

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

St. Francis of Assisi Church
(Formerly Immaculate Conception
Church), Diocese of Allentown,
and Reverend Anthony M.
Drouncheck

v.

Nesquehoning Borough Zoning
Hearing Board, Joseph Fauzio,
Donato Farole and OLMC, Inc.

Appeal of: Joseph Fauzio, Donato
Farole and OLMC, Inc.

No. 939 C.D. 2010
Submitted: October 15, 2010

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: December 29, 2010

Joseph Fauzio, Donato Farole, and OLMC, Inc. (collectively, OLMC) appeal from the April 26, 2010 order of the Court of Common Pleas of Carbon County (trial court) denying OLMC's Petition to Intervene, and striking OLMC, Inc.'s Notice of Intervention.¹ There is essentially one issue before the Court in this

¹ Fauzio and Farole participated in the Petition to Intervene, but did not join OLMC, Inc.'s Notice of Intervention. We note that while a non-case-dispositive order denying intervention is not subject to this Court's review as a *final order*, it may constitute a *collateral order* subject to this Court's review pursuant to Pa. R.A.P. 313. As noted in Section 313:19.3 of *Pennsylvania Appellate Practice*, "the courts have found that some orders denying intervention are appealable, and that others are not." 20 G. Ronald Darlington, Kevin J. McKeon, Daniel R. Schuckers & Kristen W. Brown, *West's Pennsylvania Practice* 626-627 (2009-2010 ed. 2009) (footnotes

matter: whether the trial court erred as a matter of law in striking the Notice of Intervention and denying the Petition to Intervene. For reasons that follow, we affirm the trial court.

On October 7, 2008, St. Francis of Assisi Church (St. Francis) and Reverend Anthony M. Drouncheck (Drouncheck), the pastor of the church, applied to the Nesquehoning Zoning Office for a permit to construct a handicap ramp and to extend the stairway to the church. The application was denied. St. Francis and Drouncheck appealed to the Nesquehoning Zoning Hearing Board (Board). Two hearings were held before the Board, and on March 19, 2009, the Board filed a decision rejecting the application. On April 15, 2009, St. Francis and Drouncheck appealed to the trial court.

On April 27, 2009, OLMC, Inc., a group of former parishioners of Our Lady of Mount Carmel Church, filed a Notice of Intervention. St. Francis and Drouncheck filed a motion to Strike the Notice. On July 27, 2009, OLMC, Inc., and members thereof, Joseph Fauzio and Donato Farole, filed a Petition to Intervene. A hearing was held on March 22, 2010, and the trial court granted the Motion to Strike the Notice of Intervention, and denied the Petition to Intervene. OLMC appealed to this Court.²

OLMC represents that they are involved in another suit against the Vatican for closing their church and consolidating their church with St Francis. One

omitted). Because Appellees do not raise the argument that the order denying intervention is not a collateral order subject to review, and in the interest of judicial economy, the Court will address the merits of the appeal.

² “This Court’s scope of review of the denial of a petition to intervene is limited to determining whether the trial court abused its discretion or committed an error of law.” *Galindo ex rel. Gomez v. Crozier-Keystone Health Sys.*, 973 A.2d 4, 7 n.2 (Pa. Cmwlth. 2009) (quoting *Chairge v. Exeter Borough Zoning Hearing Bd.*, 616 A.2d 1057, 1058 (Pa. Cmwlth. 1992)).

of the arguments in that suit is that OLMC's church had handicap accessibility and St. Francis does not. Thus, if St. Francis obtains a permit to build the intended ramp, OLMC can no longer make the same argument in their appeal. Further, now that the members of OLMC are members of St. Francis' parish, their dues will be used to pay for the ramp, assuming St. Francis obtains the permit and does not receive donations to pay for the ramp. Thus, they contend they have a legally enforceable interest in the instant appeal.

Initially, we note that the Notice of Intervention was based on Section 1004-A of the Pennsylvania Municipalities Planning Code (MPC)³ which provides:

Within the 30 days first following the filing of a land use appeal, if the appeal is from a board or agency of a municipality, *the municipality and any owner or tenant of property directly involved in the action* appealed from may intervene as of course by filing a notice of intervention, accompanied by proof of service of the same, upon each appellant or each appellant's counsel of record. All other intervention shall be governed by the Pennsylvania Rules of Civil Procedure.

(Emphasis added). Clearly, OLMC, Inc. is not a municipality or owner or tenant of the property involved in the action, i.e., St. Francis. Thus, the trial court did not abuse its discretion or err as a matter of law in striking the Notice of Intervention.

Regarding OLMC's Petition to Intervene, Rule 2327 of the Pennsylvania Rules of Civil Procedure, Pa.R.C.P. No. 2327, states:

At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if

³ Act of July 31, 1968, P.L. 805, *as amended*, added by Section 101 of the Act of December 21, 1988, P.L. 1329, 53 P.S. § 11004-A.

(1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or

(2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or

(3) such person could have joined as an original party in the action or could have been joined therein; or

(4) the determination of such action may affect any *legally enforceable interest* of such person whether or not such person may be bound by a judgment in the action.

(Emphasis added). OLMC contends that its arguments fall within the fourth category, implication of a legally enforceable interest. We do not agree.

The standard for determining a ‘legally enforceable interest’ for intervening in a pending action under Rule 2327(4) is not as straightforward as it might first appear. As our Supreme Court has long emphasized, the exact boundaries of the ‘legally enforceable interest’ limitation [of *Pa. R.C.P. 2327(4)*] are not clear. Consequently, [t]he result is a flexible, although uncertain rule whose application in a given case calls for a careful exercise of discretion and consideration of all the circumstances involved.

Realen Valley Forge Greenes Assocs. v. Upper Merion Twp. Zoning Hearing Bd., 941 A.2d 739, 744 (Pa. Cmwlth. 2008) (quotation marks omitted).

Here, OLMC seeks to intervene in a church’s appeal to build a handicap ramp, with the goal of causing the church to lose its appeal. The purpose of the intervention effort is to preserve OLMC’s contention to the Vatican that its church should remain open because its church has a handicap ramp and St. Francis does not. Clearly, OLMC has no “legally enforceable interest” in St. Francis’ permit application to build a handicap ramp. OLMC’s issue with the Vatican over closing

its church is a separate and distinct matter from the zoning issue before the Court. In addition, OLMC's issue is a church matter, not a municipal matter. Moreover, the fact that dues may be directed toward funding the ramp is not a sufficient financial interest to create standing to intervene, as the payment of dues is not dependent on the outcome of this matter. Thus, this Court holds that the trial court did not abuse its discretion or commit an error of law by denying OLMC's Petition to Intervene.

For all of the above reasons, the order of the trial court is affirmed.

JOHNNY J. BUTLER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

St. Francis of Assisi Church	:	
(Formerly Immaculate Conception	:	
Church), Diocese of Allentown,	:	
and Reverend Anthony M.	:	
Drouncheck	:	
	:	
	:	
v.	:	
	:	
Nesquehoning Borough Zoning	:	
Hearing Board, Joseph Fauzio,	:	
Donato Farole and OLMC, Inc.	:	
	:	
	:	
Appeal of: Joseph Fauzio, Donato	:	No. 939 C.D. 2010
Farole and OLMC, Inc.	:	

ORDER

AND NOW, this 29th day of December, 2010, the April 26, 2010 order of the Court of Common Pleas of Carbon County is affirmed.

JOHNNY J. BUTLER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

St. Francis of Assisi Church	:	
(Formerly Immaculate Conception	:	
Church), Diocese of Allentown	:	
and Reverend Anthony M.	:	
Drouncheck	:	
	:	
	:	
v.	:	No. 939 C.D. 2010
	:	
Nesquehoning Borough Zoning	:	Submitted: October 15, 2010
Hearing Board, Joseph Fauzio,	:	
Donato Farole and OLMC, Inc.	:	
	:	
	:	
Appeal of: Joseph Fauzio, Donato	:	
Farole and OLMC, Inc.	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**CONCURRING OPINION BY
JUDGE COHN JUBELIRER**

FILED: December 29, 2010

While I agree with the majority’s rationale in this case, I write separately to address the Board’s argument that OLMC’s Petition to Intervene should be granted. In its brief, the Board argues, in part, that it found OLMC had party standing before the Board and should, therefore, be permitted to intervene before the trial court. Party standing before a zoning hearing board alone is not sufficient to confer the right to intervene. Vartan v. Zoning Hearing Board of the City of Harrisburg, 636 A.2d 310, 312 (Pa. Cmwlth. 1994) (“[n]either a municipality nor a neighboring landowner

is granted automatic party status in an appeal from a zoning hearing board decision, despite the fact that both participated as parties before the zoning hearing board.”) (quoting Acorn Development Corp. v. Zoning Hearing Board of Upper Merion Township, 523 A.2d 436, 437 (Pa. Cmwlth. 1987)).

The Board cites Grant v. Zoning Hearing Board of the Township of Penn, 776 A.2d 356 (Pa. Cmwlth. 2001) and Baker v. Zoning Hearing Board of West Goshen Township, 367 A.2d 819 (Pa. Cmwlth. 1976) in support of its argument. These cases, however, deal with the question of when a party has standing to *appeal* the decision of a zoning hearing board, not the question at issue in this case of when a party has standing to *intervene* in the appeal of another from the decision from a zoning hearing board.

Because, per Vartan, a party does not have standing to intervene in a zoning appeal merely because it had party standing before the zoning hearing board, and for the reasons set forth in the majority opinion, I concur with the majority that the order of the trial court should be affirmed.

RENÉE COHN JUBELIRER, Judge