

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

Richard Costa, et. al.

v.

City of Portsmouth;  
Pier II, LLC, Intervenor

01-E-0639

ORDER

This order addresses intervenor's Motion to Dismiss plaintiffs' Zoning Board of Adjustment (ZBA) appeal for lack of standing. Plaintiffs object. For the reasons that follow, intervenor's Motion to Dismiss is DENIED.

Plaintiffs appealed a decision of the City of Portsmouth ZBA pursuant to RSA 677:6 (Supp. 2001). The ZBA decision denied plaintiffs' request to overturn an underlying decision of the Portsmouth Historic District Commission (HDC), granting a Certificate of Appropriateness to intervenor Pier II, LLC for its proposed construction of a five-story residential condominium and demolition of two buildings located in the historic district of Portsmouth.

Plaintiffs own residential condominium units located at 135 Bow Street in Portsmouth. These units are part of what is known as Harbor Place Condominiums. By virtue of their condominium ownership, plaintiffs additionally each possess deeded, appurtenant parking-related easement/limited common area ownership interests, which provides them parking space and rights of ingress and egress from

Daniel Street in Portsmouth respecting a parking garage located on or off Daniel Street.

Intervenor's property here at issue is located at 10 State Street in Portsmouth within the historic district (Historical A District) of Portsmouth. Intervenor petitioned the HDC for approval of a project demolishing two buildings and constructing a five-story, four-unit residential condominium. The HDC held an extended hearing on intervenor's petition on April 4, 2001, allowing testimony from people speaking for and against its merits.

The proposed project is a few hundred feet from plaintiffs' actual condominium units. (See Int'r Ex. B). These units overlook the Piscataqua River north of intervenor's project site. Plaintiffs' parking-related easement/property rights lie on or off Daniel Street, about one block away from intervenor's project site. The proposed project is not very visible, if at all, from the plaintiffs' actual condominium units due to an intervening building structure.

Although three of the Plaintiffs claim they attended the HDC hearing of April 4, 2001 at which the Certificate of Appropriateness was granted, none submitted any statement for or against the intervenor's project at that time, or apparently participated in prior HDC work sessions dealing with the project. However, their attorney did participate at the hearing, although not identified as their representative; and with the issuance of the HDC's decision of April 4, 2001, the plaintiffs thereafter actively and fully pursued possible administrative review both before the HDC and the ZBA, raising many issues contesting the propriety of the Certificate of Appropriateness decision.

While the HDC granted to intervenor a Certificate of Appropriateness, it did so with the stipulation "that both the stairwell and the elevator penthouse not exceed more than 8 2 feet in height above the roof deck." (R. at No. 21). Plaintiffs timely requested a rehearing, which the HDC denied, and plaintiffs then appealed that denial to the ZBA, which held a hearing and subsequently denied plaintiffs' appeal. Plaintiffs finally requested a rehearing from the ZBA, which also was denied. This appeal followed.

Intervenor moves to dismiss this appeal, claiming, inter alia, that plaintiffs are not "aggrieved parties" under RSA 677:4 and, therefore, lack standing to challenge either the ZBA or HDC decision. See Nautilus of Exeter v. Town of Exeter, 139 N.H. 450, 452 (1995).<sup>1</sup>

Intervenor contends that plaintiffs' properties are too remote, or removed, from its proposed project, and that plaintiffs lack sufficient definite interest in the outcome of the proceedings to have standing to appeal. Plaintiffs object, arguing that they are

---

<sup>1</sup>Intervenor also claims the appeal is defective because plaintiffs failed to exhaust administrative remedies by not appearing at the HDC hearing of April 4, 2001. In addition, it claims that plaintiffs are not "abutters" of the proposed project. The Court discusses plaintiffs' participation in the administrative process later in this opinion. Dismissal of this appeal solely because of any failure to not so participate is not warranted. Moreover, the issue of standing, which is the crux of intervenor's motion, is not dependent on whether plaintiffs are actual abutters. See Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541, 544-45 (1979); see also Nautilus of Exeter, 139 N.H. at 452.

property owners in close proximity to intervenor's project and they will suffer detrimental injury if it is allowed to proceed.

In ruling on a motion to dismiss, the Court must determine whether the allegations contained in plaintiffs' pleadings sufficiently establish a basis upon which relief may be granted. See Provencher v. Buzzell-Plourde Assocs., 142 N.H. 848, 852-53 (1998). However, when the motion to dismiss does not challenge the sufficiency of the underlying legal claim, but rather raises a statutory defense to that claim, the Court "must [additionally] look beyond the plaintiff[s'] unsubstantiated allegations and determine, based on the facts, whether the plaintiff[s] [have] demonstrated [any] right to claim relief." Id. at 853 (citation omitted).

Whether a person is "aggrieved" and thereby has standing to appeal to this Court, is a factual determination for this Court to decide. See Nautilus of Exeter, 139 N.H. at 452. In making this "impact" determination, the Court "may consider `factors such as the proximity of the plaintiff's property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the plaintiff's participation in the administrative hearings.'" Nautilus of Exeter, 139 N.H. at 452 (citation omitted).

If consideration of these factors leads the Court to conclude that plaintiffs possess sufficient interest in the outcome of the ZBA proceedings, then standing will be conferred. Id. However, "standing will not be extended to all persons in the

community who might . . . feel that they are hurt by the board's decision . . . pertaining to land quite remote from their own." Id. (internal quotation marks and citation omitted).

Upon full consideration of plaintiffs' interests here, the Court finds that plaintiffs have standing to bring this appeal.

First, and in connection with proximity, plaintiffs' properties are close to the proposed project, within a few hundred feet. Indeed, measured from their actual living premises, these properties are about as far removed from the proposed project as the property of one undisputed abutter, Joe M. Hunt. (See Tax Map, R. at No. 15; see also Objection to Int'r Mot. to Dismiss, &34 & "annotated" Tax Map).

Then too, plaintiffs' property interests are even closer to the proposed project, if one considers their parking-related property interests associated with Daniel Street.

This is not a case where plaintiffs' properties are so remote from the proposed project that they lack standing to complain. See Nautilus of Exeter, 139 N.H. at 452 (where plaintiffs located no closer than .8 miles from the project in question, they are deemed "too remote from the proposed . . . addition to be sufficiently affected by the ZBA's decision so as to confer standing"). Rather, plaintiffs possess properties close to the proposed project, and within the same regulated Historic District. While plaintiffs may not easily, if at all, see the proposed project directly from their condominium units, they plainly are situated in the same neighborhood

as the project, and claim direct impact in their property enjoyment by the HDC's and ZBA's approval of the proposed project.

As to the type of change proposed and the immediacy of claimed injury, plaintiffs assert in their appeal that the HDC, in approving the proposed project, failed to honor its mission: "to preserve and protect the historical and architectural resources of the City." See Portsmouth Zoning Ordinance Sections 10-1001. Plaintiffs assert, inter alia, that the HDC failed to properly consider the criteria necessary to approve structures in the Historic District and failed to make sufficient and complete findings required to render decisions. Plaintiffs further assert that the proposed project is inconsistent with, and does not further, the objectives required by the Historic District Ordinance (Sections 10-1004, A). Plaintiffs argue that the proposed project does not aesthetically fit in the neighborhood, obstructs views, undermines possibilities for a River Walk, and otherwise does not foster Portsmouth's historical heritage.

They claim that the HDC's approval of this project directly and adversely impacts their property interests within the same Historic District, and does so in an immediate manner as the HDC approval moves the project forward towards realization. The Court concludes that the injuries and harms here raised are of sufficient substance to reflect plaintiffs definite and immediate interest in the outcome of this matter.

Finally, the Court considers plaintiffs' participation in the HDC and ZBA administrative proceedings. To be sure, plaintiffs did not themselves stand up and speak at the HDC hearing of April 4, 2001. Three of them, however, claim to have been there, and their attorney (although identified only as a "concerned citizen") did speak out strongly against the proposed project--as did others. Moreover, once the HDC rendered its decision, plaintiffs vigorously pursued administrative avenues for relief both before the HDC and the ZBA. Thus, plaintiffs' participation in administrative proceedings does not reflect a lack of sustained interest or a lack of the necessary adversarial status to proceed on this approval. The Court observes that the intervenor also challenged plaintiffs' standing, both before the HDC and ZBA. These bodies, however, entertained plaintiffs' various motions and appeals on their merits.

Decisions by the HDC and the ZBA, like those here, particularly affect the quality of life of citizens such as plaintiffs who reside and possess property in the same Historic District near the proposed project at issue. Plaintiffs, moreover, manifest the ability and the willingness to properly pursue a legal challenge. In such circumstances, courts do not deny standing, but pass on the merits of the case. Cf. Portsmouth Advocates, Inc. v. City of Portsmouth, 133 N.H. 876, 878 (1991) (citizen's group held to have standing to challenge rezoning that altered historic district boundaries of the city); Hanrahan v. City of Portsmouth, 119 N.H. 944, 947 (1979), (appeal by plaintiff, identified as "citizen of Portsmouth,"

challenging decisions by ZBA and HDC to allow demolition of a building within an historic district).

Based on the foregoing, the Intervenor's Motion to Dismiss is DENIED.

So ORDERED.

MAY 14, 2002

/ S /

\_\_\_\_\_  
DATE

\_\_\_\_\_  
JOHN M. LEWIS  
Presiding Justice