20110172

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 8, 2011
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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 Commissioners and Great Northern Project Development, Appellees and Cross-Appellants.	)	Supreme Court No. 20110172

Appeal from the Judgment entered on April 6, 2011
Civ. No. 45-10-C-00315
County of Stark, Southwest Judicial District
Honorable Wickham Corwin, Presiding

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT GREAT NORTHERN PROJECT DEVELOPMENT

Lawrence Bender, ND Bar #03908
Amy L. De Kok, ND Bar #06973

FREDRIKSON & BYRON, P.A.
200 North Third Street, Suite 150
Post Office Box 1855
Bismarck, North Dakota 58502-1855
Phone: (701) 221-4020

Attorneys for Appellee/Cross-Appellant Great Northern Project Development

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PARAGRAPH

STATE CASES

OTHER CASES

STATE STATUTES

OTHER AUTHORITIES

LAW AND ARGUMENT

I. The Issue of Whether the Appellants before the District Court had Standing is Not Moot.

[¶ 1] Contrary to the Appellant's assertions in its brief, the issue of whether the various appellants who appeared before the district court had standing is not moot. "An actual controversy does not exist when an issue has been mooted by a lapse of time, or the occurrence of related events which make it impossible for a court to render effective relief." *Nord v. Herrman*, 1998 ND 91, ¶ 12, 577 N.W.2d 782, 785. In other words, a case becomes moot "when the parties lack a legally cognizable interest in the outcome." 5 Am. Jur. 2d Appellate Review § 596.

[¶ 2] Appellant Dakota Resource Council ("DRC"), argues that, because only DRC has appealed the district court's decision, the issue of the other appellants' standing is moot. This argument is without merit because Great Northern Project Development ("Great Northern"), has an interest in the number of appellants held to have standing. It is possible that this Court will rule in favor of DRC or remand one or more issues to the district court. In that case, it is very relevant whether some or all of the appellants before the district court had standing. Moreover, if more than three appellants are found to have standing, and are successful on the merits, Great Northern could be required to pay the appellants' attorneys' fees. *See* N.D.C.C. § 11-11-39 (stating that the district court may award costs and attorneys' fees the appellants when three or more persons join in a successful appeal from a county board).[1] The potential burden of thousands of dollars in

[1] It is likely that the possibility of recovering attorneys' fees is the very reason so many different "parties," composed of the same individuals, where named in the appeal of the Stark County Board of Commissioners' ("Board") decision.

attorney's fees creates a "legally cognizable interest in the outcome" of this Court's decision on standing. Thus, the standing of all parties who appealed the Board's decision to the district court is an actual controversy and this Court is capable of providing Great Northern relief in holding the some or all of the appellants lacked standing.

II. DRC, Neighbors United, and the Individual Appellants Lack Standing to Appeal the Board's Decision.

[¶ 3] None of the appellants before the district court had standing to appeal the Board's decision.[2] Thus, this Court should reverse the district court's decision insofar as the district court held that DRC, Neighbors United, and the individual appellants before the district court had standing.

A. The Individual Appellants' Affidavits were Insufficient to Establish Standing.

[¶ 4] The individual appellants before the district court, namely Myron and Nancy Eberts, Neil and Laura Tangen, Brittany Huggins, and Frank and Lucy Hurt (hereinafter the "Individual Appellants"), lacked standing to appeal the Board's decision. Standing is purely an issue of law and is reviewed *de novo*. *First Int'l Bank & Trust v. Peterson*, 2011 ND 87, ¶ 9, 797 N.W.2d 316, 321. A person must be "aggrieved" by a county commission's decision to appeal to the district court. N.D.C.C. § 11-33-12. The North Dakota Supreme Court has explained the term "aggrieved" by requiring the person asserting standing to demonstrate that they have "some legal interest that may be enlarged or diminished by the decision to be appealed from." *Hagerott v. Morton Cnty.*

[2] The following parties appealed the Board's decision to the Stark County District Court: DRC, Neighbors United, Myron and Nancy Eberts, Neil and Laura Tangen, Brittany Huggins, and Frank and Lucy Hurt. Only DRC has appealed the district court's decision to this Court.

Bd. of Comm'rs, 2010 ND 32, ¶ 9, 778 N.W.2d 813, 818 (quoting *Huber v. Miller*, 101 N.W.2d 136, 140 (N.D. 1960)). The burden to establish standing is on the person claiming injury. *Huber*, 101 N.W.2d at 140-41. Standing will be denied where a plaintiff relies on possibilities and speculation of harm. *Vickery v. N.D. Workers Comp. Bureau*, 545 N.W.2d 781, 785 (N.D. 1996). A Nebraska court held similarly to the *Vickery* case when it declined to grant standing to a plaintiff who made general allegations of harm and "feared" that traffic would greatly increase and his property values would drop as a result of nearby rezoning. *Sanitary and Improvement Dist. No. 347 of Douglas Cnty. v. City of Omaha*, 589 N.W.2d 160, 167 (Neb. App. 1999) ("*Dist. No. 347*"). Citing cases from several other jurisdictions, the court held that these "uncorroborated speculations" and "speculative" statements were insufficient to classify the plaintiff as a "person aggrieved" under the standing statute. *Id.* at 169-70. The court also held that "damages suffered alike by all property owners similarly situated, does not give to individuals such a substantial interest in the decision of the [Zoning Commission] permitting the improvement as to authorize an appeal therefrom." *Id.* at 171.

[¶ 5] In a feeble attempt to defeat Great Northern's cross-appeal on the issue of standing, DRC now claims that Great Northern's reliance on *Hagerott* is misplaced because *Hagerott* involved a proposed home while this case involves existing homes. *See* Reply Brief of Appellant, ¶ 6. This argument misses the point of *Hagerott*, *Vickery*, and *Dist. No. 347*. In *Hagerott*, the plaintiff's home was within the statutory odor setback and it was undisputed that the industrial hog operation would adversely affect the property. In this case, as in *Dist. No. 347*, the feared consequences of the Board's decision are speculative and not corroborated by <u>any</u> evidence. DRC cites affidavits from

the Individual Appellants, all of which contain no more than the speculation of laypersons as to the potential effects of the Board's decision on their property. *See* Reply Brief of Appellants, ¶ 7 (citing the affidavit of one Individual Appellant who worries she "may have to keep [her] windows closed"). One Individual Appellant, rather than alleging an actual or likely injury, directly speculates as to the effect of the Board's decision, asking, "What will [the project] do to my wells?" *Id.* A question as to the hypothetical, unknown effects of a rezoning decision is the exact type of speculation that is insufficient to establish standing. None of the Individual Appellants have presented anything beyond conclusory allegations and speculation. Therefore, the Individual Appellants have failed to meet their burden to establish standing to appeal the Board's decision. To the extent the district court's decision holds otherwise, it must be overturned.

B. DRC Lacks Standing because its Individual Members Lacked Standing to Appeal the Board's Decision.

[¶ 6] DRC likewise lacked standing to appeal the Board's decision to the district court. There are three requirements that a nonprofit organization such as DRC must show that it meets to have standing to sue as the representative of its members. *Nodak Mut. Ins. v. Ward Cnty. Farm Bureau*, 2004 ND 60, ¶ 14, 676 N.W.2d 752, 758. First, the organization's members must have standing to sue in their own right. *Id.* Second, the interests the organization seeks to protect must be "germane to the organization." *Id.* Third, "neither the claim asserted nor the relief requested" may require the participation of individual members in the suit. *Id.* Moreover, an organization asserting standing on the basis 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. 555, 563 (1992).

[¶ 7] As discussed above, the Individual Appellants before the district court did not have standing to appeal the Board's decision. The members of DRC claiming individual standing are simply the Individual Appellants. Therefore, DRC fails the first part of the three-part test. DRC did not have standing before the district court because its individual members lacked standing. Thus, this Court should reverse the district court's decision insofar as it held that DRC had standing to challenge the Board's decision.

C. Neighbors United, as an Unincorporated Association, Lacked Standing to Appeal the Board's Decision.

[¶ 8] Neighbors United is an unincorporated association and therefore lacked standing to appeal the Board's Decision. Neighbors United, like DRC, did not have organizational standing to appeal the Board's decision to the district court because its individual members did not have standing. However, even if its members had standing, Neighbors United did not have standing as an unincorporated "nonprofit" association. A nonprofit corporation has standing to sue on behalf of its members. *Nodak*, 2004 ND 60, ¶ 14, 676 N.W.2d at 752 (quoting Volume 9, Fletcher Cyclopedia of the Law of Private Corporations § 4227, at pp. 47-49 (1999 Rev. Ed.)); *see also, Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). In support of its claim of standing on the part of Neighbors United, DRC continues to cite law stating that an unincorporated association, such as a partnership, may sue and be sued. *See* Reply Brief of Appellants, ¶ 11. Standing is a constitutional concept "used to determine if a party is sufficiently affected

so as to insure that a justiciable controversy is present to the court." *Nodak*, 2004 ND 60, ¶ 11, 676 N.W.2d at 757. The capacity of an organization to sue and be sued is generally a statutory right and rests on the issue of whether the organization is a "suable legal entity separate and apart from its membership." *Askew v. Joachim Memorial Home*, 234 N.W.2d 226, 234 (N.D. 1975). Great Northern does not dispute that an unincorporated association, such as a partnership, may have the legal power to sue and be sued. DRC, however, attempts to conflate the ability to sue as a legal entity with the constitutional concept of standing.[3] This is simply an attempt to avoid the conclusion that no case law supports DRC's proposition that an unincorporated nonprofit association of persons, such as Neighbors United, has standing to sue on behalf of its members.

CONCLUSION

[¶ 9] Great Northern respectfully requests the Supreme Court reverse the district court's order insofar as it held that the individual appellants, DRC, and Neighbors United had standing to appeal the Board's decision.

[3] DRC has also ignored the fact that the case it relies upon for the principle that an association of property owners has standing to sue on their behalf involved a nonprofit corporation. *See* Reply Brief of Appellants, ¶ 11; *Piney Mountain Neighborhood Ass'n, Inc. v. Town of Chapel Hill*, 304 S.E.2d 251, 252 (N.C. App. 1983) (stating that "where, as here, a corporate petitioner has no property interest, but represents individuals" who have standing, the corporate petitioner will have standing).

Dated this 8th day of November, 2011.

FREDRIKSON & BYRON, P.A.

By /s/ Lawrence Bender
LAWRENCE BENDER, ND Bar #03908
AMY L. DE KOK, ND Bar #06973
Attorneys for Appellee and Cross-Appellant Great Northern Project Development
200 North 3rd Street, Suite 150
Post Office Box 1855
Bismarck, North Dakota 58502-1855

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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 Commissioners and Great Northern Project Development Appellees and Cross-Appellants.	)	Supreme Court No. 20110172 **CERTIFICATE OF SERVICE**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

I hereby certify that on November 8, 2011, I electronically filed the foregoing with the Clerk of the North Dakota Supreme Court and served the same electronically as follows:

Mr. Derrick L. Braaten	derrick@baumstarkbraaten.com
Mr. Mitchell D. Armstrong	marmstrong@smithbakke.com

Dated: November 8, 2011

/s/ Lawrence Bender
LAWRENCE BENDER

5012894_3.DOC