IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JAMES V. HEALY and. SYLVIA HEALY,	)	
Appellants,	)	
	)	C.A. No. 02A-08-008 WCC
v.	)	
THE BOARD OF ADJUSTMENT OF THE CITY OF NEW CASTLE	)	
Appellee.	)	

Submitted: April 1, 2003
Decided: June 30, 2003

ORDER

Upon Appellee's Motion to Dismiss. Granted.

Daniel R. Losco, Esquire, Losco & Marconi, P.A., 1813 N. Franklin Street, P.O.Box 1677, Wilmington, DE 19899. Attorney for Appellant.

Gerard P. Kavanaugh, Jr. Esquire, Herlihy, Harker & Kavanaugh, 1400 North Market Street, P.O. Box 1597, Wilmington, DE 19801. Attorney for Appellee.

CARPENTER, J.

On this 30th day of June, 2003, upon consideration of the Appeal filed by Writ

of Certiorari by James V. Healy and Sylvia Healy ("Petitioners") as well as the Motion to Dismiss filed by the Board of Adjustment of the City of New Castle (the "Board" or "Appellee") and the record of the proceedings below, it appears to the Court that:

1. Petitioners were the owners of residentially zoned property in New Castle's Historic Residence District, located at 112 The Strand, New Castle, Delaware ("the Property"). Since 1996, Petitioners have attempted numerous times to subdivide the Property and to adjust the side yard setbacks so as to construct a single family residential dwelling. During this period, Petitioners have had a series of applications and appeals before the Historic Area Commission ("HAC") and the Board of Adjustment,[1] the most recent of which occurred on June 21, 2001, when Petitioners appeared again before the HAC, at which time the HAC reaffirmed previously established setbacks. This decision of the HAC was appealed to the Board of Adjustment and considered at a hearing on May 13, 2002. The Board subsequently affirmed the HAC's decision on July 25, 2002 for which Petitioners timely filed their "Petition for a Writ of Certiorari" on August 20, 2002.

2. During the hearing before the Board on May 13, 2002, it was discovered that the Petitioners no longer owned the Property. While testifying, Mr. Healy stated

[1] The record reflects that since 1996 Petitioners have been before the Historic Area Commission at least three separate times, appealed to the Board at least three times, and have previously appealed a 1997 Board decision to the Superior Court. This appeal was voluntarily dismissed by the Petitioners.

that the Property had been sold approximately a month before the hearing to Frank A. Masie ("Masie"). He further informed the Board that he and his wife have an option to buy back the subdivided lot if they were successful in securing approval from the City for the subdivision.[2] Apparently, a "Memorandum of Option Agreement" (the "Option") was executed and signed by all parties to the transaction. The relevant portions of the Option Agreement between the Healys and Frank Masie, executed on April 4, 2002, provides the following details:

> 2. The essential terms of the Option include, but are not limited to, the following:
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> C. The Option shall be in existence for a period of two (2) years (the ["]Option Period") and shall terminate if not exercised by Buyers on April 4, 2002 [sic]. Closing on the Option Property may occur as late as 75 days following the end of the option period.
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> E. Closing on the Option Property is contingent upon Buyers securing, at Buyers' sole expense, all governmental approvals for the subdivision of the Option Property from the remainder of the

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[2]

Mr. Cavanaugh:	Yes. Mr. Healy, could you help me understand what the current ownership situation is at 112 The Strand? I thought you owned 112 The Strand?
Mr. Healy:	No. It was sold about a month ago to a gentleman by the name of Frank Macy [sic]. We are still living there as a tenant in 112B, and we have the option to but that property back from Mr. Macy [sic] should the subdivision be successful.

See Transcript of Board of Adjustment Hearing on May 13, 2002, at 61-62.

Property.[3]

3. Petitioners appear before this Court by means of a writ of certiorari to seek review of the Board of Adjustment's affirmation of the HAC's decision. Petitioners make several arguments as to why the Board and the HAC erred.[4] However, in response to Petitioners' appeal, the Board filed a Motion to Dismiss. Because the Board's Motion is potentially dispositive of the case, the Court will address it first.

4. The Board filed its Motion to Dismiss based on two theories. First, they argue that the petition must be dismissed for failure to join an indispensable party under Superior Court Civil Rule 19(b). Alternatively, they argue that dismissal is appropriate because the Healys lack standing as they are not the Property owners. As a threshold issue, the Court will first consider whether Petitioners possess standing to bring this action. Appellee contends that the Petitioners lack standing to participate

[3] *See* Appellants James V. Healy and Sylvia Healy's Reply to Appellee's Motion to Dismiss For Failure to Join an Indispensable Party and for Lack of Standing, at "Exhibit A".

[4] First, they contend that the HAC and the Board's decisions were arbitrary, capricious, contrary to law and not supported by substantial evidence. Second, they contend that the HAC acted outside of the scope of its authority and contrary to law in setting the side yard setback at 30 feet. Third, they allege that the HAC acted in an arbitrary and capricious manner in setting 30 foot side yard setbacks. And, forth, they assert that the Board of Adjustment committed legal error and issued a decision unsupported by substantial evidence in deciding that a variance is required to subdivide the property.

in these proceedings on the ground that they are not "aggrieved persons" within the meaning of title 22, section 328(a) of the Delaware Code, as a result of their selling the Property at issue to Masie.

5. Title 22, Section 328(a) of the Delaware Code provides:

> (a) Any person or persons, jointly or severally aggrieved by any decision of the Board of Adjustment . . . may present to the Superior Court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the Court within 30 days after the filing of the decision in the office of the board.[5]

This Court must now decide whether the Petitioners are "aggrieved persons" such that they have standing to bring this appeal.

6. The record shows that the Healys were the fee simple owners of the property at the time that they applied to the HAC for the establishment of the setbacks, as well as when they filed their appeal to the Board of Adjustment. However, the Healys sold their interest in the Property to Masie on April 4, 2002. This appeal was filed August 20, 2002, more than four months later. However, despite selling the property, Petitioners executed a "Memorandum of Option Agreement" to purchase a portion of the Property if the subdivision were to be approved on or before April 4, 2004. The issue now before the Court is whether this

[5] DEL. CODE ANN. tit. 22, § 328(a) (Supp. 2002).

Option provides a sufficient basis to allow the Petitioners to proceed as aggrieved persons.

7. The Court finds and agrees that the definition of "aggrieved person" should be construed to encompass a broad spectrum of individuals potentially affected by the Board's action. However, in the cases previously addressing Section 328, one consistent is land ownership in some form.[6] This makes sense since Chapter 3 of title 22 addresses the ability of legislative bodies to limit ones personal use of real estate, as well as the structures to be placed on that land. Without ownership by affected individuals as a limitation, the "aggrieved person" definition would be broadened to any individual or group who had a philosophical or perceived objection to the Board's action. The Court finds such a broadening would be inappropriate and beyond that intended by this statute. Consistent with this reasoning, the Court also finds that simply having the option, or ability to purchase the Property, at some point

[6] *See e.g.*, *Petition of Shell Oil Co.*, 203 A.2d 845, 853 (Del. Super. Ct. 1964) (stating that "a corporation which did not own the land was not an 'aggrieved person'") (citing *Lindenwood Improvement Ass'n v. Lawrence*, 278 S.W.2d 30 (Mo. App. 1955)); *Brandywine Park Condominium Council v. Members of the City of Wilmington Zoning Board of Adjustment*, 534 A.2d 286, 288-89 (Del. Super. Ct. 1987) (holding that condominium owners located on adjacent land, who were not residents in the city, had standing to seek review of city zoning board of adjustment); *Bethany West Recreation Assoc. Inc., v. ECR Properties, Inc.*, 1995 WL 1791084 *2 (Del. Ch.) (stating that "[t]here is no question that, as property owners adjoining the land being developed by defendant, plaintiffs would have standing to contest a building permit granted to defendant"); *York Beach Mall, Inc. v. Board of Adjustment of the Town of South Bethany*, 1999 WL 167788 (Del. Super. Ct.).

in the future, does not confer upon Petitioners the status of an "aggrieved party." The Option does not give the Petitioners a legal interest in the property, but rather they merely have the right to choose to purchase the land within the time frame allotted.[7] By Petitioners' decision to sell their interest in the Property they have forfeited their right to continue to challenge the actions of the Board. While perhaps an unintended consequence of the sale, the Petitioners now are no different than if they were a California environmental group who owned no property in Delaware, objecting to a development decision by the City of New Castle. Neither have standing to pursue the present appeal.

8. Petitioners rely on *Harvey v. Zoning Board of Adjustment of Odessa*,[8] to support their position. The Court can find nothing in *Harvey* to support Petitioners' position, rather *Harvey* is distinguishable from the facts in the present appeal. Simply stated, in *Harvey*, the petitioner owned property located within a Historic district which she claimed would be jeopardized by a proposed building. The operative word in that sentence is that the petitioner "owned" the property. The Court agrees that one needs not be the actual owner of the property in question to have standing under section 328. An owner of property in the general area that will arguably be affected

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[7] *See e.g.*, *Parise v. Zoning Board of Review*, 168 A.2d 476 (R.I. 1961).

[8] 2000 WL 33111028 (Del. Super. Ct.)

by the Board's decision may appeal that decision to the Court. However, here the Petitioners do not fit this classification as they do not own any property that may be affected. As previously discussed, their mere holding of an option to purchase the Property does not instill in them that interest.

9. While the Court can sympathize with the Petitioners, to decide otherwise would put the Court in the unenviable position of attempting to resolve this dispute in a manner potentially adverse to the true owner of the Property, and without his participation. While Mr. Masie may have willingly entered into the Option knowing that the setback would be appealed and the Option may potentially be enforced, the Court finds that it is Mr. Masie who now has the right to fight city hall and not the Petitioners. If they wanted to continue the fight they should have sought the Court's review before selling or required Mr. Masie to participate in the litigation process or include him as a party to the litigation. Their failure to do so terminates the litigation.[9]

10. Because the Court finds dismissal appropriate based on Petitioners' lack

[9] Further, the issue cannot be cured merely by the addition of Mr. Masie as the statutory time to appeal the Board's decision has elapsed. The failure to add Mr. Masie within the statutory 30-day appeal limitation is fatal since the parties who originally appealed had no standing to invoke the jurisdiction of this Court.

of standing, the Court will not address the remaining argument under Appellee's motion, nor the merits of the appeal. Therefore, for the reasons stated above, Appellee's Motion to Dismiss is GRANTED.

IT IS SO ORDERED.

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Judge William C. Carpenter, Jr.