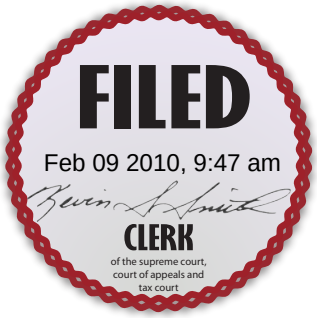

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IN THE
COURT OF APPEALS OF INDIANA

RICHARD AND SUSAN REGER,	)	
	)	
Appellants,	)	
	)	
vs.	)	No. 17A04-0907-CV-395
	)	
CITY OF AUBURN BOARD OF ZONING APPEALS,	)	
	)	
	)	
Appellee.	)	

APPEAL FROM THE DEKALB SUPERIOR COURT
The Honorable Monte L. Brown, Judge
Cause No. 17D02-0810-PL-20

February 9, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Richard and Susan Reger ("the Regers") sought a writ of certiorari in the DeKalb Superior Court challenging the City of Auburn's decision to issue permits to an adjoining landowner to make improvements to the duplex on the property. The trial court denied and dismissed the writ after concluding, in part, that the Regers had not established that they were an aggrieved party, and therefore, that they lacked standing to appeal the issuance of the permits. We address only the following dispositive issue: whether the Regers lacked standing to challenge the issuance of the permits.

We affirm.

Facts and Procedural History

In the 1950s, George and Dorothy Capen ("the Capens") constructed a duplex on North VanBuren Street in Auburn, Indiana. The Capens resided on one side of the duplex, and Dorothy Capen's parents lived on the other side of the duplex. The Capens used both sides of the duplex after Dorothy's mother passed away in 1969. In 2008, George Capen passed away, and Eric Weinbrenner ("Weinbrenner") purchased the duplex from Capen's Estate. The residence was "held out as a two-unit structure" to Weinbrenner. Appellant's App. p. 89.

Weinbrenner then applied for a remodel permit to "[i]nstall two front entrance doors and install rear entrance doors. Remodel for New Doors only." Appellant's App. p. 20. Weinbrenner also applied for permits to upgrade the electrical wiring. On July 23, 2008, the City of Auburn ("the City") issued the requested permits.

Richard and Susan Reger ("the Regers"), who own the property adjacent to the Weinbrenner property, appealed the issuance of the permits to the Auburn Board of

Zoning Appeals ("the BZA"). The Regers argued that the property is zoned for single family residences, and the property's non-conforming use as a duplex ceased in 1969; therefore, the right to use the property as a duplex was abandoned. The Regers claimed that the City ignored its zoning ordinances when it issued the permits to Weinbrenner.

After a hearing held on September 23, 2008, the BZA affirmed the City's decision to issue the remodel and electrical permits to Weinbrenner. The BZA entered the following findings in support of its decision:

> a. The structure was constructed as a two-family structure in the early 1950s.
> b. The construction of the structure took place before the institution of the Auburn Zoning Laws.
> c. The building contains two separate housing units, each with corresponding living rooms, bedrooms, kitchens and bathrooms. Each unit has its own front and rear entrances. Both units have separate common areas for laundry facilities.
> d. The improvements made to the structure as part of building permits 2008-00000010, 2008-00000050, and 2008-00000062 do not constitute major structural changes nor do they enlarge, expand or extend the structure.
> e. The unit was designed and constructed to be used as a two-family dwelling structure. Until said structure is physically altered to be in compliance as a single-family structure, it is considered to be a legal non-conforming structure as defined in our zoning ordinance 150.510 through 150.550.
> f. The determination that the structure is a two-family structure is further supported by original mylar drawing which clearly delineates the structure as a two-family two-unit structure.
> g. The original construction agreement dated December 15, 1953, sets forth that the structure was designed as a two-family structure.
> h. Copies of envelopes have been submitted demonstrating that at one time the property utilized two separate addresses.
> i. Property tax records from the 1960s show two separate families listed on the billing statements.
> j. The structures contain separate utility meter boxes located at the rear of the structure.

> k. No evidence has been presented to demonstrate that the structure was ever modified to a single-family housing unit.

Appellant's App. pp. 88-89. The BZA also concluded that "[t]he previous owner may have at one time lived in or utilized both sides of the unit, but there is no evidence that the two-family structure was ever changed. Therefore, the structure is allowed to continue as a non-conforming use and structure in combination." Id. at 89.

The Regers then filed a writ of certiorari in the trial court seeking review of the BZA's decision. In response, the BZA argued, in part, that the Regers were not an aggrieved party. After a hearing was held on the Regers' petition, the trial court issued its order on June 17, 2009, denying and dismissing the Regers' petition for writ of certiorari and affirming the decision of the BZA. In the order, the court concluded the Regers failed to prove that they were an aggrieved party, and therefore, lacked standing to appeal the BZA decision. The court also concluded that even if the Regers had standing, "the evidence submitted at the BZA hearing did not establish that the owners intended to abandon the nonconforming use." Appellant's App. pp. 7-8. The Regers now appeal.

Discussion and Decision

The trial court concluded that the Regers were not "aggrieved parties" because they failed to present evidence that they will or have "suffered an injury that is pecuniary in nature." Appellant's App. pp. 5-6. The Regers argue that because they are adjoining landowners they qualify as "aggrieved parties." Appellant's Br. at 18.

Indiana Code section 36-7-4-1003(a) requires that a person be "aggrieved" to seek judicial review of the BZA's decision.

> "To be aggrieved, the petitioner must experience a substantial grievance, a denial of some personal or property right or the imposition of a burden or obligation. The board of zoning appeals's decision must infringe upon a legal right of the petitioner that will be enlarged or diminished by the result of the appeal and the petitioner's resulting injury must be pecuniary in nature. A party seeking to petition for certiorari on behalf of a community must show some special injury other than that sustained by the community as a whole."

Thomas v. Blackford County Area Bd. of Zoning Appeals, 907 N.E.2d 988, 991 (Ind. 2009) (quoting Bagnall v. Town of Beverly Shores, 726 N.E.2d 782, 786 (Ind. 2000)); see also Benton County Remonstrators v. Bd. of Zoning Appeals of Benton County, 905 N.E.2d 1090, 1098 (Ind. Ct. App. 2009) (An adjoining landowner must demonstrate an injury that will result in pecuniary harm.).

Moreover, the petitioner bears the burden of proving that he or she is "aggrieved." Thomas, 907 N.E.2d at 991. Yet, proving an injury that results in pecuniary harm may be established by the petitioner's own testimony. "'[I]t is generally held that the owner of real estate is assumed to possess sufficient acquaintance with it to estimate the value of the property although his knowledge on the subject might not be such as would qualify him to testify if he were not the owner.'" Benton County, 905 N.E.2d at 1098 (quoting State v. Hamer, 199 N.E. 589, 595, 211 Ind. 570, 585 (1936) ("In this case, the opinion of the adjoining landowners as to the devaluation of their own property is sufficient to constitute a special injury and establish a potential pecuniary harm.")).

In their petition for writ of certiorari, the Regers alleged "aggrieved party" status because they own the real estate adjacent to the Weinbrenner property. Appellant's App. p. 10. However, they failed to allege any injury likely to result in pecuniary harm as a result of the BZA's decision to affirm the City's decision to issue the remodel and electrical permits to Weinbrenner.[1] The Regers also failed to present any evidence that they suffered a pecuniary injury as a result of the City's decision to issue the permits.

We cannot agree with the Regers' argument that they qualify as an aggrieved party simply because they are adjoining property owners. Our courts have consistently held that to be aggrieved, a party must establish a pecuniary injury caused by the BZA's decision. See e.g. Thomas, 907 N.E.2d at 991; Bagnall, 726 N.E.2d at 786; Benton County, 905 N.E.2d at 1098. In Bagnall, our supreme court affirmed the trial court's determination that the Bagnalls lacked standing to challenge the variance at issue because the Bagnalls "presented nothing in their petition nor did they enter any evidence in the record to suggest that the Lot 11 zoning variance would result in infringement of a legal right resulting in pecuniary injury[.]" 726 N.E.2d at 786.

In this case, the Regers failed to present any evidence that would establish that the issuance of the permits to Weinbrenner infringed upon a legal right of the Regers, which resulted in a pecuniary injury. For this reason, we conclude that the trial court properly

[1] In their application for administrative appeal to the BZA, the Regers did allege that "[c]onsultation with realtors has confirmed that, if and when we attempt to sell our home at 901 North Van Buren Street, having a duplex next door will definitely have an adverse effect on our number of prospective buyers as well as our selling price." See Appellant's App. p. 47. However, we cannot consider this non-testimonial statement as evidence of a pecuniary injury.

concluded that the Regers were not aggrieved parties, and therefore, that they lacked standing to challenge the BZA's decision

Accordingly, we affirm the trial court's dismissal of the Regers' petition for writ of certiorari.

Affirmed.

BARNES, J., and BROWN, J., concur.