

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DOVER HISTORICAL SOCIETY,)
HENRY R. HORSEY, MARY JANE)
RICHTER, JOSEPH GATES, III,)
LARRY JOSEFOWSKI, SUSAN TERRY,)
BONNIE JOHNSON, HOLLY JOHNSON)
and CHARLES JOHNSON,)

Petitioners,)

v.)

CITY OF DOVER PLANNING)
COMMISSION, consisting of JOHN)
FRIEDMAN, ROBERT M. SADUSKY,)
MICHAEL VON REIDER, WILLIAM)
J. DiMONDI, THOMAS HOLT, ANN)
M. BAKER HORSEY, ROBERT D.)
WELSH, FRANCIS WINSLEY and)
FRANCIS C. NICHOLS; and YOUNG)
& MALMBERG, P.A., a Delaware)
professional association; GRACE)
PROPERTIES, L.L.C., a Delaware)
limited liability company; and YOZIMA,)
L.L.C., a Delaware limited liability co.,)

Respondents.)

C.A. No. 03A-06-002 WLW

Submitted: August 15, 2003

Decided: August 25, 2003

Upon Defendants Young & Malmberg, P.A.
and Yozima, L.L.C.'s Motion to Dismiss. Granted.

Grover C. Brown, Esquire and Michael J. Maimone, Esquire of Gordon, Fournaris & Mammarella, P.A., Wilmington, Delaware, attorneys for the Petitioners.

William W. Pepper, Sr., Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware, attorneys for City of Dover Planning Commission.

Constantine F. Malmberg, III, Esquire of Young & Malmberg, P.A., Dover, Delaware, attorneys for Young & Malmberg, P.A. and Yozima, L.L.C.

WITHAM, J.

I. Introduction

Before this Court is Respondents' Motion to Dismiss based on three grounds: (1) lack of standing; (2) the writ of certiorari was filed in an untimely manner; and (3) there are sufficient reasons in the record to support the Dover Planning Commission's findings. Upon consideration of the parties' submissions and the oral arguments, it appears to this Court that the Petitioners do not have standing to bring the Writ of Certiorari; thus, the Motion to Dismiss is ***granted***.

II. Background

_____ This case concerns a proposed office building referred to as Water Street Plaza II (Proposed Building). This building is to be the "sister building" to the building immediately adjacent to the proposed building site which currently houses the Department of Justice. The controversy exists because the Proposed Building will be built within Dover's Historic District and will involve the partial demolition together with renovations of four historic houses.

The City of Dover Planning Commission (Planning Commission) is a municipal entity with the authority to approve construction projects and to grant building permits and architectural review certificates for construction within Dover. Respondents Young & Malmberg, P.A.; Grace Properties, L.L.C.; and Yozima, L.L.C. applied to the Planning Commission for a building permit and architectural review certificate to construct the Proposed Building. The site plan for the Proposed Building was approved by the City of Dover Planning Commission at its April 21, 2003 meeting. The Planning Commission sent out its Notice of Decision

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on May 6, 2003. On June 18, 2003, the Petitioners filed a writ of certiorari to this Court requesting a review of the decision by the Planning Commission. Subsequently, the Respondents filed this Motion to Dismiss alleging that Petitioners lacked standing; that the writ of certiorari was untimely filed; and that the record below is sufficient.

_____ In order to adequately deal with the Respondents' motion, it is helpful to set forth each Petitioner's interest in the action as stated in the Petition for Writ of Certiorari. First, The Dover Historical Society is a not-for-profit civic organization purporting to act as a representative body for all aggrieved persons. Next, Henry Horsey is a tax-payer and property owner in Dover. In addition, Mr. Horsey owns the following properties located in the Historic District: 7-11 The Green, Dover, Delaware, known as the Ridgely House, and 317-331 South State Street, Dover, Delaware known as the Parke Building and the Golden Fleece. Petitioners Holly and Charles Johnson own and reside at property located within the Historic District; specifically they own the Bradford-Loockerman House, which sits on the northeast corner of State Street and Water Street. Finally, the remaining Petitioners - Mary Jane Richter; Joseph Gates; Larry Josefowski; Susan Terry; and Bonnie Johnson - all claim that they are aggrieved by the decision of the Commission by virtue of being taxpayers and property owners within the city limits of Dover, Delaware.

III. Analysis

Respondents assert that the writ should be dismissed for three reasons: (1) standing; (2) timeliness; and (3) sufficiency of the record.

There are two divergent lines of cases concerning the applicable standard for determining standing in a particular case. The determination as to which legal standard for standing applies turns on whether this case is classified as a zoning case or a site planning case. The Petitioners argue that this is a zoning case where the Respondents obtained a variance, rather than a planning case where the Proposed Building complied with current zoning standards. By statute in zoning cases any person who has been “aggrieved” has standing to challenge a zoning decision.¹ It is clear that both the owner of the affected parcel of land and the adjoining land owner are “aggrieved persons” for purposes of standing in zoning cases.² Further, a civic organization has standing to challenge a zoning variance if:

- (1) whether the organization is capable of assuming an adversary position in the litigation;
- (2) whether the size and composition of the organization indicates that it is fairly representative of the neighborhood;
- (3) whether full participating membership in the organization is available to all residents and property owners in the community; and
- (4) whether the adverse effect of the challenged decision on the group represented by the organization is within the zone of interests sought to be

¹ *Holowka v. New Castle Co. Bd.*, 2003 Del. Super. LEXIS 161 (Del. Super. Ct. 2003).

² See, e.g., *Healy v. Bd. of Adjustments*, 2003 Del. Super. LEXIS 234 (Del. Super. Ct. 2003) (stating “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. . . . such broadening would be inappropriate and beyond that intended by statute.”); *McKinney v. The Kent Co. Bd. Of Adjustments*, 1995 Del. Super. LEXIS 83 (Del. Super. Ct. 1995) (adjoining land owners are the clearest case of affected property owners).

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protected by the zoning law.³

It is unclear given the facts as presented that the Petitioners in this action could gain standing even under this standard; however, given the analysis below the Court does not need to determine this issue.

_____The Respondents suggest that this case is properly classified as an approval of a site plan. This Court agrees. The Dover Planning Commission is the entity charged with reviewing and approving site development plans.⁴ The Planning Commission's role is limited to applying the powers delegated to it by the code.⁵

³ *Vassallo v. Penn Rose Civic Ass'n*, 429 A.2d 168, 170 (Del. 1981).

⁴ *East Lake Partners v. City of Dover Planning Comm'n*, 655 A.2d 821, 824 (Del. Super. Ct. 1994); *see also* CITY OF DOVER CODE, Art. 10, §§ 2.1 & 2.2.

⁵ *East Lake Partners*, 655 A.2d at 824–25. The Planning Commission's powers are expressly stated in Article 10, § 2.1 and 2.2 of the Dover City Code, which sets forth those powers as follows:

2.1 Site development plan approval shall be required for the erection or enlargement of all structures and the establishment of any use for which site development plan approval is required by this ordinance.

2.2 Objectives. In considering and acting upon site development plans, the public health, safety and welfare, the comfort and convenience of the public in general and of the residents of the immediate neighborhood in particular, shall be taken into consideration and appropriate conditions and safeguards may be prescribed as may be required that the results of its action may, to the maximum extent possible, further the expressed intent of this ordinance and the accomplishment of the following objectives in particular:

2.21 Maximum safety and convenience of vehicular and pedestrian traffic by insuring that all driveways and walkways are adequate but not excessive in number, adequate in width, grade, alignment, and visibility; and suitably located,

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In reviewing site plans, the Planning Commission may “require changes and conditions so that the end result, to the maximum extent possible, will achieve the general intent of the zoning ordinance which is in part to provide for the orderly and desirable development and use of land.”⁶ The Planning Commission can and did in this case grant waivers for on-site considerations such as driveways and walkways, off street parking, fire and police access to the structure, site layout design, landscaping, and on-site drainage.⁷ However, the Planning Commission has no authority to grant a variance to a zoning ordinance.

particularly with respect to their connections with public streets.

2.22 The provision of adequate access to all proposed structures, equipment, or material on the site for fire and police protection.

2.23 The provision of adequate off-street parking to accommodate the vehicles of persons connected with or visiting the use and to obviate the parking of such vehicles in public streets.

2.24 A site layout (including the location, power, direction, and time of any outdoor lighting of the site) which would have no adverse effect upon adjacent properties.

2.25 Landscaping of the site in a manner which is in character with that generally prevailing in the neighborhood and which provides reasonable screening, at all seasons of the year, of all playgrounds, parking areas, and service areas from the view of adjacent residential properties and streets.

2.26 In applicable cases, a drainage system and layout which would afford the best solution to any drainage problems.

⁶ *East Lake Partners*, 655 A.2d at 824 (internal quotations omitted).

⁷ CITY OF DOVER CODE, Art. 10, §§2.21–2.26.

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Since the case at bar is best classified as an approval of a site plan, the legal standard for standing that is applicable to this case is as follows. First, because there is no statutory grant of standing, the Petitioners must establish an “interest distinguishable” from other residents and property owners in the community.⁸ Next, the Petitioners must establish standing through a two-part test: (1) whether there is a claim of injury-in-fact; and (2) whether the interest sought to be protected is within the zone of interest protected.⁹ When a private organization seeks standing to sue it must meet three additional requirements: ““(1) the interests to be protected by the suit are germane to the organization’s purpose; (2) neither the claim asserted nor the relief requested requires the participation of individual members; and (3) the organization’s members would otherwise have standing.””¹⁰ Mere proximity of a land owner to a project is not enough to convey standing. Additionally, the fact that the Petitioners pay taxes and own property somewhere in Dover is not sufficient to convey standing. The Petitioners must show that they have an interest distinguishable from the public at large. Petitioners have not presented any evidence or argument that they have an interest that is distinguishable from the other

⁸ *Cave v. New Castle County Council*, 2003 Del. Super. LEXIS 273(citing *Comm. of Merchants & Citizens Against the Proposed Annexation, Inc. v. Longo*, 1996 Del. Super. LEXIS 538, *11 (Del. Super. Ct. 1996)).

⁹ *Comm. of Merchants & Citizens Against the Proposed Annexation, Inc.*, 1996 Del. Super. LEXIS 538 at *12.

¹⁰ *Id.* (citing *Oceanport Indus. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 903 (Del. 1994)).

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members of the community. Only three Petitioners own property that is even located in the Historic District. Furthermore, the Petitioners must demonstrate that the Planning Commission's decision would manifest in an injury-in-fact for the Petitioners. A hypothetical or speculative injury will not meet the injury-in-fact requirement. Petitioners have not demonstrated to this Court that the construction of the Proposed Building would detract from Petitioners' property values or in any other way injure the Petitioners. At oral argument before this Court, the Petitioners expressed only a philosophical concern relating to the Planning Commission's decision and its affect on future decisions relating to the Historic District. In order to have standing to challenge a site plan the Petitioners must demonstrate more than a theoretical injury. Moreover, the Dover Historical Society may only sue on behalf of its members if the organization's members would otherwise have standing. Because there has been no demonstration that the members of the Historical Society have standing to bring this claim, the Historical Society itself does not have standing.

Turning now to the timeliness issue. According to this Court's common law, a writ of certiorari must be filed within 30 days. Initially in this proceeding the Respondents argued that the 15-day time limit imposed by Superior Court Civil Rule 72 should govern this proceeding.¹¹ However, it is apparent from this Court's

¹¹ Superior Court Civil Rule 72 states that "if no time is prescribed by statute, the notice of appeal shall be filed within 15 days from the entry of final judgment, order, or disposition from which an appeal is permitted by law." SUPER. CT. CIV. R. 72.

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own rulings and other decisions of the Superior Court, that Rule 72 does not apply to writs and the proper time frame for timely filing a writ of certiorari is 30 days.¹² As evidenced by Respondents' August 12, 2003 letter to this Court supplementing the motion to dismiss, it is apparent that the Respondents later changed their position and agreed that the proper time frame is 30 days. Nevertheless, "[s]ince the 30-day filing period is being 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."¹³

There is a factual controversy between the parties on this point. Petitioners claim that the decision of the Planning Commission to approve the site plan was not entered until May 19, 2003, when it adopted the minutes from the April 21, 2003 meeting. The Respondents suggest that the site plan was approved during the meeting on April 21, 2003, or at the very latest when the Notice of Decision was mailed on May 6, 2003. Petitioners did not file the writ of certiorari until June 18, 2003.

From reading through the minutes of the meetings and the attached transcript it appears that there were meetings of the Planning Commission on both April 21, 2003 and May 19, 2003. Although it appears that the decision to approve the site

¹² *Del. State Fair, Inc., v. Johnson*, 1999 Del. Super. LEXIS 360 (Del. Super. Ct. 1999); *Elcorta, Inc. v. Summit Aviation, Inc.* 528 A.2d 1199, 1201 (Del. Super. Ct. 1987).

¹³ *Elcorta*, 528 A.2d at 1201.

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plan was made on April 21, 2003, it is unequivocal that the decision was published on May 6, 2003 in a letter entitled “Notice of Decision Site Plan of Water Street Office Plaza II.” Therefore, the clock for the 30-day time limitation for filing a Petition for Writ of Certiorari began running on May 6, 2003. The Petitioners should have filed the writ no later than June 6, 2003.

This time limitation is not jurisdictional in nature so the Court could in its discretion allow this untimely filing. Given the important issues raised by this Petition for Writ of Certiorari, this Court would be inclined to exercise its discretion and allow the filing; however, this is not the only defect associated with the writ of certiorari. Given the Court’s ruling on the standing issue discussed above, the timeliness of the writ is a moot point.

Finally, Respondents argue that the writ should be dismissed because there are sufficient reasons in the record to support the Planning Commission’s decision. Given the Court’s rulings on the previous two issues, this Court does not need to, nor will it, make any ruling in connection with this ground for dismissal.

IV. Conclusion

In conclusion, the Petitioners have not demonstrated that they have an interest that is distinguishable from the public at large, nor have they shown an injury in fact; thus, this Court finds that these Petitioners do not have standing to bring this Writ of Certiorari. The Motion to Dismiss is hereby *granted*.

IT IS SO ORDERED.

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/s/ William L. Witham, Jr.

J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution

File