**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| MICHAEL DELPORTE AND SHARON DELPORTE, | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| Appellants | : | |
| v. | : | |
| JAMES N. FAUST AND LORETTA A. FAUST | : | No. 833 EDA 2012 |

Appeal from the Judgment Entered April 24, 2012,
in the Court of Common Pleas of Montgomery County
Civil Division at No. 06-18082

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E., AND ALLEN, J.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: January 16, 2013

Appellants ("the DelPortes"), plaintiffs below, appeal from the judgment entered in favor of appellees ("the Fausts"), defendants below. The DelPortes had sought annexation of a certain parcel of land through a declaratory judgment action. Finding no error below, we affirm.

In 1985, the Fausts sought approval from New Hanover Township of a proposed subdivision plan known as Lookout Point. Two lots of the subdivision, Lots 51 and 52, failed to comport with the zoning regulations of New Hanover and could not be developed. In exchange for the Township's approval of the subdivision plan, the Fausts agreed to designate Lots 51 and 52 as "annexation lots." Accordingly, the following requirement was added to the subdivision plan: "Lots 51 & 52 are approved for annexation only to

the adjoining lot owners in a common deed." (Note 10, Lookout Point Subdivision Plan.) Although the DelPortes' property was not part of the Lookout Point Subdivision Plan, their property adjoins Lot 51 and certain markings on the Lookout Point Subdivision Plan map indicate that theirs was the property to which Lot 51 would be annexed. (Notes of testimony, 11/2/11 at 28, 85, 90-91, 99.)

During the intervening years, the combined factors of changes to the zoning regulations and the laying of a sewer line changed the status of Lot 51 to one which could now be developed. In 2006, the Fausts filed a new subdivision plan for Lot 51, which removed the annexation condition, and which was subsequently approved. On July 17, 2006, the DelPortes filed a declaratory judgment action seeking to enjoin the Fausts from developing Lot 51 and to have Lot 51 annexed to them. According to the DelPortes, Note 10 of the Lookout Point Subdivision Plan created an enforceable condition running with the land.

At a subsequent hearing, John Ashton, an engineer whose company prepared both the 1985 and 2006 subdivision plans, testified. According to Ashton, townships typically require stronger language in subdivision plans to create conditions, such as "shall be annexed or must be annexed." (***Id.*** at 97.) Ashton also testified that under his understanding of Note 10, the Fausts were not obligated to allow Lot 51 to be annexed, but could keep

Lot 51 as a vacant lot (***Id.*** at 100), or they could stall until development was permitted. (***Id.*** at 105-106.)

On November 23, 2011, an order was entered finding in favor of the Fausts. The court ruled that because the DelPortes do not own a lot within the Lookout Point Subdivision Plan, they lacked standing to enforce its provisions. (Opinion, 5/18/12 at 3.) In the alternative, the court found the testimony of John Ashton credible to the effect that the Fausts were free to retain the property or hold it until zoning regulations permitted development. (***Id.***) On November 30, 2011, the DelPortes filed a motion for post-trial relief. This motion was denied by order entered February 16, 2012. We note that although the notice of appeal was improperly taken from this order, judgment was subsequently entered April 24, 2012; thus, we may proceed to review the issues.[1]

On appeal, the DelPortes raise two issues. First, they claim that they have standing to seek annexation of Lot 51. Second, they argue that the plain language of Note 10 requires annexation.

Preliminarily, we must address a contention by the Fausts that the DelPortes have waived their issues on appeal because their post-trial motion failed to identify where in the record each of their grounds was asserted.

[1] An appeal properly lies from the entry of judgment and not from the denial of post-trial motions; however, where judgment is subsequently entered, we may treat the appeal as having been properly taken from that judgment. ***See Commonwealth Financial Systems, Inc. v. Smith***, 15 A.3d 492, 493, n.1 (Pa.Super. 2011).

The Fausts' argument is based upon Pa.R.C.P., Rule 227.1(b)(2), 42 Pa.C.S.A.:

> (b) Except as otherwise provided by Pa.R.E. 103(a), post-trial relief may not be granted unless the grounds therefor,
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> (2) are specified in the motion. The motion shall state how the grounds were asserted in pre-trial proceedings or at trial. Grounds not specified are deemed waived unless leave is granted upon cause shown to specify additional grounds.

Rule 227.1(b)(2).

The purpose of Rule 227.1(b)(2) is to provide the trial court the first opportunity to correct its mistakes. ***Chalkey v. Roush***, 757 A.2d 972, 975 (Pa.Super. 2000), ***affirmed***, 569 Pa. 462, 805 A.2d 491 (2002). The waiver sanction in Rule 227.1(b)(2) applies to the failure to specify a ground itself. No sanction is mandated in Rule 227.1(b)(2) for failing to identify where in the record the ground was asserted, nor have the Fausts provided any case law to that effect.

Finally, the Fausts also argue that the DelPortes are not entitled to judgment ***non obstante veredicto*** because they failed to request a directed verdict at the end of trial. While not specifically requesting a judgment ***non obstante veredicto***, we agree that the DelPortes' post-trial motion asked the court to enter judgment in their favor. Nonetheless, this

argument does not implicate waiver of the DelPortes' issues on appeal. We will review the issues.

The DelPortes assert that they have standing to enforce the annexation condition of the Lookout Point Subdivision Plan even though they do not own a lot within the subdivision. Although the trial court invoked this as its reason for finding a lack of standing, it provided no authority for the proposition.

We find that the DelPortes had standing to attempt to enforce the annexation condition. Our supreme court has held that standing is dependent upon a party being aggrieved by the matter which he or she wishes to challenge. ***William Penn Parking Garage, Inc. v. City of Pittsburgh***, 464 Pa. 168, 192, 346 A.2d 269, 280-281 (1975). This is determined by whether the matter to be challenged is substantial, direct, and immediate. ***Id.***, 464 Pa. at 193-197, 346 A.2d at 281-283.

> [T]he requirement of a 'substantial' interest simply means that the individual's interest must have substance—there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law. The requirement that the interest be 'pecuniary,' which may once have had independent significance, no longer adds anything to the requirement of an interest having substance, as defined above.
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> The requirement that an interest be 'direct' simply means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains.

. . .

> The remaining requirements of the traditional formulation of the standing test are that the interest be 'immediate' and 'not a remote consequence of the judgment.' As in the case of 'substantial' and 'pecuniary,' these two requirements reflect a single concern. Here that concern is with the nature of the causal connection between the action complained of and the injury to the person challenging it.
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> Generalization about the degree of causal connection required to confer standing is more difficult than generalization about the other requirements discussed above. However, it is clear that the possibility that an interest will suffice to confer standing grows less as the causal connection grows more remote.

***Id.***, 464 Pa. at 195, 197, 346 A.2d at 282-283.

The DelPortes assert the right to annex, possess, and own Lot 51. If the Fausts are permitted to obtain approval of a new subdivision plan extinguishing that annexation right and permitting the Fausts to develop Lot 51, the DelPortes will realize a substantial loss, directly caused by such action by the Fausts, and as an immediate consequence thereof. Plainly, the DelPortes have standing. This brings us to the remaining question as to whether Note 10 created a restrictive covenant running with the land which provided the DelPortes with an absolute right to annex Lot 51.

> Our standard of review in a declaratory judgment action is limited to determining whether the trial court clearly abused its discretion or committed an error of law. We may not substitute our judgment for that of the trial court if the court's determination is supported by the evidence.

***Pocono Summit Realty, LLC v. Ahmad Amer, LLC***, 52 A.3d 261, 265 (Pa.Super. 2012), quoting ***State Automobile Mutual Insurance Co. v. Christie***, 802 A.2d 625, 627–628 (Pa.Super. 2002) (citations and quotations omitted).

The notes appended to a subdivision plan can constitute restrictive covenants running with the land. ***Berg v. Georgetown Builders, Inc.***, 822 A.2d 810, 819-820 (Pa.Super. 2003). While Note 10 could be considered such a restrictive covenant, we find that the language of the Note, especially its use of the word "only," renders it completely ambiguous because it is unclear what "only" is modifying. This is best demonstrated by adding a comma to the language of Note 10.

In the first example, Note 10 reads as follows: "Lots 51 & 52 are approved for annexation only, to the adjoining lot owners in a common deed." Here, "only" modifies "annexation." This is the interpretation propounded by the DelPortes on appeal, rendering a directive that Lots 51 and 52 must be annexed. However, there is a second possible interpretation of Note 10: "Lots 51 & 52 are approved for annexation, only to the adjoining lot owners in a common deed." Here, "only" modifies "the adjoining lot owners in a common deed." Under this interpretation, Note 10 would seem to mean that Lots 51 and 52 may be annexed, but if they are annexed, it must be only to the adjoining lot owners and only by a common deed.

In determining whether the annexation provision of Note 10 was mandatory, the trial court relied upon the testimony of engineer John Ashton, whose company created the Lookout Point Subdivision Plan and Note 10. The court made a specific finding as to Ashton's credibility. (Opinion, 5/18/12 at 3.) As previously noted, Ashton believed that annexation was not mandatory and that the Fausts were free to retain Lot 51 or, if zoning regulations changed, develop the property. Ashton's testimony would indicate that the second interpretation of Note 10 was the intended interpretation. Thus, we find the trial court did not abuse its discretion in relying upon the credible evidence provided by Ashton that the annexation provision of Note 10 was not mandatory. Accordingly, we will affirm the judgment entered below.

Judgment affirmed.