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Commonwealth of Massachusetts
County of Nantucket
The Superior Court

CIVIL DOCKET# NACV2007-00018

Ward et al,
Plaintiff(s)
vs
Nantucket Board of Selectmen et al,
Defendant(s)

JUDGMENT ON MOTION TO DISMISS
(Mass.R.Civ.P. 12b)

This action came on for hearing before the Court, Christine M. McEvoy upon the Defendant's, George Kenny, motion to dismiss pursuant to Mass. R.Civ.P. 12(b), and upon consideration thereof,

It is **ORDERED** and **ADJUDGED**:

That the Complaint of the plaintiff (s), Timothy D. Ward, Alison B. Ward is hereby dismissed against the defendant (s), Nantucket Board of Selectmen, Nantucket Historic District Commission, George Kenny.

Dated at Nantucket, Massachusetts this 7th day of December, 2007.

By: 
Clerk

Entered: 12/7/07

Copies mailed 12/07/2007

#16

COMMONWEALTH OF MASSACHUSETTS

NANTUCKET, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 07-0018-A

FILED

DEC 07 2007

NANTUCKET SUPERIOR COURT CLERK

TIMOTHY D. WARD & another¹

vs.

BOARD OF SELECTMEN OF NANTUCKET & others²

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION TO DISMISS

Plaintiffs, Timothy D. Ward and Alison B. Ward, have appealed under M. G. L. c. 40C, § 12 from the decision of the Board of Selectmen, affirming the Nantucket Historic District Commission's (the "HDC") decision to issue a Certificate of Appropriateness to the Defendant, George Kenny (defendant or "Kenny"). Kenny now moves to dismiss plaintiffs' amended complaint on the grounds that they have failed to state a claim upon which relief can be granted pursuant to Mass. R. Civ. P. 12(b)(6) and because this court lack subject matter jurisdiction pursuant to Mass. R. Civ. P. 12(b)(1).³ The HDC and the Board of Selectmen join in Kenny's motion.⁴ For the reasons set forth below, the defendants' motion to dismiss is hereby

ALLOWED.

COPY

¹ Alison B. Ward

² Historic District Commission and George Kenny

³ The plaintiffs also filed a Motion to Amend their First Amended complaint, effectively seeking to file a Second Amended Complaint. Kenny has opposed this motion on the ground of futility. The court denies the plaintiffs' motion because, as discussed in the text of this memorandum, the new complaint does not allege any harm to the plaintiffs that the Enabling Act was intended to address. Ginther v. Comm'r of Insurance, 427 Mass. 319, 323 (1998) ("[F]or the plaintiff to have standing, the injury alleged must fall 'within the area of concern of the statute or regulatory scheme under which the injurious action has occurred'" (citations omitted). Therefore, the Second Amended Complaint fails to properly allege that the Wards have standing as aggrieved persons.

⁴ The Municipal defendants have also filed a Mass. R. Civ. P. Rule 56(c) request. However, this request is improper as there was no summary judgment motion before the court. Therefore, this request is premature and the court need not address it.

STATUTORY AND REGULATORY FRAMEWORK

In 1970, the Legislature enacted St. 1970, c. 395 (the “Enabling Act”). The Enabling Act designated the entire island of Nantucket as a historic district and created the Nantucket HDC. St. 1970, c. 395, §§ 3, 4. The Enabling Act provides the HDC with broad authority to “pass upon the appropriateness of exterior architectural features of buildings and structures hereafter to be erected, reconstructed or restored [in Nantucket] wherever such exterior features are subject to public view from a public street or way.” *Id.* at § 9(a). Accordingly, the Enabling Act requires the HDC first approve any construction or alteration of a building on Nantucket, as evidenced by a certificate of appropriateness issued by the HDC. *Id.* § 5.

The Enabling Act explicitly limits the HDC’s authority to “preventing developments obviously incongruous to the historic aspects of the surroundings and the Historic Nantucket District.” St. 1970, c. 395 as amended by St. 2000, c. 57, § 3(c). As such, the HDC may not consider “interior arrangement or building features not subject to public view.” *Id.*

Pursuant to the Enabling Act, the HDC has issued an Abutter Notification Policy which provides that abutters shall have notice of all applications “which would result in a change of one thousand square feet (1,000) or more of floor area . . .” (Def.’s Mem. Supp. Mot. to Dismiss, Ex. B) [hereinafter HDC Policy]. Abutters are permitted to “comment on an application.” *Id.* This policy also notes that the HDC only has authority to address issues within its statutory mandate. *Id.*

“[A]ny person aggrieved” by a ruling of the HDC may appeal to the Board of Selectmen. In turn, the HDC or any person aggrieved by a decision of the Board may, within 15 days, appeal such decision to the Superior Court. St. 1970, c. 395, § 12.

BACKGROUND

In July 2006, Kenny sought approval from the HDC to build an addition to his home located at 4 Stone Barn Way. The addition would expand the existing building by 902 square feet (the "Addition Project"). The plaintiffs, Kenny's next door neighbor, did not receive notice of the Addition Project and in September 2006, the HDC approved the project. Subsequently, the Nantucket Conservation Commission ordered Kenny to raise the addition 16-18 inches to comply with Zoning By-Laws provisions for a Flood Hazard District. In December 2006, Kenny sought approval from the HDC to raise both the original structure and the planned addition by 16 to 18 inches (the "Elevation Project")⁵. The Wards received notice of the Elevation Project and challenged it. The Wards also sought reconsideration of the HDC's earlier approval of the Addition Project but were precluded from addressing the issue because the date to appeal had passed. Subsequently, the HDC approved the Elevation Project. The Wards appealed to the Board of Selectmen, which affirmed the HDC's decision.

DISCUSSION

When evaluating the sufficiency of a complaint pursuant to Mass. R. Civ. P. 12(b) (1) or (6), the Court must accept as true the well-pleaded factual allegations of the complaint, as well as any reasonable inferences which can be drawn therefrom in the plaintiff's favor. Ginther v. Comm'r of Insurance, 427 Mass. 319, 322 (1998), citing Nader v. Citron, 372 Mass. 96, 98 (1977). Under Rule 12 (b)(6), the "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Nader, 372 Mass. at 98, quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957). All inferences should be drawn in the plaintiffs favor, and the complaint "is to

⁵ Kenny's original application stated that the addition would have the same roof ridge line as the existing structure. To comply with this requirement and the Zoning By-Laws, Kenny had to raise the existing structure 16-18 inches to match the addition.

be construed so as to do substantial justice . . .” Ourfalian v. Aro Mfg. Co., 31 Mass. App. Ct. 294, 296 (1991).

1. The Plaintiffs lack standing to challenge the Board of Selectmen’s decision

The plaintiffs’ claim must fail because they lack standing to challenge the Board of Selectmen’s decision. Massachusetts courts have held that standing is an issue of subject matter jurisdiction. Ginther, 427 Mass. at 322. Under the Enabling Act, “any person aggrieved” by the HDC’s decision may appeal to the Board, and if still aggrieved, to the Superior Court. In order to qualify as a “person aggrieved,” there must be an allegation of a substantial injury as the direct result of the action complained of. Id. The injury must be a direct consequence of the complained of action and must fall within the area of concern of the statute or regulatory scheme under which the injurious action has occurred. Id. at 323. In this case, the plaintiffs have failed to allege any direct injury as a consequence of the Addition or Elevation Projects, much less one that falls within the area of concern of the Enabling Act. As such, the plaintiffs lack standing to obtain judicial review of the approval of the Addition and the Elevation Projects.

Moreover, because of the limited scope of the HDC’s mandate, the plaintiffs cannot allege the type of injury that would give rise to standing. A person aggrieved is one whose legal rights have been infringed and “the injury alleged must ‘fall within the area of concern of the statute or regulatory scheme.’” Ginther, 427 Mass. at 323 (citations omitted). “The rights intended to be created [by the Enabling Act] must bear a rational relation to the situation and use of the plaintiff’s property.” Circle Lounge and Grille v. Board of Appeal of Boston, 324 Mass. 427, 431 (1949). In this case, the plaintiffs rely on the Enabling Act that expressly limits the HDC’s scope to the aesthetics of a proposed project when viewed from a public way and its impact on the existing historic and natural context. The Enabling Act also states that the HDC

“shall not consider interior arrangement or building features not subject to public view.” St. 1970, c. 395, as amended by St. 2000, c. 57, § 3(c). Additionally, the Abutter Notification Policy, on which the plaintiffs also rely, specifically states that “impacts on private properties” are outside the HDC’s purview. HDC Policy. Thus, any harm that the plaintiffs may allege to their property falls outside the purview of the Enabling Act’s narrow statutory mandate.

Finally, to the extent that the plaintiffs assert standing based on their notification of the Elevation Project and participation in HDC proceedings regarding the project, such argument must fail. “Mere participation in the administrative process does not confer standing to raise a claim in the Superior Court.” Ginther, 427 Mass. at 324. Rather, general standing principles still hold. Id. at 323-324, quoting Slama v. Attorney Gen., 384 Mass. 620, 624 (1981) (“To have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury.”). Therefore, the plaintiffs have not shown that they have standing to bring the present action to this court.

2. The Plaintiffs have failed to identify a recognizable property interest to support their Due Process Claim.

Even if the plaintiffs did have standing to challenge the Board of Selectmen’s decision, their claim must fail as they have not alleged facts sufficient to support their due process claim. The plaintiffs’ procedural due process claim fails because they do not identify a protected property interest. “Where the plaintiffs claim that a denial of procedural due process deprived them of property, they must show first that the property interest that they claim was one to which they had an entitlement.” Liab. Investigative Fund Effort, Inc. v. Mass. Med. Prof’l. Ins. Ass’n., 418 Mass. 436, 443 (1994). If the plaintiff identifies a protected property interest, then the court will consider whether they were deprived of procedural protections. See id. at 443-444. In this case, the plaintiffs do not state any property interest that would give rise to due process

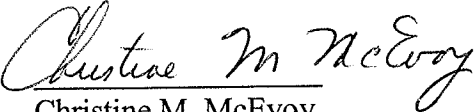
protections, nor do they establish a specific government benefit to which they had a legitimate claim of entitlement. See Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

Here, the plaintiffs' claim rests entirely on their assertion that they should have received notice of and the right to appeal the Addition Project. However, "[p]rocess is not an end itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." Olin v. Wakinekona, 461 U.S. 238, 250 (1983).⁶ Thus, procedural due process is not triggered unless the plaintiffs can identify how the alleged lack of notice deprived them of a cognizable property interest, which they fail to do. See Mathews v. Eldridge, 424 U.S. 319 (1976) (recognizing property interest in certain employment circumstances); Bell v. Burson, 402 U.S. 535 (1971) (recognizing property interest in driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (recognizing property interest in welfare benefits).

ORDER

For the reasons stated above, the defendants' motion to dismiss is hereby **ALLOWED**.

By the Court,


Christine M. McEvoy
Justice of the Superior Court

DATED: December 6, 2007

⁶ The plaintiffs' claim that there was a defective notice is questionable because the notice policy is only a policy and not a statutory requirement. Also the policy applies only to changes more than 1,000 square feet and here the addition was less than that.