IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

KELVIN UNDERWOOD,	)	
	)	
Respondent,	)	
	)	
v.	)	
	)	
	)	**WD73912**
ST. JOSEPH BOARD OF ZONING	)	
ADJUSTMENT and CITY OF	)	**OPINION FILED:**
ST. JOSEPH, MISSOURI,	)	**January 17, 2012**
	)	
Respondents,	)	
	)	
SHARON KENNEDY,	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of Buchanan County, Missouri
The Honorable Daniel F. Kellogg, Judge

Before Division Three: Karen King Mitchell, Presiding Judge, and James M. Smart, Jr., and Gary D. Witt, Judges

Respondent, Kelvin Underwood, applied for a zoning variance in order to complete construction of a detached garage on his property in excess of the size restrictions currently in place by St. Joseph zoning ordinances. The Board of Zoning Adjustment (BZA) denied Underwood's request, and he sought judicial review in the circuit court, with the city of St. Joseph (City) and the BZA as named respondents. The circuit court reversed the BZA's

decision and remanded with instructions that the BZA grant Underwood's requested variance. City chose not to appeal the circuit court's decision. Appellant, Sharon Kennedy, a nearby landowner, filed an appeal from the circuit court's decision to this court.[1] For the reasons discussed below, we dismiss this appeal on the ground that Kennedy has no standing to appeal from a lower court decision wherein she was not a party to the action.

Factual Background

Underwood submitted construction plans for a building permit for a detached garage, measuring 1,328 square feet, to City for approval. City subsequently approved the plan and design, and Underwood obtained a building permit for the detached garage.

Approximately three months later, when the structure was 80% complete, City received an anonymous complaint about the garage and issued a stop work order because the garage actually measured 1,427 square feet, rather than the 1,328 square feet authorized by the permit. St. Joseph City Ordinance § 31.050(e)(10)b.4 limits the size of a detached garage to "an area no greater than 30% of the rear yard area behind the principal structure." Based on the size of Underwood's yard, the garage could be no larger than 1,035 square feet.[2] City advised Underwood to either obtain a demolition permit or seek an area variance with the BZA. Underwood chose to seek an area variance.

In response to Underwood's variance request, City mailed certified letters to adjacent landowners (including Kennedy) and published notice of a public hearing on the variance request ("initial hearing"). Before the initial hearing, City acknowledged that it erroneously issued the

[1] Due to the procedural posture of this case and the fact that we review the BZA's decision, rather than the circuit court's, Kennedy filed the appeal but Underwood filed the appellant's brief, as he was the aggrieved party to the BZA's decision.

[2] Based on the evidence regarding the size of Underwood's yard (3,450 square feet), 1,035 square feet was the maximum permissible area of a detached garage. City, however, in its report to the BZA indicated that Underwood's variance was from 1,050 feet to 1,427 square feet. It is unclear how the 1,050-square-foot figure was reached.

building permit for the 1,328-square-foot design contrary to St. Joseph City Ordinance and offered to pay 76% of Underwood's cost to downsize the garage, as that was the portion of excessive square footage attributable to City's error. City maintained that Underwood was responsible for the additional 99 square feet that the structure actually exceeded the area allowed by the building permit. Also before the initial hearing, the BZA received written comments from three adjacent landowners regarding Underwood's requested variance. One of the comments was from Kennedy, expressing her opposition to the variance based upon her concern that "the garage does not fit the character of the neighborhood due to its size and construction material." Kennedy indicated her belief that "[t]his may adversely affect property values in the neighborhood."

At the initial hearing before the BZA, testimony was provided by Underwood and his wife, their contractor, and City staff. No one appeared to testify in opposition to the variance request. The variance was denied. Underwood thereafter filed petitions for judicial review, writ of certiorari, and declaratory judgment with the circuit court to review the BZA's decision. Underwood was identified as "petitioner," and the BZA and City were identified as "respondents."

On April 4, 2011, the circuit court entered a judgment reversing the BZA's denial of the variance and remanding the case with orders that the variance request be granted. At a second BZA hearing held May 3, 2011, one day before the circuit court judgment became final, City recommended that the BZA adopt the circuit court's findings of fact and conclusions of law. Kennedy appeared at this second hearing and argued against granting the variance request based upon her previously stated reasons. At the second hearing, the BZA adopted the circuit court's

findings, and one week later, Kennedy filed a notice of appeal in this court challenging the circuit court's judgment.[3]

Standard of Review

"When a party appeals a trial court's ruling on the propriety of an administrative decision, we review the decision of the Board, not of the trial court." *Reiz v. Bd. of Zoning Adjustment of Kansas City*, 316 S.W.3d 331, 334 (Mo. App. W.D. 2010). "We review zoning board decisions to determine whether they are supported by competent and substantial evidence on the record as a whole, or whether they are arbitrary and capricious, unreasonable, unlawful, or in excess of the Board's jurisdiction." *Id.*

Analysis

Before we can consider the merits of this appeal, we must first address the issue of standing. Standing is a precursor to the right to appeal. *State ex rel. Parsons v. Bd. of Police Comm'rs of Kansas City*, 245 S.W.3d 851, 854 (Mo. App. W.D. 2007). If a party does not have standing, we must dismiss the appeal. *Id.* Underwood filed a motion to dismiss this appeal on the ground that Kennedy lacks standing, as she was not a party to the decision below. We agree with Underwood and dismiss this appeal.

Section 64.660.2,[4] governing decisions made by county boards of zoning adjustment, indicates that certain individuals aggrieved by a board's decision may seek relief from that decision in the circuit court where the property is located. The statute also directs the potential outcomes at the circuit court level. *Id*. ("The court may reverse or affirm or may modify the decision brought up for review."). The statute then expressly indicates that "[a]fter entry of

[3] We recognize that it is possible that Kennedy's appeal was rendered moot by the subsequent grant of the variance by the BZA at the second hearing, which has not been appealed. We need not reach that issue, however, as we find Kennedy has no standing to appeal from the judgment of the circuit court.

[4] All statutory references are to RSMo 2000, updated through the 2010 Cumulative Supplement, unless otherwise noted.

judgment in the circuit court in the action in review, any *party* to the cause may prosecute an appeal to the appellate court having jurisdiction in the same manner now or hereafter provided by law for appeals from other judgments of the circuit court in civil cases." *Id*. (emphasis added). Section 512.020, governing appeals generally, provides that "[a]ny *party* to a suit aggrieved by any judgment of any trial court in any civil cause from which an appeal is not prohibited by the constitution, nor clearly limited in special statutory proceedings, may take his or her appeal to a court having appellate jurisdiction . . . ."

Here, Kennedy was not a party to the cause below in the circuit court (Underwood's appeal from the BZA decision following the initial hearing). Thus, she has no standing to seek an appeal therefrom. *F.W. Disposal South, LLC v. St. Louis County Council*, 266 S.W.3d 334, 338 (Mo. App. E.D. 2008) ("Only a party has standing to attempt to set aside or appeal from a judgment.").

Kennedy sets forth two reasons why she has standing despite her non-party status before the court below. First, she argues that section 536.100 of the Missouri Administrative Procedures Act expressly confers standing upon her as a "person . . . aggrieved by a final decision in a contested case." And second, she argues that even if the plain language of section 536.100 does not confer standing upon her, City's standing should be deemed to have transferred to her for purposes of appeal once City acted in an allegedly arbitrary and capricious manner in choosing not to pursue the appeal. We find both arguments unavailing.

A. Section 536.100 does not confer standing to non-parties on appeal in the appellate courts.

Section 536.100 provides, in pertinent part, that:

> Any person who has exhausted all administrative remedies provided by law and who is aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review thereof, as

> provided in sections 536.100 to 536.140, unless some other provision for judicial review is provided by statute . . . .

§ 536.100.

Kennedy argues that section 536.100's reference to "judicial review" contemplates review in the appellate courts, and since the statute refers to "any person," she was not required to be a named party below in order to appeal the circuit court's judgment. We disagree.

First, it is not entirely clear that section 536.100 is applicable to this situation at all, considering that section 64.660.2 provides its own mechanism for judicial review, as set out above. And under section 64.660.2's provisions, Kennedy may have been entitled to seek review by the circuit court of the BZA's initial decision, as an aggrieved landowner, arguing that the BZA's initial decision was illegal in whole or in part.[5] But, in contemplating appellate review of the circuit court's decision, the statute confers standing only upon *parties* to the cause. Kennedy was not a party to the cause in the circuit court; thus, she is not entitled to appeal therefrom.

B. Standing cannot automatically transfer from a named party to a non-party for purposes of appeal.

Kennedy alternatively argues that City was acting in a representative capacity, "representing the interests of Kennedy and other persons who would be aggrieved if the circuit court reversed the BZA's decision denying Underwood's requested variance," and that, once City opted not to pursue an appeal, if we find that that decision was arbitrary and capricious,[6] City's standing should be transferred to her to prosecute an appeal. We disagree.

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[5] We need not reach the issue as to whether Kennedy would have, in fact, been entitled to seek review in the circuit court, as the BZA's initial decision was not adverse to her interests. For a discussion of how one establishes standing under section 64.660.2, see *Fleddermann v. Camden Cnty., Missouri Bd. of Adjustment*, 294 S.W.3d 121, 124-25 (Mo. App. S.D. 2009).

[6] Kennedy relies on *State ex rel. Dolgin's, Inc. v. Bolin*, 589 S.W.2d 106, 110 (Mo. App. W.D. 1979). In *Dolgin's*, we rejected the argument that failure to appeal per se demonstrates inadequate representation under Rule 52.12. But we left open the possibility that if, in failing to appeal, an administrative body acts arbitrarily and capriciously, it may support intervention. In this case, it is unclear why City chose not to appeal the circuit court's ruling, and its decision may have been arbitrary and capricious. That being said, however, *Dolgin's* addressed the

There are generally only two ways to become a party to litigation and thereby acquire standing to appeal: (1) a person can be a named party in the original pleadings, or (2) the person can later be added as a party through joinder or intervention. *See F.W. Disposal*, 266 S.W.3d at 338. "The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988). While there may be exceptions,[7] the Supreme Court has indicated that "the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable." *Id.*

If Kennedy wished to ensure that her interests were represented, she could have moved to intervene in the action below at the circuit court level. Kennedy, perhaps recognizing that this was the better course, argues now that she was unable to intervene below because City was adequately representing her interests, which would preclude any intervention of right pursuant to Rule 52.12. She maintains that it was not until City decided not to pursue the appeal that their interests diverged, and at that point, she had only twenty-four hours in which to seek intervention before the circuit court's judgment became final. While we are not unsympathetic to the fact that she did not expect the City to decide as it did, we find several flaws in Kennedy's reasoning.

First, Kennedy's argument is premised on speculation; she argues that if she had sought intervention, the circuit court would have denied it. The problem with her premise is that we do not know what the circuit court would have done because Kennedy failed to file a motion to intervene and plead the necessary facts to establish entitlement to intervention of right. Had she filed such a motion, and had the circuit court denied the motion, then she could have sought an

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appropriateness of intervention at the circuit court level, not on appeal. *Id.* Kennedy failed to make such a request below.

[7] *See, e.g.*, *In Re Foreclosure of Liens for Delinquent Land Taxes by Action in Rem: Manager of Revenue of Jackson County, Missouri*, 328 S.W.3d 728 (Mo. App. W.D. 2010) (non-party permitted to file appeal in an in rem action where she was purchaser of property erroneously sold at a tax sale, and the sale was later set aside).

appeal from that denial. *City of Bridgeton v. Norfolk & Western Ry. Co*., 535 S.W.2d 99, 100 (Mo. banc 1976) (neighboring homeowner allowed to appeal denial of intervention in action brought by city to enjoin construction of railroad spur that was in violation of amended zoning ordinance); *Marino*, 484 U.S. at 304. At that point, we would have the necessary record before us to evaluate whether she should have been entitled to intervene in the action below. But absent that information, we are unwilling to assume that any request for intervention would have been denied.

The second flaw in Kennedy's argument is her assumption that the circuit court would have determined that Kennedy's interests were already adequately represented by City. "The determination of whether a proposed intervenor's interest is adequately represented by an original party to an action usually turns on whether there is an identity or divergence of interest between the proposed intervenor and the party." *Alsbach v. Bader*, 616 S.W.2d 147, 151 (Mo. App. E.D. 1981). "Another factor to be considered is how effective the representation will be in light of a legal disability or the trial strategy of the party which would preclude the party from presenting the claims or defenses of the proposed intervenor." *Id*. While certainly Kennedy and City were on the same side of the dispute, that, alone, would not preclude intervention. *See Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969) (it is not necessary that "the interests of the intervenor and his putative champion already a party be wholly adverse."). "In Missouri, the general rule has always been that the [intervention rule] should be liberally construed to permit broad intervention." *State ex rel. St. Joseph, Mo. Ass'n of Plumbing, Heating and Cooling Contractors, Inc. v. City of St. Joseph*, 579 S.W.2d 804, 806 (Mo. App. W.D. 1979).

Kennedy argues that under Missouri case law, neighboring property owners have no right to intervene in circuit court review proceedings when a zoning board is adequately representing

their interests. Implicit in Kennedy's argument is that case law dictates that a zoning board always represents the interests of neighboring landowners, and, thus, intervention is not permitted until a zoning board takes some action that demonstrates it no longer adequately represents the interests of the homeowner. In support of this proposition, Kennedy cites two cases: *Dolgin's*, 589 S.W.2d at 108-09; and *Landolt v. Glendale Shooting Club, Inc.*, 18 S.W.3d 101, 104 (Mo. App. E.D. 2000). But neither case stands for the broad proposition that zoning authorities always adequately represent the interests of neighboring homeowners. In *Dolgin's*, this court affirmed the circuit court's denial of several homeowners' motion to intervene because the homeowners failed to demonstrate that their interests were not adequately represented by the existing parties. 589 S.W.2d at 108. In other words, *Dolgin's* involves a failure of proof and does not establish the general rule that zoning boards per se always adequately represent the interests of homeowners. *Landolt* is even less relevant because *Landolt* did not involve a municipality or a zoning board at all. In *Landolt*, the denial of neighboring landowners' motion to intervene as of right in a nuisance action was affirmed where the prospective intervenors failed to allege that *other landowners* did not adequately represent their interests. 18 S.W.3d at 104.

Not only are we unpersuaded by the cases cited by Kennedy, but also we note that other cases imply that a homeowner may be able to intervene in a case involving a zoning board, if the motion to intervene is timely. In *City of Bridgeton*, the neighboring homeowner led an effort to have a local zoning ordinance amended so as to prevent industrial development in the area. 535 S.W.2d at 99-100. After the ordinance was amended, the city brought an action to enjoin completion of a railroad spur that was already under construction. *Id.* at 100. After the circuit court found in favor of the railroad and the city decided not to appeal, the homeowner moved to

intervene as a matter of right under Rule 52.12. *Id.* The circuit court denied the motion to intervene, finding it to be untimely, and the homeowner appealed. *Id.* The Missouri Supreme Court affirmed, finding that the motion to intervene was not timely and that "the trial court reasonably could have found that [homeowner] gambled on the outcome of the proceedings before judgment and now seeks to compel a retrial of the original issues." *Id.* at 102. The clear import of this decision is that even though the city was involved in the case below, the homeowner may have been allowed to intervene had the motion to intervene been timely made.

The dissent in *City of Bridgeton* took exception with the denial of intervention, arguing, as Kennedy does, that homeowner was not able to intervene so long as the city was diligently prosecuting the case. *Id.* at 104. In support of this position, the dissent cited a number of cases from other jurisdictions, including *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir. 1944). We acknowledge that a municipality or a zoning board may adequately represent interests such as Kennedy's, *see, e.g., Wolpe,* 144 F.2d at 507, but that is not an ironclad rule. "Adjoining property owners in a suit to vacate a zoning order have such a vital interest in the result of that suit that they should be granted permission to intervene as a matter of course unless compelling reasons against such intervention are shown." *Id.* at 508. Here, Kennedy simply never gave the circuit court the opportunity to determine whether intervention was appropriate. We cannot comment on the propriety of a decision the trial court was never asked to make.

The final flaw in Kennedy's argument is her assumption that the only method by which she could have intervened was by intervention of right. Kennedy fails to address the concept of permissive intervention. Rule 52.12 provides that a person may intervene as a matter of right

> when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect

> that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 52.12(a). Kennedy argues that City was adequately representing her interests until it elected not to appeal; thus, she would not have been permitted to intervene until the point their interests diverged. But Kennedy ignores the fact that Rule 52.12 also contemplates permissive intervention: "Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common . . . ." Rule 52.12(b). Permissive intervention does not involve the question of adequate representation. Thus, even if City was adequately representing Kennedy's interests, she would not have been precluded from seeking permissive intervention.[8]

It is important to note that "[a]n applicant [for intervention] cannot permit another to represent his interests and then seek to intervene only when the applicant becomes unhappy with the outcome." *F.W. Disposal*, 266 S.W.3d at 340. Because Kennedy was not a party to the cause below, she has no standing to appeal the circuit court's decision. "Regardless of the merits of appellants' claims, without standing, the court cannot entertain the action." *Pace Const. Co. v. Missouri Highway and Transp. Comm'n*, 759 S.W.2d 272, 274 (Mo. App. W.D. 1988) (quoting *Champ v. Poelker*, 755 S.W.2d 383, 386-87 (Mo. App. E.D. 1988)).[9] Thus, this appeal is dismissed.

C. Kennedy's appeal cannot be construed as a writ petition.

Kennedy alternatively argues that if we find the appeal to be improper, we should treat her appeal as a writ petition. We disagree.

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[8] Section 536.110.3 also provides that "[t]he [circuit] court in its discretion may permit other interested persons to intervene" in the judicial review of an administrative agency's decision.

[9] In dismissing this appeal, we take no position as to the propriety of the circuit court's reversal of the BZA's decision and granting the variance. We also take no position as to whether the BZA should have granted the variance before the circuit court's decision became final. While both actions may have been subject to legitimate challenge, the posture of this case does not allow us to reach either issue.

"[I]n limited circumstances, [an appellate court] will treat improper appeals as applications for original writs, if writ is available to a movant." *State v. Larson*, 79 S.W.3d 891, 893 (Mo. banc 2002). But Kennedy's appeal is not "improper" in the sense of the word used by the court in *Larson*. In *Larson*, the appeal was improper because there was no final, appealable judgment – a defect in the appellate procedure. *Id*. at 893. Here, there is no readily apparent defect in the appellate procedure. Despite the standing issue, Kennedy's appeal is otherwise proper. The problem is that Kennedy is not a proper person to bring the appeal since she was not a party to the cause below. We can find no cases, and Kennedy cites none, giving us the authority to grant her standing to seek a writ in a case where she lacks standing to bring an appeal. Thus, we deny Kennedy's request to treat this appeal as an application for a writ.[10]

Conclusion

Because Kennedy was not a party to the cause below, she lacks standing to bring this appeal. Underwood's motion to dismiss is granted.

Karen King Mitchell, Presiding Judge

James M. Smart, Jr., Judge, and
Gary D. Witt, Judge, concur.

[10] Even if we did have authority to treat Kennedy's appeal as a writ application, we find that a writ would be inappropriate because she has an adequate remedy at law. "A required element of proving a right to mandamus is that there is no alternative, adequate remedy other than issuance of the writ." *State ex rel. KelCor, Inc. v. Nooney Realty Trust, Inc.*, 966 S.W.2d 399, 402 (Mo. App. E.D. 1998). Here, Kennedy could have sought to intervene below, and if her request was denied, she could have appealed that denial. *Marino*, 484 U.S. at 304. If Kennedy has sustained any damages as a result of Underwood's detached garage, she could also pursue a private nuisance action. *See, e.g., McGinnis v. Northland Ready Mix, Inc.*, 344 S.W.3d 804, 809-10 (Mo. App. W.D. 2011).