IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

MARIAH D. CALAGIONE and SAMUEL A. CALAGIONE, III,	:	
Petitioners,	:	
v.	:	C.A. No. 07A-03-003
CITY OF LEWES PLANNING COMMISSION, CITY COUNCIL OF THE CITY OF LEWES, JAMES L. FORD, III, Mayor of the City of Lewes, RICHARD HEALING and DARLENE HEALING, C. LEONARD MAULL and LINDA M. TRACEY,	:	
Respondents.	:	

Submitted: September 30, 2009
Decided: December 30, 2009

On Petitioners' Petition for Certiorari, the Decisions of the City Council of the City of Lewes are **AFFIRMED**

MEMORANDUM OPINION

John A. Sergovic, Jr., Esquire, Sergovic & Carmean, P.A., Georgetown, Delaware, Attorney for Petitioners Mariah D. Calagione and Samuel A. Calagione, III.

Tempe Brownell Steen, Esquire, Steen, Waehler, Schrider-Fox, LLC, Ocean View, Delaware, Attorney for Respondents City of Lewes Planning Commission, City Council of the City of Lewes, and James L. Ford, III, Mayor of the City of Lewes.

William Schab, Esquire, Schab & Barnett, P.A., Georgetown, Delaware, Attorney for Respondents Richard Healing and Darlene Healing.

Glenn C. Mandalas, Esquire, Baird Mandalas, LLC, Dover, Delaware, Attorney for Respondents C. Leonard Maull and Linda M. Tracey.

Graves, J.

I. INTRODUCTION

Before the Court is a request for judicial review by writ of certiorari filed by Mariah D. Calagione and Samuel A. Calagione, III (hereinafter, "Petitioners"). Petitioners ask the Court to review two resolutions adopted by the City Council of Lewes on February 7, 2007, those resolutions approving the applications of Respondents C. Leonard Maull and Linda M. Tracey and Respondents Darlene Healing and Richard Healing to subdivide their respective properties.

Petitioners ask the Court "to correct errors of law, to review proceedings not conducted according to law, and/or to restrain an excess of jurisdiction". Amended Petition for Writ of Certiorari Pursuant to 10 *Del. C.* §562, at ¶ 5. Respondents[1] counter that the Council's decisions were made legally and should be upheld. Moreover, Respondents challenge Petitioners' allegation of tangible injury; that is, Respondents allege Petitioners lack standing to seek review of the Council's actions. The Court has also raised, *sua sponte*, the issue of whether the Petition, filed on March 31, 2007, was timely filed in this Court.

By way of brief summary, the Court concludes the Petition was timely filed with the Court, in accordance with 10 *Del. C.* § 8126. In the event § 8126 does not apply to this action and the thirty-day time frame established by Delaware case law applies, the Court exercises its discretion to excuse Petitioners' error. The Court also finds Petitioners have standing to challenge the adoption of the resolutions. However, the Court holds that the Council's adoption of the resolutions was not "manifestly contrary to law." Accordingly, the decisions of the

---

[1] "Respondents" refers to all named Respondents: the City of Lewes Planning Commission ("the Planning Commission"), City Council of the City of Lewes ("the Council"), James L. Ford, III, in his capacity as Mayor of the City of Lewes ("the Mayor"), Richard Healing and Darlene Healing (collectively, "the Healings"), and C. Leonard Maull and Linda M. Tracey (collectively, "the Maulls").

Council are AFFIRMED.

II. FACTUAL BACKGROUND

Review on a petition for certiorari is on the record. *Christiana Town Ctr., LLC v. New Castle County*, 2004 WL 2921830, at *2 (Del. Dec. 16, 2004). The facts outlined below are taken from the findings of fact as set forth in the Council's Resolution Approving the Final Site Plan for C. Leonard Maull and Linda M. Tracey ("the Maull Resolution") and the Council's Resolution Approving the Final Site Plan for Richard and Darlene Healing ("the Healing Resolution"), unless otherwise noted.

The Maulls and Healings own properties located within the boundaries of areas designated the "Old Town District" and the "Historic District" by the City of Lewes zoning ordinance. Although the Healing subdivision application ("the Healing Application") and the Maull subdivision application ("the Maull Application") were filed separately, many of the same issues arose with regard to the Applications and they were consistently considered by the Planning Commission or Council at the same time or in reference to each other. Similarly, the matters have been consolidated before this Court for the purpose of expediency.

A. Background unique to the Healing Application

In 2002, the Healings requested permission to divide the Healing parcel of land into five lots, two facing Second Street and three facing Front Street. Per advice received from the Town Building Official Bill Massey (hereinafter "the Building Official") and the Board of Public Works, the Healings filed the request as an application for a minor subdivision. Pursuant to the Lewes Code, one distinction between a "major" and a "minor" subdivision is the availability of utilities. The Lewes Code defines a "subdivision, major" as "[a] subdivision of land involving a proposed new street or road, the extension of an existing street or road or the extension of any

utilities." Lewes Code § 170-4(B).[2] The Healings initially received word from the Board of Public Works that utilities were available for all proposed lots. The lot sizes as proposed for the Healing subdivision were: Lot 1, 4,494 square feet, more or less; Lot 2, 9,210 square feet, more or less; Lot 3, 4,790 square feet, more or less; Lot 4, 4,641 square feet, more or less; and Lot 5, 4,161 square feet, more or less. At the time the Healing Application was made, the minimum lot size for lots located in the Old Town District was 4,000 square feet.

The Healing Application for a minor subdivision was placed on the Planning Commission's agenda for the Planning Commission's October 16, 2002, meeting. On October 15th, the Building Official notified the Healings that, in fact, water and sewer were *not* immediately available to some of the proposed lots and, accordingly, the Healing Application would need to proceed as either (1) a minor subdivision for the lots facing Second Street and a major subdivision for the lots facing Front Street or (2) a major subdivision. In either event, the Building Official informed the Healings that a larger fee was needed in order to proceed. Because the major subdivision fee was not paid prior to the scheduled meeting (held on the following day), the matter was withdrawn from the Planning Commission meeting agenda. Per direction from the Building Official, the Healings subsequently proceeded with the engineering review required for providing utilities and, in July 2003, renewed their request for a subdivision of their parcel into five lots. The matter was put on the agenda for the July 2003 Planning Commission meeting but was withdrawn from consideration due to confusion over whether the request was properly presented as a minor subdivision, a major subdivision, or a combination of the two.

---

[2] Hereinafter, cites to the Lewes Code will be abbreviated as "L.C. § ___".

B. Background unique to the Maull Application

The Maulls sought permission to divide their parcel into two lots, one facing Second Street and one facing Front Street, each approximately 4,283 square feet, more or less. The Maulls began discussing their desire to subdivide their property with the Building Official and the Board of Public Works in late spring of 2002.[3] At that time, the Maulls were advised their application would be considered as one for a minor subdivision. In June 2002, the Board of Public Works notified the Maulls that utilities were available to the proposed lots. Subsequently, however, the Building Official notified the Maulls that utilities were not immediately available and that their application must proceed as a request for a major subdivision. In July 2003, the Maulls renewed their request for a subdivision, this time requesting approval for a major subdivision. The agenda for the July 2003 Planning Commission meeting originally reflected consideration of the Maull Application but it was later removed due to confusion with regard to the proper classification of the subdivision request.

C. Background applicable to both the Maull Application and the Healing Application

In July 2003, after both the Maulls and the Healings had renewed their requests for subdivision approval, the Planning Commission recommended to the Council that the minimum square footage for lots in the Old Town District be increased to 5,000 square feet. The Planning Commission contemporaneously recommended that a moratorium on subdivision applications requesting the creation of lots less than 5,000 square feet in size be imposed while the proposal to increase minimum lot size proceeded through the amendment process. On August 1, 2003, the Maull Application was forwarded to the Planning Commission as a request for a minor

[3] As previously noted, in 2002, lots created in the Old Town District were required to be at least 4,000 square feet.

subdivision. On this date, the Healing Application was also forwarded to the Planning Commission as both a request for a minor subdivision and as a request for a major subdivision. On August 4, 2003, the Building Official modified the notice to the Planning Commission to clarify that the Maull Application was, in fact, a request for a major subdivision. The Maull Application, as both a request for a major subdivision and as a request for a minor subdivision, was set on the Planning Commission agenda for its August 20, 2003, meeting.[4] Likewise, the Healing Application, as both a request for a major subdivision and as a request for a minor subdivision, was placed on the Planning Commission agenda for its August 20, 2003, meeting. On August 11, 2003, the Council voted to set for a public hearing the Planning Commission's recommendation that the minimum lot size be increased in the Old Town District; the Council also imposed a moratorium on subdivision applications where lots of less than 5,000 square feet would result. The resolution exempted from the moratorium the Burton Subdivision area of the Old Town District and "applications for subdivision in the Old Town Zoning District currently pending on the agenda for Lewes Planning Commission".[5]

On August 20, 2003, the Planning Commission deferred action on the Healing and Maull Applications until September 3, 2003. At the September 3rd Planning Commission meeting, the

---

[4] Notice of the time and place of a public hearing on a major subdivision request (no public hearing is required for a minor subdivision request) must be published at least fifteen days prior to the time and date of the hearing. L.C. § 170-16 (A)(9). The Planning Commission will not schedule a hearing on a major subdivision request prior to receiving from the City Engineer and the Board of Public Works a subdivision plot plan report. *Id.*

[5] A review of the hearing transcripts reveals that the City Solicitor advised Council members that pending applications would be exempt from the moratorium at the August 11, 2003, Council meeting. The City Solicitor also provided this opinion to the Maulls and the Healings at the September 3, 2003, Planning Commission meeting. The exemption of pending applications was formalized throughout the application process and eventually in the Council's findings of fact in the Maull Resolution and the Healing Resolution.

City Solicitor opined that the applications should be treated as requests for major subdivisions. The City Solicitor further opined that the pending applications were protected from the moratorium because (a) they were ongoing applications and excluded due to common practice and (b) the language of the Council's resolution on the moratorium specifically excluded the pending Applications.

On October 28, 2003, the Council held a public hearing on the proposal to increase the minimum lot size in the Old Town District to 5,000 square feet. On November 10, 2003, the Council adopted the amendment to the Lewes Code, thereby increasing the minimum lot size to 5,000 square feet in the Old Town District. At this time, the Council also lifted the moratorium on subdivision applications.

On May 7, 2004, the Building Official forwarded letters to the Planning Commission asking to put the Maul Application and the Healing Application on the May 19, 2004, Planning Commission agenda.[6] On May 11, 2004, at the request of the City Manager for the City of Lewes, the public hearing on the Maull and Healing Applications was rescheduled for June 23, 2004.

At the June 23, 2004, Planning Commission meeting and public hearing on the pending Maull and Healing Applications, concerns were raised regarding storm water management and runoff. On September 15, 2004, the Planning Commission granted preliminary approval with conditions for the Maull and Healing Applications. After communication between the applicants and the Board of Public Works, the Board of Public Works notified the Planning Commission

[6] During the intervening months of 2003 and 2004, the Healings and Maulls were in regular contact with the Board of Public Works, the Parks and Recreation Committee, and Delaware Department of Transportation regarding various subdivision requirements.

that it recommended final approval of the Healing and Maull subdivision utility plans on January 2, 2005. On January 19, 2005, the Planning Commission concluded that the engineering conditions placed on the preliminary approval of the Applications had been met. Accordingly, the Planning Commission granted preliminary approval without conditions of the Healing and Maull Applications on the same date.

On March 17, 2005, the Sussex Conservation District notified the Healings and Maulls that it approved of the proposed projects. However, on March 28, 2005, the Sussex Conservation District requested additional information from the applicants. From March 2005 through January 2006, there is a record of extensive communication among the engineers, the Sussex Conservation district, the Healings, the Maulls, and the Board of Public Works regarding storm water runoff and storm water management issues. On January 19, 2006, the twelve-month period in which a final plan must be filed pursuant to L.C. § 170-16(A)(11)(b) expired. On March 17, 2006, the Sussex Conservation District notified the Healings and Maulls that it approved the sediment control and storm water management plans. Subsequently, the Healings and Maulls sought final plan approval. At its June 21, 2006, meeting, the Planning Commission again granted preliminary approval of the Healing Application and recommended final approval of the Healing Application subject to resolution of the storm water concerns. On July 19, 2006, the Planning Commission again granted preliminary approval of the Maull Application and recommended final approval of the Maull Application subject to resolution of the storm water concerns. A public hearing was held on the Healing and Maull Applications before the Council on November 28, 2006. The record was left open for additional public comment until December 1, 2006. On February 7, 2007, the Council passed the Resolutions approving the final site plans for the Healing and Maull Applications.

III. PROCEDURAL POSTURE BEFORE THE COURT

The present action was filed on March 21, 2007, seeking a writ of certiorari pursuant to 10 *Del. C.* § 562. Petitioners filed a parallel action in the Court of Chancery seeking injunctive relief.[7] Superior Court issued the writ on March 23, 2007, directing the City of Lewes to produce its record to the Court for its review. The actions were then consolidated and stayed on June 6, 2007, pending resolution of the Chancery Court actions. The Chancery Court actions were dismissed on November 13, 2007, and the stay lifted in Superior Court on February 25, 2008. Briefing was completed on the Petition for Certiorari on May 7, 2009, and oral argument took place on September 30, 2009. Briefing and oral argument addressed merits of the petition, the standing issue, as well as the applicable statute of limitations.

IV. TIMELINESS OF FILING

Petitioners filed this action pursuant to 10 *Del. C.* § 562 on March 21, 2007. The Council adopted the Healing and Maull Resolutions on February 7, 2007. Petitioners argue that, pursuant to 10 *Del. C.* § 8126, they had sixty days from the date of publication of the Council's decision to bring this action in Superior Court. This Court raised the issue, *sua sponte*, of whether or not this matter was time barred due to the rule established in *Elcorta, Inc. v. Summit Aviation, Inc.*, 528 A.2d 1199 (Del. Super. 1987), that petitions for certiorari must be filed within thirty days of the date of the lower tribunal's final decision.

In *Elcorta*, Judge Balick discussed the history of the writ of certiorari as it relates to appellate review and as it is distinguished therefrom. As Judge Balick noted, "[t]here is no time

---

[7] In order to ensure the exhaustion of any available administrative remedies, Petitioners also filed an appeal with the Board of Adjustment on March 6, 2007. The Board of Adjustment determined it lacked jurisdiction to consider Petitioners' appeal.

limit fixed by statute or by court rule for filing an action in certiorari. ... Nor have I seen a reference to any time limitation at common law. Since the writ was then discretionary, it is likely that the timeliness of the proceedings would be one of the factors considered by the court in deciding whether to allow the writ." 528 A.2d at 1200-01. After noting that "[i]n the absence of an applicable statute or court rule, many courts apply statutes limiting the time for filing a notice of appeal or a praecipe for a writ of error by analogy," Judge Balick concluded that the thirty-day period for the filing of a praecipe in the Supreme Court was the "most appropriate standard for comparison" where petitioners sought review of Justice of the Peace Court proceedings. *Id.* at 1201.

In this case, the Delaware Code contains a statute that appears to address directly the time frame for the filing of a collateral attack on the legality of a municipal body's approval of a subdivision plan. Section 8126 of Title 10 reads, in pertinent part:

> No action, suit or proceeding in any court, whether in law or equity or otherwise, in which the legality of any action of the appropriate county or municipal body finally granting or denying approval of a final or record plan submitted under the subdivision and land development regulations of such county or municipality is challenged, whether directly or by 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 action occurred, of notice of such final approval or denial of such final or record plan.

10 Del. C. § 8126(b).[8] It is worth noting that 10 *Del. C.* § 8126 was enacted in 1968, more than one hundred years after 10 *Del. C.* § 562, which codified the common law right to petition the Superior Court for certiorari, was enacted. In any case, "[i]t is well established that a writ of certiorari proceeding in the Superior Court is the appropriate cause of action for determining

[8] Section 8126 does not, in and of itself, establish a cause of action. *See MacNamara v. County Council*, 738 F. Supp. 134, 141 n. 16 (D. Del. 1990).

whether, on the face of the record, [a] Planning Commission exceeded its powers or failed to conform to the requirements of law." *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1106 (Del. 2003).

The Court finds 10 *Del. C.* § 8126(b) applies to a petition for certiorari challenging the legality of a municipal body's approval of a final subdivision plan. Such a petition is a collateral attack contemplated by the language of the statute. In the alternative, the Court is satisfied that the sixty-day time frame should apply pursuant to the analysis employed by now-Chief Justice Steele in *Green v. Sussex County*, 1992 WL 354024 (Del. Super. Nov. 19, 1992). Pursuant to *Green*, the *Elcorta* case did not set a firm thirty-day filing period for the filing of a writ of certiorari but, rather, recognized the court's interest in locating an appropriate reference for comparison when considering whether a petition has been timely filed; i.e., ideally, the court is able to turn to a statute that identifies a filing time frame for a similar issue or type of case for guidance. In *Green*, the court decided that an analogous statute provided for a six month statute of limitations and, accordingly, concluded the same time frame applied to the filing of the certiorari action. The Court is comfortable extending the same rationale to the facts at hand and finds that, even in the event 10 *Del. C.* § 8126(b) was not intended to establish the time line for the filing of a certiorari action challenging a municipal body's final approval of a subdivision plan, the statute is the best suited to provide guidance to the Court in establishing a time frame for the filing of such an action.[9] Thus, the Court concludes a writ of certiorari challenging the

[9] An interesting area of contrast is that concerning a petition for certiorari from a Board of Adjustment appeal. Not only has the Legislature explicitly established the time frame for the filing of such a petition under 22 *Del. C.* § 328, which provides a window of thirty days for the filing of the petition, but case law has distinguished between the standard of review in a common law petition for certiorari and one brought pursuant to 22 *Del. C.* § 328. *See Handloff v. City Council*, 2006 WL 1601098, at *7 (Del. Super. June 8, 2006), *aff'd*, 935 A.2d 255 (Del. 2007)

Council's Resolution approving the Healing and Maull Applications must have been filed within sixty days from the date of publication of the adoption of the Resolutions. The Petition was filed on March 21, 2007, and, therefore, was timely filed.

However, in the event the thirty-day time frame laid out in *Elcorta* does apply to this case, the Court will exercise its discretion to excuse the late filing. In *Elcorta*, the court held that, because the thirty-day filing period was "adopted in exercise of Superior Court's common law power to regulate certiorari proceedings, it is not jurisdictional but is subject to the discretionary power of the court to excuse defaults in appropriate circumstances." 528 A.2d at 1201. This Court raised the issue of the timeliness of the filing (1) after issuing the writ directing the Council to send to Superior Court its record of the proceedings below and (2) after the proceedings in this Court had been underway for some time. Moreover, Petitioners' counsel did not wait until the eve of the sixtieth day to file this action. Indeed, the Petitioners' complaint was, in effect, drafted on March 6, 2007, when Petitioners filed their appeal with the Board of Adjustment. Finally, Respondents also believed the sixty-day time frame applied, as evidenced by their affirmative defense citing Petitioners' alleged failure to file their Petition in accordance with 10 *Del. C.* § 8126.

In sum, the Court concludes the sixty-day time frame set forth in 10 *Del. C.* § 8126(b) controls the filing of this writ of certiorari. In the alternative, the Court will exercise its discretion to excuse Petitioners' failure to file their Petition within the thirty-day time frame proscribed in *Elcorta.*

V. STANDING

(TABLE).

Respondents contend Petitioners lack standing to challenge the Council's resolutions. Petitioners respond that they do have standing and argue (1) the Court of Chancery's decision finding Petitioners had standing[10] binds this Court; (2) they have a tangible interest in the "aesthetic benefit" derived from their status as landowners in the Old Town District and Historic District; and (3) they have an implied right of action to enforce the City's zoning and subdivision ordinances under *O'Neill v. Town of Middletown*, 2006 WL 4804652 (Del. Ch. Jan. 18, 2006).

"Standing" refers to "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary p. 1413 (7th ed. 1990). Whether a party has standing is a threshold issue that must be addressed by the Court. *See Dover Historical Soc'y*, 838 A.2d at 1110. The party invoking the jurisdiction of the Court bears the burden of establishing standing. *Id*. at 1109.

A. The Chancery Court Decision

The Court of Chancery considered the question of whether or not Petitioners had standing in the context of entertaining a motion to dismiss. "[G]eneral allegations of injury are sufficient to withstand a motion to dismiss". *Dover Historical Soc'y*, 838 A.2d at 1110. As a case progresses through the judicial system, an aggrieved party must present more persuasive evidence of injury. *See id.* Accordingly, I agree with Respondents' position that the Court of Chancery's decision on the motion to dismiss in the parallel case, while having persuasive value, is not binding on this Court.

B. Tangible Injury

1. Aesthetic Injury

---

[10] *Calagione v. City of Lewes Planning Comm'n*, 2007 WL 4054668 (Del. Ch. Nov. 13, 2007). The Court of Chancery dismissed the case as not ripe for judicial review.

The right to challenge a final site plan approval in Superior Court is not provided for in either the Delaware Code or the Lewes Code. In order to demonstrate standing, Petitioners must show (1) that they suffered an "injury-in-fact"; and (2) that the interests they seek to protect are within the zone of interests intended to be protected. *Dover Historical Soc'y*, 838 A.2d at 1110.

A broad, as opposed to narrow, interpretation of the standing concept is "entirely consistent with the underlying purposes of our zoning laws. Our municipalities enact zoning ordinances in order to protect the public's health, welfare and safety. A challenge to a zoning variance focuses the court's attention on this public interest." *Vassallo v. Penn Rose Civic Assoc.*, 429 A.2d 168, 170 (Del. 1981) (citation omitted). The "zone of interests" intended to be protected by town zoning regulations, in general, is codified in Title 22 of the Delaware Code:

> For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated towns may regulate and restrict the height, number of stories and size of buildings and other structures, percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.

22 *Del. C.* § 301. In addition, the Lewes Code provides:

> The purpose of [the Subdivision and Land Development Chapter] is to assure that sites are suitable for all development purposes, including residential, commercial, industrial, institutional and recreational, to assure that these sites are properly prepared for human habitation and to provide for the harmonious development of the city, for the coordination of existing streets with proposed streets, parks or other features of the city plan of streets and alleys, for adequate open areas for traffic, recreation, light and air and for proper distribution of population, thereby creating conditions favorable to the health, safety and general welfare of the City of Lewes, as set forth within the Long-Range Plan.

L.C. § 170-2.

The Court finds Petitioners have an interest as members of the Lewes community in the "health, safety and general welfare" of Lewes and, thus, they have satisfied the first prong of the

standing analysis.

However, while a challenger's interest may fall within the zone of interests to be protected by land use regulation, the courts have been reluctant to find that adjoining property owners have standing to challenge a subdivision approval. *See, e.g., Concord Towers, Inc. v. McIntosh Inn of Wilmington, Inc.*, 1997 WL 525860, at *3 (Del. Ch. July 22, 1997) (holding "[o]wners of adjoining properties do not have standing to contest the [Council's] decision to approve a subdivision plan"), *aff'd*, 1997 WL 812623 (Del. Dec. 22, 1997) (finding standing issue moot on appeal and declining to address lower court's ruling on the issue). *See also LeMay v. New Castle County*, 1992 WL 101136, at *6 (Del. Ch. May 6, 1992) (finding petitioners lacked standing to challenge technical violations of the County Code and noting that the subdivision filing requirements did not appear to have been enacted "for the special benefit of adjoining landowners"), *aff'd*, 610A.2d 726 (Del. 1992) (TABLE). In other words, owners of adjoining property lack injury-in-fact to challenge a subdivision approval unless they have a more particularized interest at stake. To that end, case law has recognized that landowners in historic districts will be able to satisfy the injury-in-fact prong of standing if they have "an enforceable right in the 'aesthetic benefit' derived from [a] Historic District as a whole". *Dover Historical Soc'y*, 838 A.2d at 1114.

In the present case, Petitioners' residence is situated on a lot adjacent to a portion of the Maulls' property. Petitioners are residents in an area known as both the Old Town Residential District and the Historic District. Likewise, the property sought to be subdivided by the Maulls and the Healings is located within the same districts. The Lewes Code identifies the purpose of the establishment of the Old Town Residential District as follows:

Specific intent. It is the intent in establishing this district to:

(1) Preserve face-to-face intimacy in an urban setting.

(2) Preserve architecturally diverse but harmonious streetscapes.

(3) Allow for yards that are appropriate to older, densely settled sections of the City yet meet minimum requirements for light and air and private open space.

(4) Make a substantial number of legally recorded small lots conforming.

(5) Allow for compact, urban, residential areas with convenient commercial and public services available to many residents by walking or bicycling.

L.C. § 197-16(A).

This Court has fewer facts before it than the reviewing courts did in many of the cases cited by Petitioners. This distinction is primarily due to the fact that Respondents are at an earlier planning stage; the nature of the structures that will eventually be placed on the subdivided property is, as yet, unknown. No doubt, when a reviewing court is presented with proposed building plans, it may be easier to identify with specificity the threatened injury.[11] Nevertheless, the Lewes Code does specifically enumerate a desire to "meet minimum requirements for light and air and private open space," and such minimum requirements will be affected by the reduction in minimum lot size. Moreover, as courts have noted in the past, if Petitioners are not able to challenge the Council's actions for lack of standing, it is difficult to imagine anyone would have standing to do so. *See Dover Historical Soc'y*, 838 A.2d at 1112-13; *Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 176-77 (3d Cir. 2000). Accordingly, the Court is satisfied that Petitioners have satisfied both requirements for standing to bring this certiorari action.

---

[11] The Court observes that any house or other structure eventually constructed on any of the properties at issue will be required to conform to the local building code, including the Historic Preservation Regulations found at L.C. §§ 197-40 – 44.

2. Due Process Injury

Petitioners allege they have also suffered tangible injury because they were denied their due process rights before the Council and the Planning Commission. Because the Court finds Petitioners' aesthetic injury gives Petitioners standing to challenge the adoption of the Healing and Maull Resolutions, it will not address this argument.

3. Storm Water Management Injury

Petitioners also allege they have suffered injury-in-fact due to storm water run off. Again, because the Court is satisfied Petitioners have met their burden of establishing tangible injury given their status as residents in a district with a heightened interest in preservation and aesthetics, the Court will not address the argument that hypothetical injury caused by not-yet-constructed buildings is sufficient to satisfy the requirement that injury-in-fact be shown.

C. Implied Right of Action

Because the Court finds Petitioners (1) have established that their interests fall within the zone of interests to be protected by the Lewes Code and (2) have alleged sufficient injury-in-fact to satisfy the standing requirements, the Court will not address the merits of Petitioners' claim that they have an implied right of action to enforce Lewes' zoning and subdivision ordinances.

VI. REVIEW OF THE COUNCIL'S ACTIONS

A. Standard of Review

The purpose of a writ of certiorari is to allow a higher court to review the conduct of a lower tribunal of record. *Christiana Town Ctr.*, 2004 WL 2921830, at *2. Review on certiorari is on the record: "the reviewing court may not weigh evidence or review the lower tribunal's factual findings." *Id.* The review for a certiorari matter is not de novo, nor is it even "substantial

evidence".[12] It is not the function of the Superior Court, on certiorari review, to review the facts underlying a finding made by the Council and/or the Planning Commission. *See, e.g., Reise v. Board of Bldg. Appeals*, 746 A.2d 271, 274 (Del. 2000), *Handloff v. Newark*, 2007 WL 2359555, at *2 (Del. Aug. 20, 2007). The reviewing court only examines the record to determine whether the lower tribunal (a) exceeded its jurisdiction; (b) committed errors of law; or (c) proceeded irregularly. *Christiana Town Ctr.*, 2004 WL 2921830, at *2. The crux of Petitioners' many allegations is that the Council and/or Planning Commission committed errors of law. "A decision will be reversed for an error of law committed by the lower tribunal when the record affirmatively shows that the lower tribunal has 'proceeded illegally or manifestly contrary to law.'" *Id.* (citation omitted).

B. Merits

1. Moratorium prevented application from moving forward

Petitioners posit the Council and the Planning Commission committed legal error when they permitted the Healing and Maull Applications to move forward despite the imposition of a moratorium on subdivision applications. Petitioners assert (1) the pending applications were improperly filed and, therefore, not properly considered "pending" at the time the Council passed the moratorium and (2) pending applications were not exempted from the moratorium, in any event.

a. "Pending" status of Healing and Maull Applications

The moratorium, previously described *supra*, was imposed by the Council on August 11, 2003. Pursuant to its findings of fact adopted in the Healing and Maull Resolutions, the Council

[12] Compare statutory certiorari review of a Board of Adjustment decision pursuant to 22 *Del. C.* § 328. *See Willdel Realty, Inc. v. New Castle County*, 281 A.2d 612, 614 (Del. 1971).

found the moratorium exempted any applications for subdivisions pending before the Planning Commission at the time the moratorium was imposed. In its findings, the Council took pains to point out that the Healing and Maull Applications had been filed, in their entirety, prior to the Council's August 11, 2003, meeting. Moreover, the Council made numerous findings of fact that reflect confusion on the part of town officials with regard to the proper classification of the Healing and Maull Applications. The transcripts from the meetings reflect an appreciation for the unique (given the shape of the proposed lots) nature of the Applications on behalf of the Planning Commission and Council members, Lewes town officials, and the applicants, themselves. In response thereto, the Planning Commission took, appropriately, responsibility for initially providing misinformation to the applicants. Considering the Healing and Maull Applications to be pending before the Planning Commission in light of initial confusion about the proper characterization of the requests does not represent legal error on the part of the town entities involved.

b. The Healing and Maull applications exempted from moratorium

Petitioners argue that, even if the Healing and Maull Applications were pending, they were not exempted from the moratorium on subdivisions. The Council found otherwise. To reiterate, it is not the function of this Court to review the facts before the Council or Commission. Rather, this Court's responsibility to make sure the Council's factual findings support its legal conclusions. In this case, the Council specifically found that the Healing and Maull Applications were exempted, both by implication and by express language, from the moratorium. The fact that the Council found the express language of the moratorium adopted by the Council excluded pending applications speaks for itself. If this finding was made in error, the Council members had many opportunities to correct the factual error. This Court's function is

not to correct factual errors.

As for whether the general practice of exempting pending applications from a moratorium is legal, such a practice is not just legal but good law. Imagine the scenario in which a proposal comes before the Council and its members object, on a personal basis, to some aspect of it. Under Petitioners' rationale, the Council could simply impose a moratorium on proposals just like application before it and subject the current applicant to the new moratorium.[13] Judge Herlihy recently held the denial of a minor subdivision to be contrary to law. In so doing, he noted that holding otherwise would result in "the imposition of uncertainty on all landowners respecting whether they can safely rely on the permitted uses conferred on their land under the zoning ordinances." *DiFrancesco v. Mayor & Town Council of Elsmere*, 2007 WL 1874761, at *3 (Del. Super. June 28, 2007), *aff'd*, 947 A.2d 1122 (Del. 2008) (TABLE). I find the same concern is raised by the argument Petitioners make in this case. It is clear from the record that the Council and Commission made a determination that the moratorium did not apply to pending applications after requesting and receiving input from the City Solicitor. This Court cannot and will not consider an otherwise well-reasoned effort to balance the interests of the town and the applicants to be "manifestly contrary to law" absent a code provision requiring it to conclude otherwise.

2. Preliminary approval was canceled, rendering it necessary to refile the applications in compliance with existing zoning ordinances

Petitioners next contend that the Planning Commission and the Council erroneously

[13] Indeed, in the Healing and Maull Resolutions, the Council concluded the filing of the Healing and Maull Applications led to the moratorium and the eventual resolution to increase the minimum square footage for lots located in the Old Town District.

interpreted L.C. § 170-16(A)(11)(b) to mean that only the Planning Commission's act of granting preliminary approval to the Healing and Maull Applications expired twelve months from the date the Planning Commission granted preliminary approval. Petitioners argue the code language required the Healings and Maulls to start back at square one with the submission of preliminary subdivision plans that complied with the Zoning Ordinance, as it was in 2006 (specifically, the Petitioners would like to see the Maull and Healing Applications comply with the amended provision mandating minimum lot size to be 5,000 square feet).

Section 17–16(A)(11)(b) reads, in pertinent part:

> Preliminary approval of subdivision plat shall be valid for 12 months. Unless a final plan, in accordance with the approved preliminary plat, including any required changes or modifications, and in accordance with all other applicable provisions, shall be filed with the Planning Commission within 12 months from the date of action of the preliminary plat, the Planning Commission's action thereon shall be deemed cancelled. .... Upon application stating the reasons therefor, the Building Official may grant a maximum of two extensions of six months each for preliminary approval.

The Council reached the following conclusions with regard to the Healing and Maull subdivision requests:

> 6. In the period following preliminary approval, January 2005, Maull along with Healing proceeded to obtain Sussex Conservation District approval and City Board of Public Works approval of construction improvement plans. The Board of Public Works issued final approval the next month, February of 2005; however, Sussex Conservation District, based on its own timeframe [sic] and not caused by any delay or negligence of the applicants, did not issue approval until mid-March of 2006, long after the 12 month time period established by the subdivision ordinance had run.
>
> 7. The only delays caused by the Applicant occurred at the City Council level related to scheduling of meetings; delays prior to that were caused by agencies beyond the control of Applicant.
>
> ...
>
> 9. The applicants, again following direction of the City, requested renewal of

the preliminary approval and, in the alternative, a waiver by the City Council of the twelve month time period as well as a waiver from the procedures required for a waiver.

10. The City Council concludes that the application for subdivision has remained the same from inception in 2002 and has been delayed, not by the applicant, but by the government agencies involved in the review process.

11. The City Council further concludes that the application, although not meeting the 12 month requirement of the subdivision between preliminary and final approval, could not meet that timeframe [sic] due to delays and inaction by agencies beyond its control.

12. The City Council concludes that the Planning Commission properly recognized that the Maull application was excluded from the increase in minimum lot area and "grandfathered".

13. The applicants proceeded, at every point, in accord with direction from the City, the Board of Public Works and other government agencies.

14. The City concludes that, although not necessary to determine whether a waiver of the subdivision time frame is necessary, it would be an extreme hardship and inequitable for the applicant to be required to begin the entire subdivision process from inception and, thus, to the extent it is applicable, waives the 12 month limitation between preliminary and final approval.

Resolution Approving Maull Application, at pp. 6-7 (this language is identical in to that in the Resolution Approving Healing Application, although some paragraphs are numbered differently).

Petitioners point to the City Solicitor's comments regarding a "fairness review" when she contributed to the discussion of whether to permit the Healing and Maull Applications to proceed. Petitioners assert any commentary regarding equitable interests was improper. However, Petitioners overlook the fact that the Planning Commission was considering the desire of the applicants to proceed either by way of renewal of preliminary approval or by way of waiver of the twelve-month time frame. In the context of whether the applicant could receive a

waiver to the time frame, the issue of fairness is, in fact, referenced by implication in the Lewes Code, as the language is permissive: "the Building Official *may* grant a maximum of two extensions of six months each for preliminary approval." L.C. § 170-16(A)(11)(b) (emphasis added). Moreover, the City Solicitor went on to say, "But, I think, just looking at the words are written, it doesn't say that the whole process is null and void; it says the preliminary action, the action is null and void. And it's on that basis that I implied that it's still a pending application before you; it's just that your action has been nullified and it's still out there." Planning Commission 6/21/06 Hr'g Transcript, at p. 17. The Court finds the Planning Commission's conclusion and, subsequently, the Council's conclusion that the Healings and Maulls were entitled to renew their application for preliminary approval after the expiration of the one-year time frame were not manifestly contrary to law. That is, the decisions were based upon facts before the Council and upon a reasonable legal interpretation of the language contained in L.C. § 170–16(A)(11)(b). Specifically, the opinion that the language "Commission's action" refers to the Planning Commission's act of granting preliminary approval, and not to the underlying application itself, is reasonable. The Council did not err as a matter of law in its interpretation of L.C. § 170-16(A)(11)(b) when it permitted the Healing and Maull Applications to proceed through the approval process, either by way of the renewal of the request for preliminary approval or by waiver of the 12-month time requirement for the filing for final approval.

3. Planning Commission and the Council denied Petitioners their due process rights

Petitioners posit the Planning Commission and the Council erred as a matter of law when they denied Petitioners their due process rights. In support of this argument, Petitioners cite two specific instances. First, they point to the Planning Commission's meetings of June 21, 2006 and July 19, 2006, when the Applications were before the Planning Commission for a renewal of

preliminary approval (or, in the alternative, a waiver of the time frame for the filing of a final site plan) and final approval. Petitioners assert, "Obviously, when an application is scheduled for both preliminary and final review by the Commission, the purpose behind the review process is defeated." Petitioners' Opening Brief, at p. 30. This conclusion is not "obvious" to the Court.[14] First, the Court notes Petitioners have had *and exercised* the opportunity to speak out against the Applications on *at least* five different occasions. Pursuant to the Lewes Code, Petitioners are entitled to speak at exactly two public hearings on a major subdivision application: they are entitled to speak once in front of the Planning Commission prior to the issuance of preliminary approval, L.C. §170-16(A)(9); and once in front of the Mayor and Council prior to the issuance of final approval, L.C. § 170-16(B)(6). Second, the Court declines to conclude that setting an item on the agenda for both preliminary and final approval is an error of law when (a) there is no allegation that the site plans presented for preliminary approval at the June 21, 2006, and July 19, 2006, meetings were substantively different from the plans presented at the public hearing on the Healing and Maull Applications held on January 19, 2005, before the Planning Commission; (b) the issue of proper procedure was raised at the hearing and the City Solicitor specifically directed the Planning Commission members not to reach the issue of final approval until granting preliminary approval, *see* Planning Commission 6/21/06 Hr'g Transcript, at p. 7; (c) Petitioners' representatives spoke in opposition to the Healing and Maull Applications at the June 21, 2006, and July 19, 2006, Planning Commission meetings where the Healing and Maull Applications were presented for both preliminary and final approval; and (d) Petitioners or their

[14] What *is* obvious to the Court is that the preliminary and final review were ultimately scheduled at the same time because of the issues discussed, *supra*, at section (VI)(B)(2) of this decision.

representatives had spoken in opposition to the Applications at public meetings held *prior to* the June 21, 2006, and July 19, 2006, Planning Commission meetings.

Petitioners also allege their due process rights were violated because they were not permitted to speak at a Council hearing on the Applications held on January 9, 2007. As noted above, the Lewes Code gives Petitioners the right to air their grievances at *two* public hearings on a major subdivision application. L.C. § 170-16(A)(9); L.C. § 170-16(B)(6). Both of these requirements were met. In addition, Petitioners spoke at numerous other meetings on the matter. The Lewes Code specifically permits the Mayor and Council "either prior or subsequent to [the public hearing required by § 170-16(B)(6) before the Mayor and Council], [to] request an informal review with the applicant and/or the applicant's engineer and/or the applicant's legal representative regarding alteration, changes or modifications deemed desirable by the Mayor and Council." L.C. § 170-16(B)(6). The January 9, 2007, meeting was held in accordance with this provision. Finally, the Court notes that Petitioners were allowed to speak once more *after* the January 9, 2007, meeting and did so. Accordingly, the Court concludes Petitioners' due process rights were not violated.

4. The City Council failed to determine the impact of extending public sidewalks

Petitioners next assert the Council erred as a matter of law when it failed to make a determination as to the impact of extended public sidewalks on the square footage of the lots. Respondents point to the project site maps, which show that the sidewalks required by the City would be located entirely in Delaware Department of Transportation's right-of-way. Regardless, however, this argument has no merit as, even if the sidewalks were located on the Healing and Maull properties, their existence would have no effect on the lot's size. To the contrary, the sidewalks' only impact would be to limit the square footage of any proposed house. The size of

any proposed structure is, of course, not an issue pending before the Court at this time.

5. The Mayor and the Council failed to comply with infrastructure regulations

Petitioners complain that the Council erred as a matter of law when it granted final approval to the Applications without a final report from the City Engineer with regard to a storm water detention system, thus rendering the final approval "premature" in light of L.C. § 170-16(B)(8)(b).

Section 170-16(B)(8) reads, in pertinent part:

> Standard conditions of approved subdivision application. Approval of each subdivision application shall be subject to the following standard conditions:
> ...
> (b) Performance of a construction improvement program in strict accordance with approved plans and specifications complete in every respect. ... All work started shall be completed within two years or approved extension thereof by resolution of the City Council on recommendations of the City Engineer and Board of Public Works.

As Petitioners acknowledge, compliance with this ordinance is not required prior to obtaining the Council's final approval. However, Petitioners assert this language "implies that the applicant should have a final storm water management plan by the time the application is considered by Council for final approval." Petitioners' Opening Brief, at p. 33.

Section 170-16(B)(8) of the subdivision ordinance guides the development as it progresses *after* an applicant has obtained final approval from the Council. The Council did not err when it failed to require that a storm water management plan be in place prior to granting final approval. In the case of the Healing and Maull subdivisions, storm water concerns were raised early on in the application process and were thoroughly researched, as indicated by the Council's findings of fact. Those findings reflect much back and forth between the various parties on the subject. The Sussex Conservation District ultimately approved the Applicants'

storm water management plans. The Planning Commission recommended the Council grant final approval, subject to the resolution of outstanding storm water concerns. The language of the Resolutions, themselves, requires that modifications to the drainage design be made "as needed" and requires those modification to be approved by the City Engineer. The foregoing reflects not only a past consideration of the storm water management issues but also the Respondents' ongoing interest in addressing storm water problems as they arise, an interest appropriately addressed, pursuant to the Lewes Code, by way of the placement of conditions upon the subdivisions' final approval. The Council's handling of the storm water concerns does not constitute an error of law. Petitioners' argument that the Council ignored the Lewes Code's alleged implicit requirement that a storm water management plan be in place at the time the Council granted final approval of the Applications has no merit.

6. The Mayor and the Council improperly approved the start of construction in violation of the Lewes Code's sunsetting provision

Finally, Petitioners argue the Mayor and the Council erred as a matter of law when they approved a developer's agreement in violation of L.C. § 170-16(B)(8), which reads, in pertinent part:

> Standard conditions of approved subdivision application. Approval of each subdivision application shall be subject to the following standard conditions:
>
> (a) Execution of suitable agreement (referred to also as "developer's agreement") within 90 days after notification of approval by the City Council of a subdivision application. Said agreement shall be executed and acknowledged by the developer and all persons having any interest in the title to the subdivision and shall, by its terms, constitute a covenant running with the land and be binding upon the persons signing the agreement and their successors and assigns.
>
> (b) Performance of a construction improvement program in strict accordance with approved plans and specifications complete in every respect. ... All work started shall be completed within two years or approved extension thereof by resolution

> of the City Council on recommendations of the City Engineer and Board of Public Works.
>
> (c) Time limit for commencing and completion of construction improvement program.
>
> [1] The subdivision shall become void unless the developer/owner shall have commenced within one year from the date of final approval by City Council.
>
> [2] The construction improvement program must be completed within two years of final approval by City Council.
>
> [3] The developer may apply for an extension thereof by approved resolution of City Council.

In support of this argument, Petitioners cite the fact that approval of the Healings' developer's agreement and Maulls' developer's agreement was set for consideration by the Council on February 11, 2008, even though the 90-day period proscribed by the Lewes Code expired on or about May 9, 2007. In response, Respondents point to the language of the above-cited ordinance that permits a developer to apply for an extension. In this case, Respondents assert, extensions were properly requested and granted. Petitioners allege the extensions were improperly granted as the requests were verbally made and granted.

The only record available to the Court for review on this matter is the transcript of the February 11, 2008, Council meeting at which the developer's agreements for the Maull property and for the Healing property were presented for approval. At that meeting, the 90-day deadline was discussed. The City Solicitor noted (a) that the developer's agreements had been signed by the developer on September 23, 2007, (b) negotiations had been under way for some time, long before the expiration of the 90-day period; (c) the pending litigation seeking injunctive relief in Chancery Court and relief in Superior Court had caused much of the delay; and (d) the approval of the developer's agreements was a ministerial duty on the City's part because the purpose of

the agreements is to bind the developer to their terms. The City Solicitor opined that an extension to the deadline was properly requested, again emphasizing the role the pending litigation played in the delay. The Council noted the Petitioners' objections and voted to accept the developer's agreements.

To the extent the parties quibble about the proper form for an extension request, I am satisfied that L.C. § 170-14(B)(1), cited by Petitioners as giving them a vested due process right to weigh in on any request made by Respondents pursuant to L.C. § 170-16(B)(8)(c)[3], is inapplicable. Section 170-14(B)(1) is entitled "Unusual conditions". The Court finds this language may be reasonably interpreted to mean that L.C. § 170-14(B)(1) applies to those circumstances in which a waiver is sought but the right to a waiver is not specifically provided for under the relevant code section. Under § 170-16(B)(8)(c)[3], a specific right to request a waiver is provided. Moreover, there are a number of circumstances one might envision that would give rise to the need to extend the 90-day deadline imposed by the ordinance. The Court is comfortable concluding a request made as permitted by L.C. § 170-16(B)(8)(c)[3] does not constitute an "unusual circumstance." The extensions sought by the Healings and Maulls were not granted in a manner contrary to law. Petitioners final argument is also rejected.

VII. CONCLUSION

The issues raised by Petitioners in this petition for certiorari have been duly considered by various town officials, the City of Lewes Planning Commission, the City Council for the City of Lewes, the Court of Chancery, and now the Superior Court. This case has simply gone on for too long and it is time to turn the page and move forward. For the reasons articulated above, the decisions of the Council are AFFIRMED.