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**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947

Submitted: October 18, 2007
Decided: November 13, 2007

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Re: *Calagione, et al. v. City of Lewes Planning Comm'n, et al.*
Civil Action No. 2814-CC

Dear Counsel:

Before me is a motion to dismiss in which respondents' allege that petitioners lack standing to challenge the disputed subdivision application approvals and fail to demonstrate irreparable harm necessary to warrant the extraordinary remedy of injunctive relief. On February 7, 2007, after a lengthy and complicated application process that began in the spring of 2002, the City of Lewes approved two applications to subdivide two parcels of property into seven lots. Petitioners are owners of property adjacent to one of the parcels to be subdivided. Petitioners seek a preliminary and permanent injunction to enjoin the implementation of those approved subdivision plans. As discussed below, I conclude that, though petitioners have standing to challenge the approved applications, they are not entitled to an injunction on the grounds of ripeness. I dismiss the petition without prejudice.

I. BACKGROUND

On February 7, 2007, the City of Lewes (the "City") approved applications submitted by C. Leonard Maull and Linda M. Tracey ("Maull") and Darlene Healing and Richard Healing ("Healing"). Petitioners, Mariah D. Calagione and Samuel A. Calagione, III, challenge this approval. Respondents are the City of Lewes Planning Commission (the "Commission"), City Council of the City of Lewes (the "Council"), James L. Ford, III, Mayor of the City of Lewes, Maull, and Healing. The parties dispute many facts relating to the application procedure and approval process, all of which, for purposes of this motion, need not be recited nor resolved here. The following, however, is not disputed. Maull's application proposed the subdivision of Maull's property into two lots, each allegedly approximately 4283 square feet. Healing's application proposed the subdivision of Healing's property into five lots, four of which allegedly measure between 4161 square feet and 4790 square feet.[1] The parcels owned by Maull and Healing are located within the Old Town Residential District (the "Old Town District") and are in the Historic District under the zoning chapter of the City's Code.

Of particular relevance to the resolution of this motion is the ramification of the proposal and subsequent adoption of an amendment to the City's zoning code. On August 11, 2003, the Council voted to set a public hearing on the Commission's recommended proposal to increase the zoning ordinance's minimum lot size in the Old Town District from 4000 square feet to 5000 square feet. At this meeting, the Council also voted to impose a moratorium on subdivision applications, excepting applications that were currently pending on the Commission's agenda. On November 10, 2003, the Council adopted this amendment and lifted the moratorium.

The parties dispute whether or not the Maull and Healing applications were exempted from the amendment. Petitioners contend that the applications were not "pending" at the time the amendment was enacted because Maull and Healing failed to submit proper applications until after the imposition of the moratorium. Petitioners further argue that, even if they were pending, pending applications were exempt only from the moratorium, not from the increased minimum size requirement in the ordinance. Respondents, in response, rely on the Council's

[1] Resp'ts' Joint Opening Br. in Supp. of Their Joint Mot. to Dismiss 4 ("The five proposed lots were the existing house and lot, being 9,210 square feet, more or less, Lot 1, being 4,494 square feet, more or less, Lot 3, being 4,790 square feet, more or less, Lot 4, being 4,641 square feet, more or less, and Lot 5, being 4,161 square feet, more or less.").

resolution approving the Maull and Healing subdivision applications, in which the Council made the following conclusions: (1) both applications satisfied all zoning regulations at the time the applications were originally filed in 2002; (2) the applications were specifically exempted from the moratorium imposed on August 11, 2003; and (3) the Commission properly recognized that the applications were grandfathered and, therefore, excluded from the increased minimum lot requirement amendment.

In any event, on February 7, 2007, the City approved the Maull and Healing applications. On March 6, 2007, petitioners filed an appeal of that approval with the City's Board of Adjustment. On April 27, 2007, the Board of Adjustment informed petitioners that their appeals would not be considered by the Board of Adjustment because it lacked jurisdiction.

On March 21, 2007, petitioners filed petitions in this Court seeking injunctive relief in the form of a preliminary and permanent injunction against respondents to enjoin them from proceeding with the implementation of the final subdivision plans that were approved by the City on February 7, 2007.

On March 21, 2007, petitioners also filed two petitions for writ of certiorari pursuant to 10 *Del. C.* § 562 in the Sussex County Superior Court seeking a review of the legality of the Council's February 7, 2007 approval of the Maull and Healing subdivision applications.

On May 29, 2007, this Court entered an order granting the parties' stipulated motion to consolidate. On June 5, 2007, the Superior Court entered an order granting the parties' stipulated motion to consolidate and stay the Superior Court actions pending resolution of the parallel actions filed in this Court.

Respondents now seek dismissal of the consolidated petitions. First, respondents contend that petitioners lack standing to challenge the subdivision approvals because they have not suffered an injury in fact and the interests that petitioners seek to protect are not within the zone of interests intended to be protected by the subdivision ordinance. Second, respondents argue, even if petitioners have standing, they have not demonstrated the harm necessary for issuance of injunctive relief.

II. ANALYSIS

In ruling on a motion to dismiss, I construe all facts in favor of the petitioner.[2] As noted above, there are a number of disputed facts surrounding the approval of the subdivision applications. Focusing on what I have determined to be the most pertinent facts for purposes of resolving this motion, I conclude that, when these facts are construed in favor of petitioners, petitioners do not lack standing to challenge the subdivision approvals but have not demonstrated the requisite harm for imposition of injunctive relief.

To proceed with this action in this Court, petitioners must satisfy traditional standing requirements, including that a tangible injury threatens or has resulted from the alleged zoning ordinance violation.[3] In *Bethany West Recreation Ass'n, Inc. v. ECR Properties, Inc.*,[4] plaintiffs sought injunctive relief, specifically alleging that defendant's proposed construction violated zoning ordinances. This Court determined that, if plaintiffs were correct that defendant's building permit (which was allegedly obtained through failure to disclose material information) violated the town's building or zoning codes, then "a tangible injury will have been inflicted upon plaintiffs as a direct result of the violation."[5] Though plaintiffs would likely not suffer this harm until the completion of construction of the building authorized under the permit, this fact did not operate to deprive plaintiffs of standing.[6] Here, petitioners allege that the approved subdivision plans violate the zoning ordinance because, according to the plans, the subdivided lots would satisfy only smaller minimum lot size, not the larger minimum lot requirement under the amendment adopted in November 2003. Drawing reasonable inferences from petitioners' well-pleaded facts in favor of petitioners, I determine that petitioners have sufficiently demonstrated the threat of a tangible injury.

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[2] *See Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, Nos. 470,2006, 623,2006, 2007 WL 3208783, at *6 (Del. Nov. 1, 2007) ("We hold that, where, as here, the issue of standing is so closely related to the merits, a motion to dismiss based on lack of standing is properly considered under Rule 12(b)(6) rather than Rule 12(b)(1)."); *see also, e.g., Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 188 (Del. Ch. 2006) ("All inferences from well-pled allegations of fact in the complaint must be construed in favor of the plaintiff . . . .") (citing *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985)).

[3] *See Bethany West Recreation Ass'n, Inc. v. ECR Properties, Inc.*, No. 1739-S, 1995 WL 1791084, at *2 (Del. Ch. Apr. 28, 1995).

[4] No. 1739-S, 1995 WL 1791084 (Del. Ch. Apr. 28, 1995).

[5] *Id.* at *2.

[6] *Id.*

Therefore, I conclude that petitioners have standing to challenge the approval of the subdivision applications.

Though petitioners have standing, they have not, however, demonstrated that they have suffered harm necessary to entitle them to injunctive relief. For the issuance of an injunction, petitioners must demonstrate: (1) a reasonable probability of success on the merits; (2) irreparable injury if an injunction does not issue; and (3) that the harm suffered by the plaintiff absent the injunction outweighs the harm to the defendant if an injunction does issue.[7] *Bethany West* is again instructive. There, though the Court determined that plaintiffs had standing, it denied plaintiffs' motion for a temporary retraining order. The Court, ultimately, was "not persuaded that defendant's *current* activities threaten plaintiffs with imminent, irreparable injury."[8] Here, any harm that petitioners identify is speculative. As in *Bethany West*, issuance of an injunction, at this juncture, would be premature. So far, all that has happened is that the City has approved the Maull and Healing subdivision applications. Nothing has been constructed (or even proposed to be constructed) on the properties other than the addition and improvement of underground storm water management and a sidewalk.

I am further convinced that this case is not ripe for an injunction to issue because there is a process in place to govern the construction of a structure on the properties. As respondents observe: "Indeed, the process to actually build a structure on the property would require at least the preparation and presentation of a proposal to the City's Building Inspector pursuant to Section 197-42(A) of the City of Lewes Code, the successful review of the proposal at a public meeting by the City's Historic Preservation Commission pursuant to Section 197-42(C) of the City of Lewes Code, and the issuance of a Building Permit pursuant to Section 70-27 of the City of Lewes Code."[9] In light of this, even if this Court were to issue an injunction, it is not clear what, precisely, would be enjoined. Petitioners seek to enjoin the "implementation of the final subdivision plan", but it does not seem that that plan calls for anything other than the subdivision of two parcels of land. At

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[7] *See, e.g.*, *Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173, 179 (Del. 1986).

[8] *Bethany West Recreation Ass'n, Inc.*, 1995 WL 1791084, at *5 (emphasis added). In reasoning inapplicable here because of factual dissimilarity, the Court conditioned the denial of the temporary restraining order against all further construction on defendant's agreement to post a secured bond that would be used to remove the building (if it was found to be barred under the town's zoning ordinances) or to convert it into a permissible use (if it was found to be barred under restrictive covenants). *Id.*

[9] Resp'ts' Joint Opening Br. in Supp. of Their Joint Mot. to Dismiss 21.

most it appears that "subdivision" entails the construction of a concrete curb and sidewalk. If, under the process outlined above, respondents obtain approval to construct some structure and petitioners wish to challenge that approval, they may do so at that future time. I therefore conclude that, at this time, petitioners are not entitled to an injunction on grounds of ripeness. This action is dismissed, however, without prejudice. Petitioners may seek, in Superior Court, money damages resulting from any sidewalk or storm water drainage construction that has already occurred, if any such damages (as well as liability for them) can be proved.

III. CONCLUSION

For the reasons stated above, I conclude that petitioners have standing to challenge the subdivision application approvals but have not demonstrated the harm necessary for injunctive relief. I, therefore, dismiss this petition without prejudice.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

WBCIII:mpd