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

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| FARMERS FOR FAIRNESS, an unincorporated association of Kent County landowners on its own behalf and on behalf of all others similarly situated, KENT COUNTY FARM BUREAU, INC., a Delaware Corporation, on its own behalf and on behalf of the Kent County landowners it represents, HENRY CAREY, MARY MOORE, CARTANZA FARMS LIMITED PARTNERSHIP, a Delaware Limited Partnership, SANDRA L. CARTANZA, CHESTER T. DICKERSON, JR. AND HARMAN BROTHERS, LLC, a Delaware Limited Liability Company, | ) | |
| Petitioners, | ) | |
| v. | ) | *Civil Action No. 4215-VCG* |
| THE KENT COUNTY LEVY COURT, the Governing Body of Kent County, Delaware, P. BROOKS BANTA, ALLAN F. ANGEL, HAROLD K. BRODE, ERIC L. BUCKSON, BRADLEY S. EABY, W.G. EDMANSON and RICHARD E. ENNIS in their official capacities as members of the Kent County Levy Court, | ) | |
| Respondents. | ) | |

**MEMORANDUM OPINION**

Date Submitted: April 3, 2013
Date Decided: July 1, 2013

John W. Paradee and Nicole M. Faries, of PRICKETT, JONES & ELLIOTT, P.A., Dover, Delaware; Attorneys for Petitioners.

Max B. Walton and Josiah R. Wolcott, CONNOLLY GALLAGHER LLP, Newark, Delaware; Attorneys for Respondents.

GLASSCOCK, Vice Chancellor

Kent County's governing body, the Levy Court, has divided lands within the County into several zoning districts, each with its own limitations on development, including permissible housing density. In its 2008 Comprehensive Plan Ordinance, the Levy Court imposed overlay districts onto these existing zoning districts, describing variability in permitted density within single districts. The individual Petitioners,[1] who own property which they allege became subject to more restrictive density limitations under the 2008 Comprehensive Plan Ordinance, have challenged the Ordinance. However, because the Petitioners have not shown that invalidation of that Ordinance would allow them to develop their property under the prior, less-restrictive density regulations, I find that the Petitioners lack standing to challenge the Ordinance.

## I. BACKGROUND

The Kent County Levy Court ("the County") adopted its first comprehensive zoning ordinance in 1972, which divided the County into various zoning districts, each with its own set of regulations and permitted uses.[2] At that time, two of the districts, Agricultural Conservation ("AC") and Agricultural Residential ("AR"), allowed property owners to conduct some residential development, subject to

[1] In addition to the individual Petitioners, Farmers for Fairness and the Kent County Farm Bureau have appeared as Petitioners on behalf of their members.

[2] R., Ex. 1 at 00009-00024. *See also* Kent Cty. C. § 205-7 (dividing the County into eleven different districts).

density limitations of one single-family dwelling per acre.[3] These limits changed in 1996 when Kent County created a Growth Zone Overlay (the "Growth Zone").[4] The Growth Zone encompassed all land within a two-mile radius of the County's central sewer and water systems.[5] AC and AR properties within the Growth Zone were granted increased residential development rights—up to three dwelling units per acre—and AC and AR properties without the Growth Zone were limited to develop at a density of one dwelling unit per ten acres.[6] The 1996 Zoning Ordinance provided an exception to these new density restrictions on properties located outside of the Growth Zone by creating a "Village Development" option which permitted landowners to develop their property at a density of one unit per acre—the same density permitted under the original zoning ordinance—so long as on-site sewer and water services were provided for the new residences.[7] In 2003, the Levy Court passed Ordinance No. 03-13, which established the boundaries of the Growth Zone on the Kent County zoning map.[8] Although the Growth Zone

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[3] R., Ex. 1 at 00015.
[4] R., Ex. 3 at 00146.
[5] R., Ex. 3 at 00147-00148.
[6] R., Ex. 3 at 00148.
[7] R., Ex. 3 at 00146-00157.
[8] Kent Cty. C. § 205-397.2. *See also* R., Ex. 8. While the Petitioners argue that the Growth Zone as depicted in Ordinance No. 03-13 differed substantially in its area and its effect from the Growth Zone created by the 1996 Zoning Ordinance, the Respondents argue that the two depictions of the Growth Zone were "virtually identical." *Compare* Pet. Op. Br. at 6 *with* Resp. Op. Br. at 2. Any prior changes in the Growth Zone are irrelevant to my analysis today. When I refer to the "Growth Zone" in my analysis, I refer to the geographic area labeled "Growth Zone"

overlays were of questionable validity under 9 *Del. C.* § 4902(b)[9]—which requires uniformity within zoning districts—no challenge was ever made to the 1996 Zoning Ordinance or Ordinance No. 03-13, and the Petitioners here concede that the statute of repose has long since run, barring any challenge to those ordinances.

Here, the Petitioners challenge Kent County's adoption on October 7, 2008 of a Comprehensive Plan Ordinance (the "2008 CPO") enacted pursuant to 9 *Del. C.* § 4960(a).[10] The Petitioners maintain that the 2008 CPO has downzoned their property, which lies in AC- and AR-zoned property outside of the Growth Zone. Specifically, the Petitioners argue that while AC- and AR-zoned property outside the Growth Zone could, under the earlier Comprehensive Plan Ordinance, be developed at a density of up to one dwelling unit per acre, the 2008 CPO imposed up to a four-fold diminution of possible development density.[11]

The County, for its part, contends that the 2008 CPO did not work any change in density limitations and that those limitations were imposed by ordinances related to the regulation of wastewater facilities used in residential development. On March 25, 2008, the Levy Court adopted two Ordinances, No.

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by the land use map accompanying the 2008 Comprehensive Plan Ordinance. *See* R., Ex. 79 at 01776.

[9] *See generally Farmers For Fairness v. Kent Cty.*, 2007 WL 1413247 (Del. Ch. May 1, 2007) *aff'd sub nom. Kent Cty. v. Farmers for Fairness*, 940 A.2d 945 (Del. 2007).

[10] *See* R., Ex. 79.

[11] *See* R., Ex. 79 at 01781.

08-05 and No. 08-06 (the "First Wastewater Ordinances").[12] Ordinance No. 08-05 "prohibits the use of community wastewater treatment and disposal systems throughout the County, [and] removes the Village Design standards within the Agricultural Conservation and Agricultural Residential zoning districts,"[13] and Ordinance No. 08-06 "requires the low density development option for major subdivision outside of the Growth Zone," and limits the allowable density for new development to one unit per acre (for subdivisions with fewer than 10 lots), one unit per two acres (for subdivisions with 11-25 lots), one unit per three acres (for subdivisions with 26-50 lots) and one unit per four acres (for subdivisions with more than 50 lots). That is, it imposes the same density limitations as would the later-enacted 2008 CPO.[14] To be clear, the 2008 CPO only reiterates, rather than creates, the development restrictions complained of here.

After the Levy Court adopted the 2008 CPO on October 7, the Petitioners filed their Petition for Injunctive Relief, Declaratory Judgment, and Other Relief on December 8, 2008. On March 13, 2009, Kent County filed a Motion to Dismiss Counts V, VI, VII and IX of the Petition. On April 24, 2009, the Petitioners filed a Motion for Leave to File an Amended Petition. Thereafter, progress in this case stalled. In August 2009, the Court, at the suggestion of the Petitioners, decided to

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[12] R., Exs. 25-26.
[13] R., Ex. 25 at 00989.
[14] R., Ex. 26 at 00991-00993.

stay consideration of the outstanding motions until the resolution of *J.N.K., LLC v. Kent County Levy Court*, C.A. No. 3662 ("*JNK*"). *JNK* involved a challenge to the First Wastewater Ordinances, and the Petitioners specifically noted that the validity or invalidity of the Ordinances could be material to the resolution of this case.[15] On February 25, 2010, the Petitioners notified the Court that then-Vice Chancellor Strine had granted summary judgment in favor of the County with regard to the notice claims at issue in *JNK*,[16] and that the other claims in that case had been settled by the County's agreement to repeal the First Wastewater Ordinances and readopt them in the form of new Ordinances, No. 09-33 and No. 09-34 (the "Second Wastewater Ordinances").[17]

Shortly thereafter, the Petitioners in this case moved for summary judgment on their state law claims only, and the parties agreed that all three outstanding motions—the County's Motion to Dismiss, the Petitioners' Motion for Leave to

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[15] *See* Letter From John W. Paradee to Chancellor Chandler 2 (Aug. 17, 2009) ("One of the changes implemented by the [First Wastewater Ordinances] was a dramatic 'downzoning' of all lands located outside the Kent County 'growth zone.' If the [First Wastewater Ordinances] are upheld as valid it is conceivable that the instant action may be rendered moot. If, on the other hand, the [First Wastewater Ordinances] are ultimately invalidated, then the federal constitutional claims become much stronger, because such a holding would mean that the adoption of the Comprehensive Plan challenged by this lawsuit would clearly have the effect of implementing substantive changes.").

[16] *J.N.K., LLC v. Kent Cty. Levy Court*, 974 A.2d 197, 206 (Del. Ch. 2009).

[17] Letter to the Hon. William B. Chandler, III, at 1 (Feb. 25, 2010).

Amend, and the Petitioners' Motion for Summary Judgment—would be briefed and argued together. The case was then reassigned to me.[18]

In a Memorandum Opinion dated January 27, 2012, I denied the County's Motion to Dismiss.[19] The County had argued that the Petitioners' claims were not ripe, because the County had not yet passed ordinances *implementing* the density regulations set forth in the 2008 CPO. I rejected that argument, and held that because the 2008 CPO created a land use map which has the binding force of law, the Petitioners' claims that their property was downzoned by the 2008 CPO were ripe for decision.[20]

Subsequently, Kent County moved for reargument, but before that motion was fully briefed, the County retained new attorneys in this matter. The parties then agreed to submit a stipulated record and to submit all of Petitioners' state law claims in the form of cross-Motions for Summary Judgment.[21] This Memorandum Opinion represents my decision on those Motions.

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[18] After Chancellor Chandler's retirement, this case was assigned to my docket.
[19] *Farmers For Fairness v. Kent Cty. Levy Court*, 2012 WL 295060 (Del. Ch. Jan. 27, 2012).
[20] *Id.* at *7.
[21] By working together in good faith, in a way that reflects well on the Delaware bar, counsel were able to prune what appeared to be a near-impenetrable thicket of issues into a comprehensible legal topiary, an effort of which they should be proud and for which I am grateful.

## II. ANALYSIS

*A. Standard of Review*

Summary judgment may be granted to the moving party when that party demonstrates that there is no issue of material fact and that the moving party is entitled to judgment as a matter of law.[22] Where the parties have submitted cross-motions for summary judgment on a stipulated record, as the parties here have done, I may treat the matter as submitted for a decision on the merits.[23]

*B. Do the Petitioners Have Standing?*

At the outset, I must address the County's argument that the Petitioners lack standing to challenge the 2008 CPO. Standing is a "threshold question" that the Court must address to ensure its judicial powers only operate in actual "case[s] or controversies."[24] Though state courts are not subject to standing limitations under the United States Constitution, state courts "apply the concept of standing as a matter of self-restraint to avoid the rendering of advisory opinions at the behest of parties who are 'mere intermeddlers.'"[25] Our Supreme Court has held that a plaintiff or petitioner must meet the following requirements to show standing:

> (1) 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; (2) there must

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[22] Ct. Ch. R. 56(c).
[23] Ct. Ch. R. 56(h).
[24] *Dover Hist. Soc. v. Dover Plann'g Comm'n*, 838 A.2d 1103, 1110 (Del. 2003).
[25] *Id.* at 1111 (citing *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del.1991)).

> be a causal connection between the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[26]

Kent County argues that the Petitioners here lack standing because they have suffered no diminution in property rights, and hence no injury, *by virtue of the 2008 CPO*. According to the County, the change in density requirements for properties outside the Growth Zone was the result of the First and Second Wastewater Ordinances, not the 2008 CPO. Although the Second Wastewater Ordinances were not adopted until well after this litigation commenced, the County argues that the repeal and readoption makes no difference to this case, because of the general rule that "[w]here a new statute or ordinance which merely repeals and re-enacts an earlier one . . . prescribes a rule from and after the passage of 'this act,' it is merely a continuation of the old enactment and speaks as of the date the old one became effective."[27]

The Petitioners maintain that they have standing because the County's repeal of the First Wastewater Ordinances renders those Ordinances a legal nullity, and therefore it was the 2008 CPO which downzoned the Petitioners' property. The

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[26] *Id.* at 1110 (citing *Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3rd 168, 175-76 (3d Cir. 2000)).
[27] 77 A.L.R.2d 336 § 8 (1961).

Petitioners argue that the County intended for the Second Wastewater Ordinances to have prospective effect, because they were adopted as part of a settlement which allowed certain development projects to proceed which did *not* conform to the density limitations of the First Wastewater Ordinances.

In my view, the issue of when the Wastewater Ordinances became binding is mostly irrelevant.[28] Even if the Petitioners are correct that the Second Wastewater Ordinances only apply prospectively, the Petitioners have still failed to show that a favorable decision invalidating the 2008 CPO can redress their alleged injuries, because the Petitioners would still be bound by the density limitations of the Second Wastewater Ordinances. Because a decision in their favor would fail to remedy the alleged harm—that the Petitioners' property has been downzoned—I find that the Petitioners lack standing to challenge the 2008 CPO.

The Petitioners' attempts to explain away the impact of the Second Wastewater Ordinances are unpersuasive. According to the Petitioners, if the 2008 CPO were to be held invalid, the Second Wastewater Ordinances would be "rendered null and void," because they would be inconsistent with the prior Comprehensive Plan of Kent County.[29] I disagree. The Petitioners have alleged the invalidity of the 2008 CPO, only. They have failed to challenge the validity of

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[28] As discussed below, only one of the Petitioners asserts that it was pursuing permission to develop its property at the time of the adoption of the Second Wastewater Ordinances.
[29] Pet'rs' Ans. Br. 13 n.23.

the Second Wastewater Ordinances. In so doing, the Petitioners have left undisturbed laws which impose the same density restrictions as the 2008 CPO. Furthermore, even if the Petitioners were to challenge the Second Wastewater Ordinances, any such attack would be barred by Delaware's statute of repose.[30] The statute provides that

> No action, suit or proceeding in any court, whether in law or equity or otherwise, in which the legality of *any ordinance, code, regulation or map, relating to zoning*, or any amendment thereto, or *any regulation or ordinance relating to subdivision and land development*, or any amendment thereto, enacted by the governing body of a county or municipality, is challenged, whether by *direct or collateral attack or otherwise*, shall be brought after the expiration of 60 days from the date of publication in a newspaper of general circulation in the county or municipality in which such adoption occurred, of notice of the adoption of such ordinance, code, regulation, map or amendment.[31]

Because Section 8126 is a statute of repose, the failure of a party to bring a timely challenge to a County ordinance relating to zoning or land use extinguishes the party's right to bring that challenge.[32] Furthermore, because the statute of repose extinguishes substantive rights it leaves nothing for this Court to adjudicate.[33] Accordingly, any challenge to the Second Wastewater Ordinances—adopted in 2009—would fail, because the 60-day time period has run. Because the Second Wastewater Ordinances would still limit the development rights of the Petitioners

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[30] 10 *Del. C.* § 8126.
[31] *Id.* § 8126(a) (emphasis added).
[32] *Cheswold Vol. Fire Co. v. Lambertson Const. Co.*, 489 A.2d 413, 421 (Del. 1984).
[33] *Id.*

in exactly the same way as does the 2008 CPO, I find that the Petitioners have failed to meet their burden to show standing.

However, one of the Petitioners, Harmon Brothers, LLC, argues that it could benefit from a decision invalidating the 2008 CPO, because it submitted "concept plans" to develop a subdivision on December 2, 2009, *before* the County adopted the Second Wastewater Ordinances.[34] Because subdivision plans are generally governed by the laws in place at the time the landowner begins the application process,[35] the Petitioners argue that Harmon Brothers could benefit from the lower density regulations which existed prior to Kent County's adoption of the Wastewater Ordinances and the 2008 CPO. While Kent County disputes whether Harmon Brothers complied with the proper application procedures under the County Code,[36] I can resolve the issue of standing without determining whether Harmon Brothers complied with proper procedures. Like the other Petitioners, Harmon Brothers has failed to show how a decision granting the relief sought here—the invalidation of the 2008 CPO—would allow Harmon Brothers to develop its property at a higher density than that allowed by the 2008 CPO or the Second Wastewater Ordinances. The Petitioners have not indicated that Harmon Brothers availed itself of its statutory right to appeal the administrative denial of its

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[34] Letter from John W. Paradee 1, Jun. 24, 2013.
[35] *See Chase Alexa LLC v. Kent Cty. Levy Court*, 991 A.2d 1148, 1151-52 (Del. 2010).
[36] Letter from Max. B. Walton 1, Jun. 26, 2013.

subdivision applications.[37] No such appeal is a matter of record in this case. Harmon Brothers could have, but did not, filed a timely appeal *after* the First Wastewater Ordinances were (in the Petitioners' view) made void by the repeal and readoption of the Second Wastewater Ordinances. However, any appeal of the County's denial of Harmon Brothers' subdivision application is now foreclosed.[38]

The Petitioners have not made any other argument as to why Harmon Brothers could develop its property under the density limits as they existed before the County adopted the Wastewater Ordinances and the 2008 CPO. The Petitioners' statement that Harmon Brothers "was actively attempting to navigate through Kent County subdivision application process"[39] prior to the adoption of the Second Wastewater Ordinances is not the same as asserting that Harmon Brothers *actually has* a right to develop under lower density limits if the 2008 CPO were to be invalidated. Accordingly, I find that Harmon Brothers, like the other Petitioners, does not have standing to challenge the 2008 CPO, because the Petitioners have failed to show that Harmon Brothers would benefit from a decision invalidating the Ordinance.

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[37] *See* Kent Cty. C. § 187-21(D) ("Any approval or disapproval [of a preliminary plan] may be appealed to the Levy Court within 30 days.").
[38] *Id.*
[39] Letter from John W. Paradee 1, Jun. 24, 2013.

## III. CONCLUSION

For the foregoing reasons, the Respondents' Motion for Summary Judgment on their state law claims is GRANTED. The Petitioners' Motion for Summary Judgment is DENIED. The parties should provide a form of order consistent with this Opinion and indicate whether any issues remain for consideration.