which it has steadfastly applied \textit{Barvenik}. \textit{See Riley v. Janco Cent., Inc.}, 38 Mass. App. Ct. 984, 652 N.E.2d 631 (1995), \textit{review denied}, 421 Mass. 1108, 659 N.E.2d 287 (1996); \textit{Reagan v. Planning Bd.}, 37 Mass. App. Ct. 956, 642 N.E.2d 1054 (1994); \textit{Monks v. Zoning Bd. of Appeals}, 37 Mass. App. Ct. 685, 642 N.E.2d 314 (1994), \textit{review denied}, 419 Mass. 1106, 646 N.E.2d 1070 (1995). \textit{Reagan} and \textit{Riley} are rescript opinions. \textit{Monks} is arguably the most interesting of the three. On the standing question, the trial court issued summary judgment in favor of the defendants. The appeals court in \textit{Monks} ruled that the plaintiffs had standing to challenge a special permit issued for a cellular phone tower measuring 180 feet in height and located approximately 1500 feet away from their home. The plaintiffs complained that the tower would cause a diminution in the value of their property, emit harmful microwaves, and impact the visual quality of the neighborhood. Ordinarily, the court noted, the visual impact claim would not qualify a plaintiff for standing. In this case, however, the Plymouth zoning by-law specifically indicated that the board of appeals was to consider "the visual character or quality of the neighborhood" as a special permit criterion. \textit{Monks}, 37 Mass. App. Ct. at 688, 642 N.E.2d at 316. This "created and defined a protected interest" which the plaintiffs had standing to assert. \textit{Id}.


\(^{220}\) \textit{Id.} at 661-63, 642 N.E.2d at 602-03. See the Supreme Judicial Court's discussion in \textit{Watros}, 421 Mass. at 107-09, 653 N.E.2d at 590-92, which is reviewed \textit{infra}, part V. The Supreme Judicial Court corrected the procedural error and found that the plaintiffs had standing to proceed.
tiffs did not qualify for aggrieved person status.\textsuperscript{221}

The second decision accepted for further appellate review was \textit{Marashlian v. Zoning Board of Appeals}, a rescript opinion.\textsuperscript{222} The Massachusetts Appeals Court rejected standing for plaintiffs who claimed that a proposed complex would cause traffic and parking injuries. The lower court found, after the trial, that the plaintiffs had standing. The court also ruled that the permits in question were validly issued because the project would not cause traffic and parking problems. The appeals court characterized the trial court's ruling as inconsistent and erroneous.\textsuperscript{223} Where traffic and parking were not aggravated by the project, the appeals court determined that the matter should be dismissed for lack of standing. After trial, the plaintiffs' claimed injuries were demonstrably nonexistent.

The Massachusetts Appeals Court's post-\textit{Barvenik} decisions reveal an absolute reversal in this trend. In six of the eight decisions (including \textit{Barvenik}), the plaintiffs were denied standing. Five of the six rejected plaintiffs were parties in interest.\textsuperscript{224} This contrasts with a success rate of more than seventy percent for parties in interest in the pre-\textit{Barvenik} era.\textsuperscript{225} Of the two successful plaintiffs, one was protected by a unique local by-law provision;\textsuperscript{226} the other was located 480 feet from the subject property.\textsuperscript{227} In both of these decisions, rendered by the trial courts in the context of a motion for summary judgment, the Massachusetts Appeals Court was quick to point out that a Rule 56 determination of standing does not pre-

\textsuperscript{221} Watros, 37 Mass. App. Ct. at 664-66, 642 N.E.2d at 603-05. According to the appeals court, the plaintiffs submitted no affidavits or other material to establish the requisite adversity of impact to their peculiar rights. The unverified allegations of their complaint were entitled to no consideration in evaluating the matter, and provided no specific facts as to the impact of the proposed project on them in any event. \textit{Id.} at 666, 642 N.E.2d at 604-05 (citations omitted).


\textsuperscript{223} \textit{Id.} at 932, 641 N.E.2d at 126.


\textsuperscript{225} \textit{See} discussion \textit{supra} part III. Ten of 14 parties in interest were awarded standing in appellate decisions prior to \textit{Barvenik}.


clude a later assessment of the issue at the trial stage. In short, there is hardly any good news for plaintiffs.

B. Trial Courts

A survey of land court decisions during the period from 1993 to 1995, indicates that *Barvenik* had an enormous impact on the trial courts. The results are striking:

**FIGURE 1**
**LAND COURT STANDING DECISIONS**
**1993-1995**

<table>
<thead>
<tr>
<th></th>
<th>1993</th>
<th>1994</th>
<th>1995</th>
<th>Total</th>
</tr>
</thead>
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<tr>
<td>For Defendant</td>
<td>6</td>
<td>6</td>
<td>5</td>
<td>17</td>
</tr>
<tr>
<td>For Plaintiff</td>
<td>1</td>
<td>1</td>
<td>4</td>
<td>6</td>
</tr>
</tbody>
</table>

Most of the standing decisions, fourteen of twenty-three, were en-

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228. *Id.* at 931, 612 N.E.2d at 695; *Monks*, 37 Mass. App. Ct. at 689, 642 N.E.2d at 316.


tered after trial. Nine of the decisions were entered at the summary judgment stage. No decisions were entered pursuant to Rule 12(b)(1) or 12(b)(6).

Parties in interest generally fared quite poorly:

**FIGURE 2**
**PARTIES IN INTEREST AT THE LAND COURT 1993-1995**

<table>
<thead>
<tr>
<th></th>
<th>1993</th>
<th>1994</th>
<th>1995</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Standing</td>
<td>1232</td>
<td>1233</td>
<td>3234</td>
<td>5</td>
</tr>
<tr>
<td>No Standing</td>
<td>5235</td>
<td>3236</td>
<td>4237</td>
<td>12</td>
</tr>
</tbody>
</table>

This trend is confirmed by a cursory check of decisions in the superior courts during the period from 1994 to 1995, as reported in *Massachusetts Lawyers Weekly*. In his feature article, Robert A. Cohen traced the impact of *Barvenik* on five trial decisions, all siding with defendants on the issue of standing. In four decisions of the superior courts between 1994 to 1995, reported in *Massachusetts Lawyers Weekly*, plaintiffs obtained standing in the pretrial stages of litigation.

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C. Conclusion

Barvenik obviously inspired considerable adherence in later panels of the Massachusetts Appeals Court and in the trial courts. At the appeals court, six of the eight subsequent decisions resulted in a finding that plaintiffs were without standing to contest the issue. Of the twenty-three relevant decisions of the Massachusetts Land Court in the period from 1993 to 1995, nineteen cited Barvenik, including fourteen of the seventeen decisions that resulted in a finding of no standing.

V. Barvenik at the Supreme Judicial Court

The Supreme Judicial Court of Massachusetts has been presented with three opportunities to review standing in the post-Barvenik era. The first of these decisions, Tsagronis v. Board of Appeals, signaled the contentiousness of the issue later made apparent in the third decision, Marashlian v. Zoning Board of Appeals.240 The focus of the second post-Barvenik decision, Watros v. Greater Lynn Mental Health and Retardation Ass'n, was primarily procedural and did not substantially alter the Barvenik test for injury.241 In Marashlian, however, the Supreme Judicial Court modified two important aspects of the Barvenik decision. First, the court reduced the Barvenik “comparable uses” balancing test to a mere factor. Second, the court discouraged post hoc findings, based on a failure to succeed on the merits, that a plaintiff lacked standing.

A. The Tsagronis Decision

Tsagronis involved the standing of an adjoining landowner to challenge a variance issued for the construction of a single-family home on the last lot in a subdivision. Like the subject parcel, the plaintiffs’ parcel was undersized and lacked the requisite frontage. In a decision rendered only eleven days before Barvenik, the Massachusetts Appeals Court ruled that the plaintiffs had standing to challenge the variance.242 By virtue of their status as abutters and because they resided in the same district as the subject parcel, the
plaintiffs were presumptively aggrieved persons. The plaintiffs testified that the construction of the home would partially obstruct their views of Buzzards Bay, resulting in a diminution of value.\textsuperscript{243} Defendants failed to produce any evidence to contradict these contentions.\textsuperscript{244} As a result, the appeals court ruled that the evidence warranted a finding of standing.

The Supreme Judicial Court agreed in a divided opinion.\textsuperscript{245} The court characterized the plaintiffs' testimony regarding obstructed views and diminished value as "uncontroverted."\textsuperscript{246} For the majority, this was determinative: "Indeed, on the uncontested facts, the status of aggrieved party probably is compelled as a matter of law."\textsuperscript{247} The dissent, however, was unsympathetic to the crucial claim of pecuniary harm. The dissent pointed out that "[t]here was no evidence as to the value of the Tsagronises' [sic] lot at the time of the hearing or what the value might be after construction of the [defendant's] house, or whether the value would diminish even more if the locus were used for purposes not requiring a variance."\textsuperscript{248} In the dissent's view, the speculative opinion of the plaintiffs did not constitute plausible harm.

There is much in the Massachusetts high court's Tsagronis decision to suggest that Barvenik had been well-received at the Supreme Judicial Court. Barvenik is not cited in Tsagronis, but the

\begin{itemize}
\item \textsuperscript{243} Id. at 58-59, 596 N.E.2d at 371. The dissent in the Supreme Judicial Court's Tsagronis decision noted that the plaintiffs also claimed harm from a diminution of light and air, air pollution, erosion, and wastewater discharge. Tsagronis, 415 Mass. at 335-36 nn.2-3, 613 N.E.2d at 896-97 nn.2-3 (Abrams, J., dissenting). These issues were not discussed by the appeals court.
\item \textsuperscript{244} Tsagronis, 33 Mass. App. Ct. at 59, 596 N.E.2d at 372.
\item \textsuperscript{245} Justices Abrams, Liacos, and Lynch dissented in this four to three decision. Tsagronis, 415 Mass. at 329, 613 N.E.2d at 893.
\item \textsuperscript{246} Id. at 330 n.4, 613 N.E.2d at 894 n.4.
\item \textsuperscript{247} Id. The dissent suggested that the majority had "replaced the rebuttable presumption... with an automatic standing rule." Id. at 336 n.4, 613 N.E.2d at 897 n.4. However, the majority's position, grounded in the lack of evidence produced by the defendants at trial, cannot be said to go this far. After all, the presumption only "recedes if the issue is contested." Redstone v. Board of Appeals, 11 Mass. App. Ct. 383, 385, 416 N.E.2d 543, 544 (1981). Failure to contest the issue would preserve the presumption, not automatic standing. See LIACOS ET AL., supra note 113, at 235 ("A presumption is rebuttable... by evidence warranting a finding contrary to the presumed fact."). As the Massachusetts Appeals Court noted in several pre-Barvenik rulings, failure to contest standing leaves the presumption intact. See supra part III and accompanying text for a discussion of the pre-Barvenik rulings.
\item \textsuperscript{248} Tsagronis, 415 Mass. at 335, 613 N.E.2d at 896 (Abrams, J., dissenting). Obviously, this again raises the specter of obligatory expert testimony to demonstrate standing, here, presumably by an appraiser. See supra note 186 and accompanying text for a discussion of this issue as raised in Barvenik.
\end{itemize}
results are consistent, even complementary. The Tsagronis majority subscribed to a principle often announced by the Massachusetts Appeals Court: Where the defendant fails to produce evidence sufficient to contest the presumption of aggrieved person status, the presumption survives. 249 Nothing in Barvenik contradicts this principle. In fact, by delineating the evidentiary obligations of the parties, Barvenik demands nothing less.

The Tsagronis dissent also embraced elements of the Barvenik holding. To gauge the plaintiffs' claim of diminished value, the dissent looked to alternative uses—here, campgrounds—that might, as of right, be placed on the site. This is consistent with Justice Laurence's Barvenik formulation for injury in fact. 250 The dissent also scrutinized the plaintiffs' various claims of harm, rejecting those injuries not related to typical zoning disputes or reducible to pecuniary harm. Justice Laurence had reached similar conclusions regarding legitimate zoning injuries in Barvenik. In short, nothing in Tsagronis contemplates the Marashlian criticism of Barvenik.

B. The Watros Decision

The second of the Supreme Judicial Court's post-Barvenik standing decisions focused on a narrow procedural question. In Watros v. Greater Lynn Mental Health and Retardation Ass'n, the court provided a blueprint for the treatment of motions to dismiss pursuant to Rule 12(b)(1) of the Massachusetts Rules of Civil Procedure. 251 The Massachusetts Appeals Court characterized such a motion to dismiss as a summary judgment motion where the movant had submitted extra-pleading materials. 252 The Massachusetts Appeals Court, citing Barvenik and Lujan II, applied the tougher standards associated with Rule 56 of the Massachusetts Rules of Civil Procedure to find that the plaintiffs did not qualify for ag-

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249. See supra notes 128-34 and accompanying text for a discussion of the Massachusetts Appeals Court's handling of the issue of the presumption.

250. In focusing on the other uses that might be made of the lot, the dissent asked the equivalent of the Barvenik test for injury: Whether the plaintiff's property or legal rights are "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 . . . locus." Barvenik v. Board of Aldermen, 33 Mass. App. Ct. 129, 133, 597 N.E.2d 48, 51 (1992).


grieved person status. The Supreme Judicial Court opted to apply the more lenient standards associated with Rule 12(b)(1) to find that the plaintiffs had standing to challenge the permits. The court noted that no evidence was presented by the defendants at the hearing to controvert the claim of standing. Thus, the plaintiffs "were entitled to rely entirely on their presumed status of being aggrieved parties." Watros is best characterized as a procedural correction, not a repudiation, of the Barvenik line; it does not repudiate the substantive aspects of the doctrine.

C. The Marashlian Decision

Until 1996, the Supreme Judicial Court of Massachusetts was content to let the appeals court's view of standing develop without significant comment. In Marashlian v. Zoning Board of Appeals, however, the Supreme Judicial Court wrestled with several key components of the Barvenik decision. The facts of the matter are typical fare. The board of appeals issued a special permit and two variances for the development of a hotel with a conference center on Newburyport's waterfront. Two plaintiffs, each a party in interest, sought judicial review. The plaintiffs claimed that the proposed development would cause disruption of neighborhood character, a shortage of parking spaces, attendant traffic congestion, and various problems (primarily noise and lighting) associated with the proposed valet parking services. After trial, the judge ruled that the plaintiffs had standing to maintain the action but that the board had not exceeded its authority. In essence, the trial judge found that

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253. Id. at 664-66, 642 N.E.2d at 603-05. The court found that the plaintiffs submitted no affidavits or other material to establish the requisite adversity of impact to their peculiar rights. The unverified allegations of their complaint were entitled to no consideration in evaluating the matter... and provided no specific facts as to the impact of the proposed project on them in any event. Id. at 666, 642 N.E.2d at 604-05 (citations omitted).

254. The Supreme Judicial Court viewed the matter as governed by Rule 12(b)(1) despite the fact that summary judgment motions were also pending before the trial court. Watros. 421 Mass. at 108-09, 653 N.E.2d at 591. In a brief discussion, the court pointed out that only Rule 12(b)(6) motions to dismiss are converted to Rule 56 motions by the submittal of such materials. Id.

255. Id. at 111, 653 N.E.2d at 592.

256. Id. at 111, 653 N.E.2d at 593.


259. Id. at 931, 641 N.E.2d at 126.
the proposed complex would not cause any of the alleged problems. Consequently, the special permit and variances were sustained on the merits; the complex would not detrimentally affect the area.

The appeals court held that the trial judge's findings as to traffic, parking and the valet service militated against standing.260 The appeals court's position was simple. The plaintiffs' claimed harm stemmed from traffic and parking. The trial resulted in a finding that there was no such harm: "Based on the judge's findings, [the plaintiffs] have failed to make a 'specific showing that the plaintiffs will either be injured or that such an injury would be special and different from that which others throughout the zone would experience . . . .'"261 In short, the appeals court ruled that it need not reach the merits of the board's decision because the plaintiffs' claims of injury were not proved at trial.

The appeals court's decision in Marashlian inspired some negative reviews. Commentator Michael Halley, in Massachusetts Lawyers Weekly, was quite blunt:

The import of the Marashlian decision is a wholesale renunciation of the very concept of standing as a threshold, jurisdictional issue. The Appeals Court has held, in essence, that if a defendant prevails on the merits, after trial, the plaintiff never had standing to bring the claim in the first place.262

Mr. Halley argued that "[a]ggrievement . . . means, if anything, a colorable claim, not certain guaranteed success."263 This is the point of view that ultimately prevailed at the Supreme Judicial Court in its Marashlian decision. Chief Justice Liacos, who sided with the dissent in Tsagronis, wrote the majority opinion. He cited Barvenik for the proposition that "[i]f standing is challenged, the jurisdictional question is decided on 'all the evidence with no benefit to the plaintiffs from the presumption.'"264 However, Chief Justice Liacos noted that:

[A] review of standing based on "all the evidence" does not re-

260. Id. at 933, 641 N.E.2d at 127.
262. Halley, supra note 13, at B4 (endnote omitted). Given that standing can be raised "at any time," Mr. Halley's characterization of standing as a threshold issue is more a statement of expectation than requirement.
263. Id.
quire 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. 265

It is plausible that a trial judge may conclude that the facts warrant both a finding of standing and an adverse ruling on the merits. Marashlian suggests that these are not inherently inconsistent results.

In this regard, Marashlian resuscitates the oft-repeated proposition that "[t]he words 'person aggrieved' . . . are not to be narrowly construed." 266 On several occasions, the court reminds us that "[t]he findings of the judge should not be overturned unless 'clearly erroneous.'" 267 As the Supreme Judicial Court noted, the appeals court's Marashlian decision turned on a reinterpretation of the trial judge's findings, which otherwise supported standing for the plaintiffs. 268 In general, "[a] trial judge's findings of aggrieved person status are entitled to deference." 269 The ruling of the appeals court did not comport with this standard.

The court used this opportunity to correct another key aspect of the Barvenik ruling. Justice Laurence had fashioned a threshold test for injury in fact. Plaintiffs must show:

[S]pecific evidence demonstrating a reasonable likelihood that the [decision] 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 . . . locus. 270

As noted in Part IV of this Article, this test is founded in pragmatism, not precedent. 271 To the Barvenik panel, common sense dictated that the plaintiff had no claim of injury where a new or

265. Id.
268. Id. at 723, 660 N.E.2d at 373.
271. See supra note 172 and accompanying text.
proposed activity would be less onerous than the existing use, or less onerous than uses available as of right. Nonetheless, the Supreme Judicial Court of Massachusetts limited the Barvenik formulation:

This line of cases appears to be a departure from those previously decided . . . . We decline to adopt such a rule, except to the extent that it requires specific facts to establish perceptible harm. Although the magnitude of the threat of harm to a potential plaintiff in relation to the threat of harm from a use permissible as of right is a factor that may be considered, it is not dispositive of the standing issue.272

For this proposition, Chief Justice Liacos cited Justice Abrams's dissent in Tsagronis, in which he joined.273 Justice Abrams had argued in Tsagronis that the failure to consider the impact of alternative, or as of right, uses on the subject parcel exposed the defects in the plaintiffs' claim of diminished value.274 However, he did not suggest that this analysis was a required element of every standing contest.275

Marashlian, then, rejects two key aspects of the Barvenik line. First, in a clear message to trial judges, the court reduced the balancing test offered by Justice Laurence—focusing on comparable uses—to a mere factor. The court held that this test should not be determinative of the outcome without rejecting its application in some form. Second, in an equally clear message to the appeals court, the decision suggests that a finding after trial of standing for plaintiffs is best left undisturbed. Where the trial judge's findings are supported in the record, the usual standards of appellate review demand deference. A decision on the merits for the permittee, coupled with a decision that the challengers nonetheless had standing to bring suit, is not inherently inconsistent.

The Marashlian dissent was composed of Justice O'Connor, its author, and Justices Lynch and Greaney. Only Justice Lynch held over from the Tsagronis dissent.276 The dissent did not necessarily

272. Marashlian, 421 Mass. at 724, 660 N.E.2d at 373.
275. Id. at 335-36, 613 N.E.2d at 896-97.
disagree with the majority's prescription for deference. The dissent, however, conceded only that the judge made the following relevant findings:

(1) "The number of parking spaces to be provided for the Project will be sufficient to meet the parking demands generated by the hotel. Therefore, the Project will not add to any existing onstreet parking congestion in the area"; (2) "[T]he supply of public parking spaces in the area will be adequate to meet the demand"; (3) "With respect to traffic, the [P]roject is expected to minimally increase traffic volumes and . . . site-generated traffic will not have a major impact on area traffic patterns. Any adverse traffic impacts will be controlled by implementing certain mitigation measures."277

The dissent pointed out that there were no findings "suggesting that the zoning board's actions are likely to result in harm to the plaintiffs' legally protected interests."278 Consequently, the appeals court's rescript opinion was characterized as appropriately deferential. The judge had simply made an erroneous conclusion of law in determining that his findings, although warranted, demonstrated the plaintiffs' standing. In the dissent's view, the lower court's ruling was not entitled to the deference demanded by the majority.

**Conclusion**

Reaction to Marashlian was immediate. In the January 29, 1996 edition of Massachusetts Lawyers Weekly, commentator William V. Hovey summarized that the Marashlian decision shows "the very confused state of the law regarding who is an 'aggrieved person' for purposes of challenging a variance . . . . The courts have been all over the place on the standing issue—backwards, sideways

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275 (O'Connor, J., dissenting). The trial judge ruled, citing Sherrill House, that "[e]ven if Snow and Marashlian were to prove no more than the likelihood of fear of harm on the part of themselves, their visitors, clients and employees, they have standing to maintain this action." *Id.* Justice O'Connor noted that the portion of Sherrill House relied upon, however, was dictum, and, thus, the "judge's reasoning and ruling were incorrect." *Id.* Furthermore, these types of "fears" (Sherrill House involved the siting of a correctional facility) would "tend to diminish the market value of the Plaintiff's property," unlike the fears of Snow and Marashlian, which had to do with a hotel complex. *Id.* at 728, 660 N.E.2d at 375.

277. *Marashlian*, 421 Mass. at 729-30, 660 N.E.2d at 376 (O'Connor, J., dissenting) (alterations in original). A few other relevant, but minor, findings were also detailed.

278. *Id.*
and upside down."\(^{279}\) Hovey added that standing remains "a chicken or the egg" problem: "[I]t is difficult to give definite advice to a client who is considering a zoning challenge."\(^{280}\)

With a bit more time to ponder the issue, some post-*Marashlian* considerations do emerge from the confusion. First, in the realm of evidentiary expectations, *Marashlian* makes only a minor adjustment to *Barvenik*. The decision certainly does nothing to disturb *Barvenik*’s insistence upon rigorous proof of standing. *Marashlian*, several times, demands "credible evidence to substantiate [the plaintiffs'] allegations."\(^{281}\) This is consistent with *Barvenik*’s statement of the evidentiary burden: The "plaintiff must establish—by direct facts and not by speculative personal opinion—that his injury is special and different."\(^{282}\) There must be "specific evidence demonstrating a reasonable likelihood" of injury.\(^{283}\) *Marashlian* undoubtedly preserves the *Lujan II* calibration of this evidentiary burden, appropriate to the stage of litigation.

*Marashlian* also keeps intact the *Barvenik* concept of "legitimate zoning-related concerns" sufficient to provide standing.\(^{284}\) The plaintiffs’ claim to standing turned on injuries attributable to traffic and parking impacts. Justice Laurence had specifically cited "possible vehicular traffic increases [and] anticipated parking problems" as "legitimate" concerns.\(^{285}\) The Supreme Judicial Court’s *Tsagronis* decision, particularly the dissent, is also consistent with this formulation for zoning aggrievement. In the post-*Marashlian* era, "the possible impairment of aesthetics or neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood feeling, or the loss of open or natural space" are not bases for standing.\(^{286}\)

*Marashlian* does, however, slightly alter the evidentiary focus attending injury in fact. *Barvenik* had suggested that in order to prove the special and different kind of injury necessary for standing, a plaintiff must show that these legitimate zoning-related concerns

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280. Id.


283. Id. at 133, 597 N.E.2d at 51.

284. Id.

285. Id.

286. Id.
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.\textsuperscript{287}

\textit{Marashlian} reduces this balancing test to a factor for consideration. Otherwise, \textit{Marashlian} ensures that the spirit of \textit{Lujan II} will pervade the trial courts of the Commonwealth of Massachusetts.

\textit{Marashlian}’s second realm reminds the Massachusetts Appeals Court of the deference due to a trial judge’s findings. To the extent that this aspect of \textit{Marashlian} is read narrowly, there is no fundamental inconsistency with \textit{Barvenik}. The findings of a lower court cannot be disturbed unless “clearly erroneous.” Chief Justice Liacos cited \textit{Building Inspector v. Sanderson}\textsuperscript{288} for the appropriate standard: “A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”\textsuperscript{289} Further,

\begin{quote}
[i]n applying the clearly erroneous standard to the findings of a [trial] court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether “on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.”\textsuperscript{290}
\end{quote}

Read narrowly, \textit{Marashlian} merely reiterates that where the trial judge finds standing warranted by the evidence, the appeals court, except in the rare case, must accede.

However, \textit{Marashlian} does not preclude the trial court from

\begin{footnotes}
\textsuperscript{287}. \textit{Id}. The court offered no legal precedent for its alternative measures of injury in the absence of diminished value. They are grounded in common sense, in that the plaintiff cannot complain of injury where the new activity would be less onerous than the existing use, and less onerous than uses available as of right.


\textsuperscript{289}. \textit{Id}. at 160-61, 360 N.E.2d at 1053-54 (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

\end{footnotes}
dismissing a matter, post-trial, for lack of standing. In this regard, *Marashlian* is quite consistent with general principles reviewed in Part II of this Article. The issue of standing may still be raised at any time during the proceedings, addressed sua sponte, or raised by a party for the first time at the appellate level. *Marashlian* does not reduce standing to a threshold device with a useful lifespan limited to the pretrial phase of litigation.

The Supreme Judicial Court’s decision keeps intact *Barvenik’s* two key contributions to the doctrine of standing: (1) rigorous proof of injury tailored to the stage of the litigation, and (2) injury in fact which is founded upon “legitimate zoning-related concerns.” With these guardians of the court house door still in place, *Marashlian* can hardly be said to liberalize standing. The rigorous proof demanded by *Lujan II* will bar many plaintiffs, particularly those with only limited resources. The *Lujan II* standards are not likely to change, since they are pinned to the rules of civil procedure. *Barvenik’s* concept of injury in fact, narrowly focused on “legitimate zoning-related concerns,” will also exclude plaintiffs. For access to be significantly broadened, it is this concept which must be changed.

291. See *Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477, 1484 (10th Cir. 1995); *Board of County Comm’rs v. W.H.I., Inc.*, 992 F.2d 1061, 1063 (10th Cir. 1993); *Barvenik*, 33 Mass. App. Ct. at 131 n.6, 597 N.E.2d at 50 n.6 and cases cited therein.


293. *Prudential-Bache Sec., Inc. v. Commissioner of Revenue*, 412 Mass. 243, 248, 588 N.E.2d 639, 642 (1992). The court in *Prudential-Bache* noted that “a party may not argue for the first time on appeal that an opponent lacks standing to raise a constitutional issue that was presented below without any objection to the party’s standing.” *Id.* (citing *Aronson v. Commonwealth*, 401 Mass. 244, 247, 516 N.E.2d 137, 139 (1987), *cert. denied*, 488 U.S. 818 (1988)). This, apparently, is one of the few limitations on raising the issue of standing.