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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

Supreme Court Case No.: 20110172
Stark County District Court No.: 10-C-00315

Dakota Resource Council,

Appellant and
Cross-Appellee,

and

Neighbors United, Myron and Nancy Eberts,
Neil and Laura Tangen, Brittany Huggins
and Frank and Lucy Hurt,

v.

Stark County Board of County
Commissioners and Great Northern
Project Development,

Appellees and
Cross–Appellants.

REPLY BRIEF OF APPELLANT

APPEAL FROM STARK COUNTY DISTRICT COURT OPINION AND JUDGMENT ENTERED IN STARK COUNTY DISTRICT COURT CASE NO. 10-C-00315

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A. Appellants Have Standing to Appeal the County's Decision.

1. The Stark County Board of County Commissioners ("County") and Great Northern Project Development ("GNPD") argue that Appellants lack standing for this appeal. This issue was not pertinent to the Stark County Zoning Board hearings or the Stark County Commission meetings, and was raised for the first time on appeal. In typical litigation, a "challenge to standing is an affirmative defense." 61A Am. Jur. 2d Pleading § 316. As the County itself stated: "It is important to note that standing is not an issue evaluated at the County hearing level." (Docket No. 24). Regardless, the record contains sufficient information to establish standing. It must first be noted, however, that GNPD's cross-appeal should be dismissed insofar as it challenges the standing of persons not parties to this appeal. It is only Dakota Resource Council ("DRC") that has taken the present appeal, and the lower court affirmed the County's decision. As such, any ruling on whether or not the other parties had standing below is moot as to those parties, and would constitute only an advisory opinion if decided at this time. If the Court rules that DRC has no standing, then its appeal will be dismissed. If DRC does have standing, then the Court will decide the merits of its appeal. GNPD can then be granted relief with respect to DRC's appeal. This is untrue of the other parties not on appeal here. No relief can be issued to GNPD with respect to the other parties. "When it becomes impossible for the Court to issue relief, no controversy exists and the issue is moot. We do not render advisory opinions and will dismiss an appeal if the issue becomes moot." State v. Ehli, 2006 ND 140, ¶ 5, 717 N.W.2d (citing State v. Grager, 2006 ND

102, 713 N.W.2d 531). Regardless, DRC has standing, and all Appellants had standing at the Stark County District Court level.

2. "Some zoning statutes authorize judicial review of a decision of a board of adjustment at the instance of a person or persons who is 'aggrieved' by the decision in question. These statutes are intended to create a broader class of persons with standing to seek judicial review than are statutes that restrict the right of appeal to parties of record." 83 Am. Jur. 2d Zoning and Planning § 924. Hornbook law from other treatises on zoning is also instructive here.

> …An adjoining or nearby property owner, on the face of it, has a sufficient interest to enable him to appeal a determination of a board regarding the zoning usage of adjacent property without proof of special injury or damage. In some cases, moreover, the interest claimed to be adversely affected need not take the form of depreciation in the value of the plaintiff's property or any special pecuniary damage. An interest in the continuation and observance of the classification of the zoned district in which petitioners reside and own property is sufficient to qualify one as an aggrieved person.
>
> Some states require allegation and proof of damage separate and distinct from that suffered by the public generally, even in the case of persons owning property in close proximity to that which is the subject of the action or proceeding. The distance between the putative plaintiff's or petitioner's property and that which is the subject of the action does not, in itself, preclude standing if there is sufficient proof that, despite the distance, the property of the plaintiff is specifically injured. A statute permitting "aggrieved parties" to appeal has been held to be one which should be liberally construed.

4 Rathkopf's The Law of Zoning and Planning § 63:18 (4th ed.). Even in a state such as North Dakota where, to be aggrieved, a person must be injuriously

affected by the decision beyond that of a taxpayer or elector, the "distance between the putative…petitioner's property and that which is the subject of the action does not, in itself, preclude standing if there is sufficient proof that, despite the distance, the property of the plaintiff is specifically injured." Id.

3. In a similar context related to the Administrative Agencies Practice Act ("AAPA"), the Supreme Court of North Dakota has noted that "[a]ny doubt on the question of standing involving a decision by an administrative body should be resolved in favor of permitting the exercise of the right of appeal by any person aggrieved in fact." Shark v. U.S. West Communications, Inc., 545 N.W.2d 194, 197 (N.D. 1996) (citing Application of Bank of Rhame, 231 N.W.2d 801, 808 (N.D. 1975)). Significantly, the AAPA contains even stricter requirements than the law governing appeals from county zoning decisions. Under the AAPA, in order to appeal, a person must have participated in the proceedings before the agency. N.D.C.C. § 28-32-42; see also N.D.C.C. § 28-32-40. This requirement does not exist in the provisions allowing an appeal from a local governing body. N.D.C.C. § 11-33-12 ("Any person, or persons, jointly or severally, aggrieved by a decision of the board of county commissioners under this chapter, may appeal to the district court in the manner provided in section 28-34-01."). The Supreme Court of North Dakota, with reference to the AAPA, has also made clear that "any person who takes part in the proceedings and *may* be factually aggrieved by the decision" has standing. Matter of Persons, 311 N.W.2d 919, 922 (N.D. 1982) (emphasis added).

4. The bottom line is that "[t]he question of who is a proper party should not be resolved on strict technical grounds which could result in the public being denied the opportunity to question the actions of [the County]." See Shark at 197 (citing Application of Bank of Rhame, at 808). Further, even on the strict technical grounds for standing, Appellants have standing for this appeal.

1. The Individually Named Appellants Have Standing.

5. First, the County's reliance on the Hagerott case is misplaced. See Hagerott v. Morton County Bd. of Com'rs, 2010 ND 32, 778 N.W.2d 813. Second, because the Appellants *are* factually aggrieved by the County's decision beyond any grievances suffered generally by electors or taxpayers, they have standing for the present appeal. See Hagerott, ¶ 9; (see also Appellee/Cross Appellants' Supplemental Appendix ("Supplemental Appendix"), pp. 2-9).

6. In Hagerott, Donald Hagerott, one of the appellants, was found to have standing for the appeal. The Supreme Court of North Dakota stated:

> Moreover, merely because Donald Hagerott's current residence is not within the setback does not defeat standing, and it cannot be seriously argued that a proposed feedlot within the odor setback will not adversely effect [sic] Donald Hagerott's use and enjoyment of his property for a proposed house. Donald Hagerott has been factually aggrieved by the decision to permit a feedlot within one mile of the proposed construction site.

Hagerott, 2010 ND 32 at ¶ 10. In Hagerott the appellant had standing based on a *proposed* house. Here, Appellants have houses in which they're already living, and which are particularly and significantly impacted by the County's decision to amend the zoning designation of thousands of acres of agriculturally zoned land

to industrial use, and to approve all of the following uses for construction in this agricultural neighborhood: A chemical fertilizer plant, a coal gasification or conversion plant, a coal mine, an electric power generating plant, a liquid, gas bulk, explosive, highly compressed or other hazardous material storage, mineral and other substance exploration or excavation and mining in accordance with provisions of Sec. 6.10 of the Stark County Ordinance, a solid waste landfill, the manufacture of hazardous products and the manufacture of odorous products. (County Record ("R") at 348).[1] In Hagerott, the appellant's *proposed* home was a mile from the feedlot. Here, individual appellants own property in close proximity to the rezoned land. And GNPD's project is no hog farm; it is an industrial complex thousands of acres in size, laden with hazardous and odorous products and plants, obtrusively implanted into farm and ranch country.

7. The farmers and ranchers who are expected to become its unwilling neighbors are most certainly factually aggrieved by its presence and by the County's decision, and the existence of an enormous industrial complex in their neighborhood will affect their use and enjoyment of their property. It is also untrue that, as the Appellees assert, there is no evidence of the individual appellants being factually aggrieved in the record. The affidavits of Frank and Lucy Hurt indicate that the affiants live in close proximity to the rezoned land, and that they are concerned about their property values and the impact the industrial complex, with its hazardous, odorous, and explosive products, will have on their daily lives.

[1] DRC's references to the record submitted by the County to the District Court will be to the bates numbers provided by GNPD in its appendix, which it provided to the District Court at Docket No. 35.

(Supplemental Appendix, pp 2-5). Although the undersigned was unable to obtain affidavits in time from Brittany Huggins, Neil and Laura Tangen and Myron and Nancy Eberts, these individuals also have standing. The Affidavits of Mark Trechock and Mary Hodell both establish that the Eberts also live in close proximity to the proposed industrial complex, and thus have the same concerns as the other individual appellants, and are factually aggrieved in the same way. (Supplemental Appendix, pp. 6-9). Brittany Huggins testified that she had a home a half mile from the proposed industrial site, that she was trying to sell it, and that "everybody that comes to look, the biggest question is about this coal mine, where is it going to be and how close, we don't want it in our backyard." (R. at 390). Neil and Laura Tangen were among those who received notice of the zoning application by certified mail because they live within two hundred feet of the proposed industrial site. (R. at 8, 12). Laura Tangen testified that she "may be smelling this sulfur, rotten eggs and may have to keep [her] windows closed." (R. at 394). Ms. Tangen also testified about her concern regarding the blasting at the proposed mine, and asked: "What is this blasting going to do to the foundation of my house that may be 50 years old? What will it do to my wells?" (Id.) Neil Tangen testified about his concerns related to property value as well. (R. at 396-97). Even Mr. Southwick, and representative of Great Northern, admitted that odors from the plant could reach the Tangen household. (R. at 407).

8. The individual Appellants are not mere taxpayers or electors. They are the neighbors being forced to live with the County's decision to rezone part of their farm and ranch community to create an enormous industrial complex.

2. Dakota Resource Council Has Standing.

9. Dakota Resource Council has organizational standing to appeal the County's decision. It has members directly impacted by the County's decision who have standing to sue in their own right, and the interests DRC seeks to protect are germane to the organization. See Supp. App. 6-7.

> … a nonprofit organization that has not suffered an injury itself can sue as the representative of its members 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. In addition, a nonprofit membership corporation has standing to seek judicial review on behalf of its members, of governmental or municipal regulations directly affecting such members.

Nodak Mut. Ins. Co. v. Ward County Farm Bureau, 2004 ND 60, ¶ 13, 676 N.W.2d 752 (citing 9 V. Braucher, B. Jacobsthal & G. O'Gradney, *Fletcher Cyclopedia of the Law of Private Corporations*, § 4227, at pp. 47-49 (1999 rev. ed.)). Kenneth Kudrna, a DRC member, received a notice by certified mail of the public hearing in this matter as required by the Stark County Zoning Ordinance § 9.05 because he lives within 200 feet of the rezoned land. (R. at 5, Certification of Notice with attached Certified Mail Receipts). Because DRC has members who would have standing to sue in their own right, the interests it seeks to protect are germane to DRC's organizational purpose, and the appeal does not require the participation of DRC's individual members, DRC has organizational standing. (See id.; see also Supplemental Appendix, pp. 6-7). Also, DRC has the right to

seek judicial review of the County's decision because the decision directly affects its members. Id.

3. Neighbors United Has Standing.

10. For the same reasons that DRC has standing, so does Neighbors United. Its members would have standing to sue in their own right, the interests it seeks to protect are germane to its purpose, and its participation in this appeal does not require the participation of its individual members; therefore it has standing. See Nodak Mut. Ins. Co. v. Ward County Farm Bureau, 2004 ND 60, ¶ 13, 676 N.W.2d 752; (see also Supplemental Appendix, pp. 8-9). Neighbors United also has the right to seek judicial review of the County's decision because the decision directly affects its members. Id. Additionally, Neighbors United has its own individual standing for this appeal. See N.D.C.C. § 11-33-12 ("Any person, or persons, jointly or severally, aggrieved by a decision of the board of county commissioners under this chapter, may appeal to the district court.") (emphasis added).

11. Although Neighbors United is an unincorporated association rather than a nonprofit corporation, this does not defeat its organizational standing. The Supreme Court of North Dakota has stated: "While we do not have a statute which explicitly authorizes suit against unincorporated associations, we do note that our Legislature, as early as 1927, enacted statutes which have recognized associations as legal entities which could sue and be sued." Askew v. Joachim Memorial Home, 234 N.W.2d 226, 234 (N.D. 1975). The Court in Askew analogized to the Uniform Partnership Act, which shows that formal

incorporation is not required to create a legal entity with the power to sue and be sued. See id.; see also N.D.C.C. § 45-15-07. Commentary from other jurisdictions is pertinent here.

> The question whether an association of property owners may have party aggrieved standing under appropriate circumstances has received varying answers, *see* Annot., 8 A.L.R.4th 1087 (1981). Although our Courts have not addressed this issue, we take note of the trend in other jurisdictions toward relaxing strict procedural requirements involving standing. *See id*. We thus hold that where, as here, a corporate petitioner has no property interest, but represents individuals who live in the affected area and who potentially will suffer injury by the issuance of a special use permit, such petitioner has standing to seek judicial review of the municipality's action in approving an application for a special use permit. *See, e.g., Residents of Beverly Glen, Inc. v. Los Angeles*, 34 Cal.App.3d 117, 109 Cal.Rptr. 724 (1973); *Tuxedo Conservation & Taxpayers Assoc. v. Town Board of Town of Tuxedo*, 96 Misc.2d 1, 408 N.Y.S.2d 668, 669-70 (1978), aff'd, 69 A.D.2d 320, 418 N.Y.S.2d 638 (1979); Annot., supra, at § 5[a].

Piney Mountain Neighborhood Association, Inc. v. Town of Chapel Hill, 304 S.E.2d 251, 252 (N.C.App. 1983). The Supreme Court of North Dakota agrees with other jurisdictions that "[t]he question of who is a proper party should not be resolved on strict technical grounds which could result in the public being denied the opportunity to question the actions of [the County]." See Shark at 197 (citing Application of Bank of Rhame, at 808).

12. The very name of the association, Neighbors United, conveys the information that should be necessary to a fair determination of standing. This is not a distant, uninvolved corporation. It is a group of people, neighbors not only to each other

but to the land rezoned by the County, who have banded together to protect their livelihood and way of life. They have repeatedly voiced their concerns, fears and issues to the County on this rezoning issue, and have begged for the County not only to consider its decision more closely, but to gather crucial information before making such a significant decision. The County did not listen. Neighbors United has standing and is aggrieved in fact; it should not be denied the opportunity to question the actions of the County.

B. GNPD Did Not Comply with the Stark County Zoning Ordinance

13. Appellees both assert that DRC did not raise the issue on appeal here until its reply brief to the Stark County District Court ("District Court"). This is untrue. In its principal brief to the District Court, DRC argued, for example, that "[t]he Stark County Ordinance requires an applicant for a permit for coal mining and exploration to submit a detailed plan. See Stark County Ordinance § 6.10-A. The County did not require GNPD to submit a detailed plan as dictated by the County's own laws. The Ordinance makes submission of this plan mandatory by using the word "shall". Ordinance, § 6.11.4 ("The word 'shall' is mandatory and not discretionary, the word 'may' is permissive.")." (Docket No. 23). DRC went on at length to discuss GNPD's failure to submit evidence as required by Section 6.10-A. Id.

14. Regardless, DRC is correct that GNPD failed to comply with the Stark County Ordinance. The County and GNPD's strained attempts to argue away GNPD's failure to properly apply for a land disturbance permit are unavailing.

15. For example, the County argues that DRC ignores the language of section 3.04, which provides that 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." (Appellee and Cross-Appellant Stark County Board of County Commissioners' Brief ("County Brief"), ¶ 20; App. at 55). The County proceeds to assert that "*this project* includes buildings and structures." (County Brief, ¶ 20). The language in the Stark County Ordinance does not refer to massive industrial *projects*, it refers to a *permit*. In this case, the permit at issue is for "[m]ineral and other substance exploration or excavation and mining in accordance with the provisions of Sec. 6.10." (See R. at 3). Thus, *this permit* does *not* include buildings and structures. The conditional use permit granted "acts as a land disturbance permit" pursuant to the express language of Section 3.04 of the Stark County Ordinance.
16. By way of illustration, a conditional use permit for a chemical fertilizer plant would act as a building permit for that plant…a permit which has been granted to GNPD, but for which there are no additional requirements as there are for a permit pursuant to Section 6.10 and 6.10-A of the Stark County Ordinance.
17. Further, both appellees argue that the grant of a conditional use permit for mineral and other substance exploration or excavation and mining in accordance with the provisions of Sec. 6.10 does not obviate the need for a separate land disturbance permit for mineral and other substance exploration or excavation and mining in accordance with the provisions of Sec. 6.10. This interpretation begs the question: What is the point of obtaining or granting a conditional use permit

pursuant to that provision if the land disturbance permit is yet required? The answer lies in the Ordinance: "A conditional use permit shall serve as a land disturbance permit when no buildings or structures are involved … ." Stark County Ordinance, Section 3.04. The arguments made by the County and GNPD would read this explicit language right out of the Ordinance. The fact that the County placed a condition on its zoning amendment to the effect that all local, state and federal permits must be obtained does not have any bearing on the proper interpretation of the Stark County Ordinance. Indeed, to assume that the additional conditions placed on the amendment have a bearing on the proper reading of the Ordinance leads to another confusing result: If such condition had *not* been placed on the amendment, the Ordinance suddenly stops making sense. In reality, the Ordinance is very clear, and the bottom line is that GNPD did not comply with the requirements for receiving the conditional use permit, which *is* also a land disturbance permit, pursuant to Section 6.10 and 6.10-A.

18. GNPD attempts to argue, for example, that the conditional use permit requires GNPD to proceed in accordance with the provisions of Section 6.10, and therefore it must adhere to the requirements of Section 6.10-A before actually utilizing the property for coal operations. (Brief of Appellee/Cross-Appellant Great Northern Project Development ("GNPD Brief"), ¶ 25). The requirements of Section 6.10-A do not become active *after* a permit is granted. The materials *shall* be submitted *to receive a permit*. Stark County Ordinance, Section 6.10-A. GNPD received the permit. It should not receive a permit until it complies with the explicit requirements of Section 6.10-A.

19. The County also argues that "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." County Brief, ¶ 21 (citing Supp. App. at 1). The County proceeds to argue that DRC's interpretation of the Ordinance would thereby render the appeal moot. This is not the case. Section 3.04 of the Ordinance sets forth numerous conditions that can be placed on a conditional use permit, including "Time limitations for permit validity." Ordinance § 3.04(1). DRC is not arguing that a conditional use permit is the same as a land disturbance permit. It is simply reading the Ordinance and giving it its plain meaning: "A conditional use permit shall *serve as* a land disturbance permit." Ordinance § 3.04. The time restriction for a land disturbance permit does not apply to a conditional use permit. Conditional use permits may have time restrictions, but these must be made a condition of the permit.

20. As the County itself argues, the Court "construe[s] ordinances as a whole and harmonize[s] them to give meaning to related provisions." Hagerott v. Morton County Bd. of Com'rs, 2010 ND 32, ¶ 13, 778 N.W.2d 813. Further, "an interpretation that contradicts clear and unambiguous language is not reasonable." Id. DRC's interpretation of the Ordinance complies with the above-quoted rules. Appellees' does not.

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Dated this 25th day of October, 2011.

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