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STATEMENT OF THE ISSUES

1.
 - I. Whether Stark County's decision relating to one conditional use was contrary to its zoning ordinances.
 - II. Whether Dakota Resource Council has standing.

I. STATEMENT OF THE CASE

2. This appeal involves the decision of the Stark County Board of County Commissioners (“Stark County”) to amend its zoning ordinance and allow certain conditional uses by Great Northern Project Development (“GNPD”). On February 22, 2010, GNPD applied for an amendment to the provisions of the Stark County Zoning Ordinance and Map to rezone property in Stark County and allow certain conditional uses of the property. (R. at 35, bate stamp numbered pages 1-2).¹ After the appropriate hearings, Stark County approved GNPD’s request subject to four conditions. *Id.* at pp. 329-30). Written findings were prepared as required by law. *Id.* at pp. 341-46. The official *Amendment to Stark County Zoning Ordinance* (“*Amendment*”) approved the rezoning of the land from Agricultural to Industrial with nine conditional uses and subject to four conditions. (*Appellees/Cross-Appellants’ Supplemental Appendix* at 1) (“Supp. App.”) (R. at 35, p. 348).
3. Dakota Resource Council (“DRC”) and others appealed Stark County’s decision on May 6, 2010. (App. at 28). GNPD was added as a party during the briefing process on appeal. (R. at 30). A hearing was held by the district court on March 22, 2011. (App. at 4). The district court issued its opinion on April 6, 2011, affirming Stark County’s decision. (App. at 6-26). Judgment was entered and the appeal was dismissed with prejudice. (App. at 27) *Notice of Entry of Judgment* was filed on April 12, 2011. (R. at 43). DRC filed its notice of appeal on June 10,

¹ Stark County filed the *Certification of Record on Appeal* on September 16, 2010. (App. at 1) (R. at 3). The transcripts were filed on September 29, 2010. (R. at 4-6). During the course of the proceedings, GNPD submitted an appendix to its brief (R. at 35), which re-produced the entire record and transcripts, but bate-stamped the record for ease of reference. (R. at 35, Appendix). Stark County will cite to the bate-stamped pages in the Appendix filed by GNPD for consistency and to allow the documents to be more easily located by the Court.

2010. (App. at 28). GNPD and Stark County filed notices of cross-appeal on June 24, 2011. (App. at 31-33).

4. Stark County requests the appeal be dismissed because DRC lacks standing. If the appeal is not dismissed, Stark County requests the judgment of the district court be affirmed.

II. STATEMENT OF FACTS

5. While various issues were addressed at the district court, DRC has raised only one issue on appeal, relating to one of the nine conditional uses in the *Amendment*. Therefore, Stark County will address only the facts applicable to the issue raised by DRC and associated with the cross-appeal.

6. This case involves Stark County's decision to amend its zoning ordinance and allow certain conditional uses by GNPD. *Amendment to Stark County Zoning Ordinance* (July 30, 2011) (Supp. App. at 1). Specifically, Stark County granted GNPD's application to amend the zoning ordinance for numerous acres of land from Agricultural to Industrial with nine conditional uses. *Id.* As relevant to this appeal, one of the enumerated conditional uses was mineral and other substance exploration or excavation and mining in accordance with section 6.10 of the Stark County ordinances. *Id.* The approval was also subject to the following four conditions:

1. Great Northern Project Development shall obtain all the necessary local, state and federal approvals, licenses and permits relative to the operation of the coal mine.
2. Great Northern Project Development shall agree in writing to replace all water lost as a result of damage to water wells caused by their mining operation.

3. Great Northern Project Development shall build and maintain necessary access roads to the mining plant, said roads be built to the satisfaction of the Stark County Commission.
4. Great Northern Project Development shall work in concert with law enforcement and emergency responders to facilitate public safety.

Id.

7. As required by law, Stark County has a comprehensive plan, which specifically addresses land use goals. See N.D.C.C. § 11-33-03. The comprehensive plan recognizes 800 million tons of strippable coal reserves in Stark County. (R. at 35, p. 365, ¶ 5). The comprehensive plan provides the goal of strengthening and diversifying Stark County's economic base (R. at 35, p. 354), and encouraging the wise and proper use or development of natural resources (R. at 35, p. 357). The plan's objectives include recognizing the potential of the land and its uses, "particularly in regard to natural resource development." (R. at 35, p. 357, ¶ A). Considering these underlying facts aids in the interpretation of Stark County's zoning ordinances and its action in this case, and indicates the judgment should be affirmed.
8. Stark County also challenges whether DRC has standing. There is minimal information regarding DRC in the record. See *Opinion* at p. 9 (Apr. 5, 2011) (App. at 14) (discussing standing and noting, "At this point, the factual record is limited and incomplete.") Mark Trechock, DRC's Staff Director, filed an affidavit in support of DRC's assertion it has standing. (Supp. App. at 6-7) (R. at 37, Ex. C). He states DRC is a non-profit corporation with its principal place of business in Dickinson, North Dakota. Id. at ¶ 1. According to Trechock, DRC has 580

members and is a democratically-run organization with seven local affiliates and a 28-year history of policy work related to agriculture and energy issues. *Id.* at ¶¶ 2-3. One of DRC's stated goals is the "regulation of coal mining." *Id.* at ¶ 4. Trechock asserts DRC has members (Myron and Nancy Eberts, Frank and Lucy Hurt, Gordon Krance, Rocky and Laurie Solberg, Randall and Kaylene Kudrna, and Caroline Heidt) who live in close proximity to and will be directly impacted by Stark County's decision. *Id.* at ¶ 6 (Supp. App. at 7).

9. Two of these members, Frank and Lucy Hurt, also filed affidavits (which were identical) alleging they can see the proposed coal mine from their home, and are concerned about additional traffic, emissions, odors and noise. *Affidavits of Frank and Lucy Hurt* at ¶ 2 (Supp. App. at 2, 4) (R. at 37, Exs. A and B) (Jan. 3, 2011). The Hurts "believe" their quality of life and "possibly" the value of their property will be impacted by the mine. *Id.*

10. Based on these conclusory statements, the record does not demonstrate DRC has standing and this appeal should be dismissed. Regardless, the judgment of the district court should be affirmed.

III. APPLICABLE LAW AND ARGUMENT

11. DRC's sole argument on appeal is that the granting of one of the nine conditional uses in the *Amendment* was not in accordance with Stark County's zoning ordinances. Stark County asserts DRC has misinterpreted its ordinances and its underlying action. Stark County's decision was entirely in accordance with its ordinances. If the ordinances and *Amendment* at issue are interpreted as

(internal citations omitted).

14. There are three Stark County ordinances particularly relevant to the issue raised by DRC. Section 3.04 provides:

Sec. 3.04 Conditionally Permitted Use. A use which could represent a hazard to the general health safety and welfare of the residents of Stark County as such shall have specific stipulations or conditions assigned to ensure that problems do not occur.

A conditional use permit shall serve as a land disturbance permit when no buildings or structures are involved and as a building permit, when a structure or building is involved. A conditional use permit applies only to those uses specified within the zoning district stipulations. Unlike a variance to the zoning ordinance, a conditional use permit involves more rather than less stringent guidelines.

....

(App. at 55). In addition, Sections 6.10 and 6.10A provide:

Sec. 6.10 Mineral or other Substance Exploration, Excavation and Mining. Any operation involved in the search, exploration or prosperity for any substance or mineral involved in the extraction or excavation of any mineral or material including sand, gravel or scoria shall do so only upon the granting of a land disturbance permit by the board of county commissioners [removed]. The permit shall be valid for a period of one year.

Sec. 6.10A Submission of Application and Plan. The applicant shall submit the following to receive a permit:

1. Written evidence of the approval of landowner or landowners.
2. A legal description of the permit area and a map of proposed operations.
3. [Removed]
4. Evidence that excavation operation and reclamation shall take place in accordance with Public Service Commission (PSC) or Industrial Commission requirements.

5. A plan indicating type of operation, hauling routes, elevations, drainage and reclamation plans for future use.
6. Acceptance of the responsibility to ensure the health and safety of the general public through the use of sound procedures and proper barriers or fencing.
7. [Removed]

(App. at 83-84). The flaw in DRC's arguments is trying to force the requirements of Section 6.10A into the *Amendment* at issue, which was granted pursuant to Section 3.04.

15. In its appeal, DRC argues Stark County erred because GNPD did not submit the information required by Section 6.10A even though one of the conditional uses granted in Stark County's *Amendment* was mineral and other substance exploration or excavation and mining in accordance with the provisions of 6.10. The flaw in DRC's argument is it ignores the conditions contained in the *Amendment*, does not include consideration of the entire language of Section 3.04, and inaccurately attempts to force the requirements of Sections 6.10 and 6.10A into Section 3.04 of Stark County's ordinances.

16. The ordinances, when read together and giving effect to each provision, allow Stark County to grant a conditional use subject to various conditions, which is more stringent than other methods of approving nonconforming uses via a zoning change. *Zoning Ordinance* Sec. 3.04 (App. at 55-56). In this case, Stark County granted a conditional use for "Mineral and other substance exploration or excavation and mining [in] accordance with [the] provisions of 6.10." (Supp. App. at 1). That conditional use was subject to GNPD obtaining "all the

necessary local, state and federal approvals, licenses and permits relative to the operation of the coal mine.” Id. In other words, the conditional use granted was subject to additional, more stringent conditions, i.e. that GNPD still had to obtain all necessary approvals, including approval of a land disturbance permit in accordance with section 6.10 as well as complying with all state and federal regulations. DRC’s argument fails because it attempts to view the conditional use challenged in a vacuum, without consideration of the other conditions imposed by Stark County. GNPD did not have to satisfy those conditions at the time of Stark County’s decision, but the “conditional” uses were contingent upon obtaining all of the relevant permits and approvals. This is the reason Stark County appropriately argued to the district court that a land disturbance permit was not at issue in this appeal. See DRC’s Brief on Appeal at ¶ 14.

17. DRC’s argument puts the cart before the horse, and misinterprets Stark County’s underlying action. Stark County’s action in this case did not go as far as DRC contends. Stark County applied the controlling law and granted certain conditional uses subject to various conditions. It did not grant GNPD the right to immediately begin operating a coal mine or disturbing land, a necessary precursor for DRC’s argument to have any merit. It is not logical to assert Stark County granted such permission under the facts of this case for various reasons. First, GNPD was still in the process of seeking various approvals, including from the North Dakota Public Service Commission. *Partial Transcript of Zoning Commission Meeting* at pp. 16-20 (discussing the various permits and approvals GNPD needs to obtain to operate the mine) (R. at 35, p. 384-85). During the

course of obtaining all of the necessary permits and approvals from other agencies, certain plans relating to the mine would likely be altered, adjusted, or modified based on the decisions of those agencies. It would be premature for the County to approve such an unlimited conditional use (as argued by DRC) when these agencies, which have more specialized knowledge in such areas, have not yet acted on the proposed mine.

18. Stark County did not give GNPD *carte blanche* to begin operation of the coal mine by granting the conditional use at issue. Rather Stark County's *Amendment*, when read in its entirety, granted GNPD the ability to operate a coal mine in accordance with section 6.10 when and if it obtained all necessary local, state, and federal approvals. This action is consistent with common sense, state law, and Stark County's ordinances. By requiring GNPD to obtain all necessary local permits, including a land disturbance permit, Stark County could grant the general zoning change requested and conditional uses while still recognizing further modifications would likely occur during the remaining agency review process. This also allows Stark County an opportunity to monitor the project, including subsequent modifications from the state and federal agencies, while still retaining some oversight through the land disturbance process under section 6.10. Were Stark County to attempt to place itself in the position of the Public Service Commission and place strict, technical criteria on GNPD it would be at risk of overextending its powers because the Public Service Commission has the authority to regulate such activities. See N.D.C.C. ch. 38-14.1 (setting forth various procedures for surface coal mining operations and granting the Public

Service Commission various powers and duties associated with surface coal mining operations); Ramsey County Farm Bureau v. Ramsey County, 2008 ND 175, ¶ 26, 755 N.W.2d 920 (recognizing that the legislature gave the authority to adopt environmental regulations for animal feeding operations to the North Dakota Department of Health and that a zoning ordinance placing greater environmental restrictions on animal feeding operations was beyond the power granted to the county).

19. Under DRC's argument, Stark County could not act on a request for zoning amendment until such time as an applicant has gone through the entire regulatory process and obtained all necessary approvals. Section 6.10A(4) requires evidence that excavation operations and reclamation shall take place in accordance with Public Service Commission or Industrial Commission Requirements. Section 3.04 specifically indicates one of the conditions imposed may include time limits for permit validity and state of North Dakota design and performance standards. (App. at 55-56). Inclusion of these items as potential conditions indicates a conditional use permit under Section 3.04 does not necessarily have to mirror compliance with Sections 6.10 and 6.10A. This is only logical because, by its very nature, the conditional uses at issue are subject to certain conditions that may be satisfied in the future. DRC's argument would require all of the regulatory process to be completed before a zoning change could be granted, which is contrary to the plain language of Section 3.04 and the possible conditions set forth therein.

20. DRC also ignores the entire language of the second paragraph of Section 3.04, which provides a “conditional use permit shall serve as a land disturbance permit when no buildings or structures are involved and as a building permit, when a structure or building is involved.” (App. at 55) (emphasis added). The facts of this case do not fit within the language DRC relies upon for its appeal. For instance, this project includes buildings and structures. Because there are buildings and structures involved with the project, the plain language of Section 3.04 does not grant GNPD a land disturbance permit de facto as argued by DRC. See Appellant’s Brief at ¶ 16 (citing only the first half of the provision in section 3.04). Rather, GNPD received approval for a conditional use of coal mining in accordance with section 6.10 when it meets all the requirements under that section as required by the conditions imposed by Stark County.

21. The most prominent example of the flaw in DRC’s argument is that if it is accepted, this appeal is likely moot.

This Court can consider the issue of mootness in every appeal and will dismiss an appeal if the issues become moot. An appeal will be dismissed as moot if no actual controversy is left to be determined. No actual controversy exists if certain events have occurred which make it impossible for this Court to issue relief, or when the lapse of time has made the issue moot. We will determine a moot issue, rather than dismiss the appeal, if the controversy is one of great public interest and involves the authority and power of public officials or if the matter is capable of repetition, yet evading review.

In re Guard./Conserv. of Van Sickle, 2005 ND 69, ¶ 12, 694 N.W.2d 212 (internal citations omitted). If DRC’s interpretation is accepted this appeal is likely moot because Section 6.10 specifically states “the permit shall be valid for a period of one year.” (App. at 83). In other words, even if Stark County’s action was

contrary to its ordinances, the conditional use at issue would have expired on July 30, 2011, one year after it was granted. See Supp. App. at 1. Therefore, no relief could be appropriately granted on appeal because the authority at issue (as argued by DRC) would have already expired. Applying DRC's interpretation of section 3.04 with sections 6.10 and 6.10A would create an entirely impractical interpretation of the ordinances and would render this appeal moot.

22. Stark County's ordinances do not require GNPD to go through the entire regulatory process and associated expense of all matters associated with a coal mine only to hope Stark County will approve a subsequent application for a zoning amendment. Rather, it is entirely appropriate for Stark County and GNPD to take the action at issue here by applying for the zoning amendment and conditional uses subject to various conditions, including the necessity of obtaining all local, state, and federal permits and approvals, which would include GNPD complying with Section 6.10 of the Stark County Zoning Ordinances. DRC's misinterpretation of Stark County's zoning ordinances and of Stark County's actual decision would create an irreconcilable conflict between Section 3.04 and Sections 6.10 and 6.10A of Stark County's ordinances. Therefore, its argument should not be accepted and the district court judgment should be affirmed. Hagerott, 2010 ND 32, ¶ 13, 778 N.W.2d 813 ("We construe ordinances as a whole and harmonize them to give meaning to related provisions").

B. DRC Lacks Standing

23. Stark County cross-appealed on the issue of standing. While various parties were involved at the district court level, DRC is the only party that has appealed. DRC asserted it has organizational standing to appeal Stark County's decision. (R. at 37, p. 6). Standing is a question of law, which is reviewed de novo. Hagerott, 2010 ND 32, ¶ 9, 778 N.W.2d 813. This Court has recently addressed organizational standing in First Int'l Bank & Trust v. Peterson, stating:

We have recognized an organization may have associational standing to sue on its members' behalf, if: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. An association's standing depends on the nature of the relief sought because if the association seeks declarative, injunctive or other prospective relief, the association's members will see the benefit of the remedy.

2011 ND 87, ¶ 12, 797 N.W.2d 316 (internal quotations and citations omitted) (holding the condominium association had standing).

24. In order to determine if DRC's individual members have standing, prior zoning cases are instructive. In Hagerott, the Court explained its requirements for individual standing as follows:

Under N.D.C.C. § 11-33-12, any person "aggrieved" by a county commission's decision under N.D.C.C. ch. 11-33 may appeal to the district court as provided by N.D.C.C. § 28-34-01. Under a similar statute authorizing an appeal from any county commission's decision by an "aggrieved" person, this Court said the person seeking to appeal must show a "personal, individual interest in the decision, and any grievance which he might have suffered simply because he is an elector and taxpayer is not sufficient to give him the right to appeal." We said a resident taxpayer's "mere dissatisfaction or displeasure" with a county commission's decision for locating a road was insufficient to authorize the taxpayer to appeal from the decision. We explained

the person “must have some legal interest that may be enlarged or diminished by the decision to be appealed from. In other words, such party must be injuriously affected by the decision.” In another context under N.D.C.C. ch. 28-32, this Court said a party who is factually aggrieved by a decision, as indicated by the circumstances of the particular case, has standing to appeal a decision by an administrative agency. We said a person is factually aggrieved if the decision enlarges or diminishes that person’s interest.

2010 ND 32, ¶ 9, 778 N.W.2d 813 (internal citations omitted). In Hagerott, the Court held Donald Hagerott had standing because he was the owner of land and had a building permit on his land within a one-mile setback requirement for a feedlot. Id. at ¶ 10. The Court stated, “it cannot be seriously argued that a proposed feedlot within the odor setback will not adversely [a]ffect Donald Hagerott’s use and enjoyment of his property for a proposed house.” Id.

25. In this case, the individual appellants who submitted affidavits below, Frank and Lucy Hurt, have no similar argument. (R. at 37, Exhibits A and B). In cases such as the present matter, Stark County Ordinance 9.05(4)(c) requires notification be sent to “all owners of properties within 200 feet of the property in question by personal service”. See Zoning Commission Minutes (Aug. 3, 2009); Official Proceedings at 4 (Sept. 1, 2009); In re: Application for Amendment of Stark County Zoning Ordinance Section 9.05(4)(c) (Sept. 15, 2009) (included within Exhibit A to Appellee Stark County’s Brief to the district court) (R. at 24). Of the appellants in this appeal, only Neil and Laura Tangen are included within the persons who must receive personal service of the zoning amendment (i.e. property owners within 200 feet), and they did not provide an affidavit claiming to have standing. (R. at 35, pp. 9-14). In fact, none of the people actually within

the land rezoned or within 200 feet of the land rezoned submitted an affidavit or other evidence establishing standing in this case.

26. In Hagerott, Donald Hagerott had a building permit within the one-mile setback area, which was sufficient to provide him standing. Such a circumstance does not exist in this case. Rather, the affidavits from the only individuals indicate they are concerned about additional traffic, emissions, odors, noise, and the facilities associated with the proposed mine. *Affidavits of Frank and Lucy Hurt* at ¶ 2 (Supp. App. at 2, 4). They further “believe” their quality of life, and “possibly” the value of their property will be impacted. Id. These complaints, beliefs, and unsupported possibilities are not sufficient to establish standing. See Washburn Pub. Sch. Dist. No. 4 v. State Bd. of Pub. Sch. Ed., 338 N.W.2d 664, 667(N.D. 1983) (“This court has distinguished between the potential to be aggrieved and to be aggrieved in fact”). In fact, these individuals are not property owners of land that has been rezoned, and no property owners of the land that has been rezoned objected at the public hearings on GNPD’s application. See e.g., Washburn Pub. Sch. Dist. No. 4, 338 N.W.2d at 668 (party who participated in agency proceeding but neither gained nor lost anything is not factually aggrieved for standing to appeal agency decision). The record lacks sufficient information that any individual members of DRC would otherwise have standing. Therefore, DRC lacks standing on this basis alone.

27. In its affidavit, filed by Mark Trechock, DRC provided no information, other than generalities and conclusory statements that its members will supposedly be affected. *Affidavit of Mark Trechock* (Dec. 28, 2010) (Supp. App.

at 6). DRC's affidavit does not establish its members would otherwise have standing to sue in their own right for the reasons stated above. An organization asserting standing on the basis that its members would otherwise have standing to sue in their own right has long been required to "submit affidavits . . . showing, through specific facts . . . that one or more of [its] members would . . . be 'directly' affected." Lujan v. Defenders of Wildlife, 504 U.S. 55, 563 (1992) (emphasis added). In this case, DRC did not set forth any specific facts indicating its members would otherwise have standing. It simply listed some of its members and conclusively stated they live by and will be directly impacted by the proposed coal mine. (Supp. App. at 7, ¶ 6). This is not enough to establish organizational standing, and therefore, DRC's appeal should be dismissed because it lacks standing.

IV. CONCLUSION

28. Stark County respectfully requests this appeal be dismissed because DRC lacks standing. Regardless, the judgment of the district court should be affirmed.

Dated this 13th day of October, 2011.

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CERTIFICATE OF SERVICE

29. I hereby certify that a true and correct copy of the foregoing **APPELLEE AND CROSS-APPELLANT STARK COUNTY BOARD OF COUNTY COMMISSIONERS' BRIEF** was on the 13th day of October, 2011, e-mailed to the following:

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