IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

SWANN KEYS CIVIC ASSOCIATION, INC., ***Petitioner,***	:	
	:	**Civil Action No. 99A-12-004**
v.	:	
THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY AND MICHAEL SCHUCHMAN, ***Respondents.***	:	
	:	

MEMORANDUM OPINION

Date Submitted: January 3, 2001
Date Decided: January 23, 2001

Timothy G. Willard, Esquire, Fuqua and Yori, P.A., Georgetown, Delaware, Attorney for Petitioner.

John A. Sergovic, Jr., Esquire and Julie G. Bucklin, Esquire, Sergovic, Ellis & Shirey, P.A., Georgetown, Delaware, Dennis L Schrader, Esquire, Wilson, Halbrook & Bayard, P.A., Georgetown, Delaware, and Richard E. Berl, Jr., Esquire, Georgetown, Delaware, Attorneys for Respondents.

Motion for Reargument

BRADLEY, Judge

NATURE AND STAGE OF THE PROCEEDINGS

Respondent Michael Schuchman (hereinafter "Schuchman") filed a Motion for Reargument, pursuant to Superior Court Civil Rule 59(e), asking this Court to reconsider its decision of October 31, 2000 that reversed a decision of the Sussex County Board of Adjustment. This Court, pursuant to 9 Del. C. § 6918(e), held a hearing on January 3, 2001, to address the issues raised in Schuchman's motion. For the following reasons, this Court refuses to reverse its prior decision of Swann Keys Civic Association, Inc. v. Board of Adjustment of Sussex County and Michael Schuchman, Del. Super., C.A. No. 99A-12-004, Bradley, J. (Oct. 31, 2000) (Mem. Op.).

SCHUCHMAN'S ARGUMENTS

First, Schuchman contends that this Court failed to follow the precedence of Riedinger v. Board of Adjustment of Sussex County, Del. Super., C.A. No. 99A-03-003, Graves, J. (Sept. 26, 2000) in reversing the Board of Adjustment's ("Board") decision. He cites the following passage of Riedinger to support his contention that had this Court applied the statutorily required analysis of the Board's decision in the same manner it applied it in Riedinger, it would have upheld the Board's decision:

> Clearly, while the Board's conclusions could have been more fully developed, it is clear that the Board considered the necessary factors under the legal standard. Any failing of specificity on the Board's [part] finds adequate cure by a review of the record. Sufficient evidence is present in the record to support the requisite elements of the substantial practical difficulty test.

Id., at 16. Second, Schuchman argues that this Court was incorrect in finding that the Petitioner, Swann Keys Civic Association, Inc. (hereinafter "Association"), had standing to challenge the Board's decision.

Schuchman's argument against standing is based partly on the unusual factual situation of the development of the community of Swann Keys and the relation between the Association and the government of Sussex County. The original restrictions for Swann Keys required a seven foot side-yard setback. This was a private restriction that the Association, or individual homeowners themselves, would customarily have the authority to enforce. Later zoning laws enacted by the County, which were adopted by the Association in item 13 of the Swann Keys Rules and Regulations, mandated ten foot side-yard setbacks in residential areas. Schuchman argues that once the Board decided to grant the variance, the Association would have standing to enforce only the privately covenanted setback of seven feet – that is, that the Association has no interest (and is actually prevented from having an interest, based on the nature of the covenants, which have no amendment provisions) in enforcing the ten foot side-yard setback mandated by the County. However, the express adoption of the County's zoning regulations indicates the Association's intent to apply and enforce the County's 10 foot setback. Moreover, the Association does not merely passively enforce the County's setbacks, but actually requires the landowner to apply to the Swann Keys Zoning Committee in addition to the normal County procedures. The Association also promulgates its own set of building requirements. The mere fact that the privately created setbacks that run with the land are less restrictive than the County's setbacks does not preclude the Association from having an opportunity to challenge a variance that concerns one of the properties within the Swann Keys community.

ANALYSIS

A. The Board's decision was not supported by substantial evidence on the record.

This Court, after reviewing the parties' briefs and arguments presented at the January 3,

2001, hearing, refuses to reverse its decision that the Board's findings did not meet the requirements of 9 Del. C. § 6917(3) and that there is not substantial evidence on the record that would allow the Court to make its own findings adequate to meet the statutory requirements. As discussed in this Court's decision the findings of the Board were almost entirely unresponsive to the factors listed in 9 Del. C. § 6917(3). Also, as discussed on pages 5 through 7 of the previous opinion, there is evidence on the record that concerns only one or two of the statutory requirements. This evidence is not enough to support all five of the requirements, as mandated by the statute. While there may be enough facts in Schuchman's situation to allow for a variance, these facts simply are not present in the Board's findings or on the record.

Respondent's reliance on Riedinger is misplaced. This Court in Riedinger stated that the Board's lack of specificity found "adequate cure by a review of the record" and that there was "sufficient evidence . . . in the record to support the requisite elements of the substantial practical difficulty test." In the present case, this Court searched the record for any evidence that would support the five statutory requirements of 9 Del. C. § 6917(3) and failed to find enough evidence. B. Vassallo is the correct standard to use in this case.

The Association challenged the Board's decision in accordance with 9 Del. C. § 6918, which states that "any persons jointly or severally aggrieved by a decision of the Board of Adjustment" may petition the Superior Court describing how the decision is illegal. Schuchman argues that Association does not have standing to challenge the Board's decision because it is not "aggrieved." Schuchman also argues that the test for whether an organization has standing is set forth in the Oceanport case, which provides a three prong test for organizational standing. This Court, in its previous decision, concluded that the appropriate test for standing of civic

associations in zoning matters is found in Vassallo, which has a four part test adopted from a 1974 New York case, Douglaston Civic Association, Inc. v. Galvin, N.Y.Ct.App., 324 N.E.2d 317 (1974). These four factors are:

> (1) whether the organization is capable of assuming an adversary position in the litigation;
> (2) whether the size and composition of the organization indicates that it is fairly representative of the neighborhood;
> (3) whether full participating membership in the organization is available to all residents and property owners in the community; and
> (4) whether the adverse effect of the challenged decision on the group represented by the organization is within the zone of interests sought to be protected by the zoning law.

Vassallo, at 170. This Court adheres to its prior decision concluding that Vassallo is the proper test and finding Association had standing under a Vassallo analysis. Although this Court finds that even under the Oceanport test Association has standing, Vassallo is the more appropriate guide for this present situation. Vassallo has never been overturned and is still frequently cited by Delaware courts. See e.g., Bethany West Recreation Assoc. v. ECR Properties, Inc., Del. Ch., C.A. No. 1739-S, Chandler, V.C. (April 28, 1995), Hanley v. Wilmington Zoning Board of Adjustment, Del. Super., C.A. No. 99A-12-004-WTQ, Quillen, J., (Aug. 3, 2000) (Letter Op.). Furthermore, the facts of Vassallo closely match those of the present case – in particular, both concern civic associations and the challenge of a variance from a county zoning ordinance granted by a board of adjustment. By contrast, Oceanport concerns permit applications under the Coastal Zone Act where the challenger was a labor union. Finding no indication by the Delaware Supreme Court that Vassallo is no longer applicable, this Court chooses to adhere to the Vassallo test in its standing analysis because the facts of Vassallo closely match those of the

present case and the policy reasons that underlie Vassallo are pertinent to the present case.

C. Even if the Oceanport test were used in this case, the Association would be granted standing.

Although Oceanport provides an extended discussion of standing in general and organizational standing in particular, the Court finds that Vassallo is the more appropriate test to use in the situation presently before this Court for the following reasons. First, as discussed above, Vassallo is still good law and the facts are more similar to those in this case. Second, the statutes under which the organization in Oceanport sought standing are different from the statute under which the Association seeks standing. Moreover, the two statutes use different standards. The relevant statutes in Oceanport were 7 Del. C. §§ 6008 and 7210, which state that an appellant must have "1) an interest that is 2) *substantially affected* by an action of the Secretary or the DNREC." Oceanport, 636 A.2d 892, 899 (emphasis added). By contrast, appeals from the Board of Adjustment are controlled by 9 Del. C. § 6918, which states that a person may appeal a decision of the Board if he or she is *aggrieved*. The Court in Oceanport, a 1994 decision, noted that it was considering "a case of first impression" and found that the standing question is based entirely on the statute, thus indicating that it viewed the issue it was deciding as being different from standing decisions, including Vassallo, that it had issued previously.

Even if the organizational standing test in Oceanport is general enough to apply to all standing questions, the record before the Board and the hearing held by this Court provide adequate evidence to find that the Association has standing to bring this challenge. The first prong of the test "requires only mere pertinence between the litigation subject and organizational

purpose." Oceanport, 636 A.2d at 902 (internal quotations omitted). This is a "weak standard, barring only those whose litigation goals and organization's purpose are *totally unrelated*." Id. (emphasis in original). In the present matter, Schuchman argues that the purpose of the Association is to maintain common areas of the community, not to bring lawsuits. Yet, the Association is plainly concerned with the aesthetic appearance of and quality of life in its community and therefore has a direct interest in zoning decisions that affect its community.

The second prong of Oceanport asks whether the organization's members are required to participate in the legal proceedings. I find that the Association meets this second test as well. Its members do not need to participate, since all that is ultimately being challenged is the soundness of the Board's decision, an issue that does not require any individual to be present.

Likewise, the Association meets the third prong of Oceanport which "requires that the organization's members also have standing." Id. at 902. Because the residents of Swann Keys, who individually would have standing to challenge the variance, comprise the membership of the Association, the Association meets the third prong of the Oceanport test.

CONCLUSION

For the foregoing reasons, this Court adheres to its prior decision that the Association has standing to challenge the variance in Superior Court and that the record fails to provide substantial evidence to support the statutory requirements of 9 Del. C. § 6917(3).

E. Scott Bradley

Dated: January 23, 2001