SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

January 17, 2006

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RE: Davis v. Sussex County Planning and Zoning Commission
C. A. No. 05A-05-001 (THG)

Dear Counsel:

On March 3, 2005, the Sussex County Planning and Zoning Commission ("Commission") granted plan approval for a 33 lot subdivision designated #2004 - 18 Cherry Walk Woods III. On March 4, 2005, the Commission mailed a letter to Milton Brunner (the "applicant") advising that the subdivision had been approved subject to certain conditions. Mr. Brunner's involvement in the subdivision will be discussed below.

H. Clay Davis, III, Leslie Ann Davis, Edward G. Davis and Elizabeth A. Davis ("the Davis family") filed a timely appeal of the decision, but named only the Sussex County Planning and Zoning Commission and its members as appellees. No one else, including the applicant who received the subdivision approval, was included as a named party.

The Appeal filed on May 4, 2005 attacked the Commission's approval of the subdivision because the Commission "acted arbitrarily and capriciously". Specifically, the appeal raised issues concerning the State quality of life statute (9 Del. C. §6951), the dangers of hunting activity near the subdivision, and the factors to be considered by the Commission pursuant to The Sussex County Code. The Davis family, owners of the property

adjacent to the approved subdivision, were understandably concerned about residential housing in an area where hunting and similar activities have been ongoing for generations. The Commission noted this but determined the applicant should be permitted to subdivide the property with certain conditions being imposed.

Appellee moved to dismiss the appeal because the Davis family only included the Commission as a party. Appellee argues that the applicant is a necessary party who cannot now be joined in the litigation. Therefore, the appeal must be dismissed.

The Davis family argues that the Motion to Dismiss for Failure to Include the Applicant must fail because the applicant was not the owner of the subject property. For this same reason, The Davis family seeks summary judgment that the decision below must be reversed.

The Court notes that the legal entity owning the subject property is Cherry Walk Woods, III, L.L.C. The Davis family concedes Milton Brunner is a member of this limited liability company ("L.L.C.").

The County zoning statute allows the subdivision of property to be presented by an agent of the subdivision. Sussex County Code Sec. 99-5[1]. In this case, it is clear to the Court and to all involved that Mr. Brunner acted as the agent for the L.L.C. known as Cherry Walk Woods, III, L.L.C. which, owned the property.

The relationship between the L.L.C. and Mr. Brunner was known or easily discernible based on the following:

(a) The application check came from the L.L.C.

(b) The County receipt for the subdivision application fee of $300.00 was made out to "Cherry Walk Woods L.L.C".

(c) The State of Delaware's comments in writing as to water and wastewater treatment dated June 3, 2004 noted the applicant as being the

[1]"Subdivider - Any individual, firm, partnership, association, corporation, estate, trust, or any other group or combination . . . and <u>including any agent of the sudivider</u>."

L.L.C.

(d) The public records identify the owner of the subject property as the L.L.C.

Who was pursuing the application was never an issue at the hearings attended by the Davis family, nor was it raised in their appeal. This only became an "issue" when the Motion to Dismiss was filed.

I find that the subdivision application and the processing of the subdivision was proper, regardless of whether it was processed in the name of the L.L.C. or its agent. The paper trail made this clear to the Court, the State, and the interested public. To reverse the Board on a "name" technicality would be contrary to the subdivision ordinance allowing agents to be involved and it would be contrary to common sense, as nobody was misled.

I now turn to the issue of whether the appeal must be dismissed because the applicant was not made a party to the appeal. The statute permitting the subdivision appeal is found at 10 Del. C. §8126(b):

> (b) No action, suit or proceeding in any court, whether in law or equity or otherwise, in which the legality of any action of the appropriate county or municipal body finally granting or denying approval of a final or record plan submitted under the subdivision and land development regulations of such county or municipality is challenged, whether directly or by collateral attack or otherwise, shall be brought after the expiration of 60 days from the date of publication in a newspaper of general circulation in the county or municipality in which such action occurred, of notice of such final approval or denial of such final or record plan.

10 Del. C. §8126 is a statute of repose and cannot be waived as it is jurisdictional. Once the sixty days permitted under the statute runs, then additional parties may not be added or joined. *Southern New Castle County Alliance, Inc. v. New Castle County*

Council, 2001 WL 855434 (Del. Ch. 2001); *Council of Civic Organizations of Brandywine Hundred, Inc. v. New Castle County*, 1993 WL 390543 (Del. Ch. 1993); *Admiral Holding v. Town of Bowers*, 2004 WL 2744581 (Del. Super. 2004).

The sixty days permitted under the statute have long since run. Applicant may not be added as a party.

In determining whether a party is indispensable and if so, what are the consequences of the failure to include the indispensable party, the Court must conduct the analysis required by Superior Court Civil Rule 19(b).

> (b) *Determination by Court whenever joinder not feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the Court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person
>
> being thus regarded as indispensable. The factors to be considered by the Court include: First, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Justice Hartnett (then Vice Chancellor) applied Chancery Court Rule 19(b)[2] in *The Council of Civic Organizations of Brandywine Hundred* case under facts that are basically identical to the present case. He ruled that a zoning applicant whose interests are directly impacted by any decision on appeal was an indispensable party under Rule 19(b) and since the applicant could not be joined because of 10 Del. C. §8126, the appeal was dismissed.

[2]Chancery Court and Superior Court Rule 19(b) are the same.

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Justice Jacobs (then Vice Chancellor), in applying Chancery Court Rule 19(b) and the aforementioned decision of Justice Hartnett, reached the same result, finding that the interest of those included in the appeal were not the same as those parties not included. *Southern New Castle County Alliance, Inc.,* 2001 (WL 855434). In other words, those parties included in the appeal would not necessarily protect the interest of those who were omitted. The appeal was dismissed. Id.

In the present case, neither the applicant, the L.L.C, nor the surveyor who initially filed the application, were included in the appeal. If the Davis family had included any of these entities, their hand would have been stronger.

The precedential value of the reasoning of Justice Hartnett is strong in light of the similarity of the facts of that case to the facts in the present case. Therefore, in adopting his reasoning and analysis of Rule 19(b), I find that this appeal must be dismissed due to the failure to name an indispensable party who cannot now be joined.

While the dismissal is unfortunate, the procedural rules must be followed.

Appellee's Motion to Dismiss is granted.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

THG:baj
cc: Prothonotary