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IN THE COURT OF APPEALS OF INDIANA

Lockerbie Glove Company Town Home Owner's Association, Inc., Elliot J. Serena Androphy, Cherri D. Hobgood, Sashwati Roy, Chandan K. Sen, and Brian Edward West,

Appellants-Plaintiffs,

v.

Indianapolis Historic Preservation Commission, Daniel C. Jacobs, and The Athenaeum Foundation, Inc.,

Appellees-Defendants.

August 30, 2022

Court of Appeals Case No. 22A-PL-204

Appeal from the Marion Superior Court

The Honorable John F. Hanley, Special Judge

Trial Court Cause No. 49D11-2104-PL-14004

Tavitas, Judge.

Case Summary

[1] This is the second appeal stemming from the Indianapolis Historic Preservation Commission's ("Commission") grant of a certificate of appropriateness ("COA") for construction of a retail, residential, and parking project known as "Block 20" in the Lockerbie Square Historic District in Marion County. After an initial appeal in which the grant of the COA was affirmed, the local homeowner's association ("HOA") and six residents of nearby townhomes (collectively "Appellants") sought declaratory and injunctive relief to halt construction of Block 20. The trial court granted a motion for judgment on the

pleadings on the basis of Appellants' lack of standing. Concluding that Appellants lack the necessary standing, we affirm the ruling of the trial court.

Issue

[2] We find a single, threshold issue to be dispositive: whether Appellants had standing to seek declaratory and injunctive relief.

Facts

Prior Litigation

[3] We recall the facts of this case—outlined in our previous opinion—as follows:

> In 2001, the Athenaeum Foundation acquired property at 428 N. East Street and sought from the Commission a certificate of appropriateness[1] that would allow it to demolish the building then existing on that property and turn the property into a paved

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[1] Such a certificate is required for construction in historic areas in Marion County and is defined as follows:

> (a) If the commission determines that the proposed construction, reconstruction, alteration, or demolition will be appropriate, the secretary of the commission shall forthwith issue to the applicant a certificate of appropriateness.
>
> (b) The commission may impose any reasonable conditions, consistent with the historic preservation plan, upon the issuance of a certificate of appropriateness, including the requirement of executing and recording covenants or filing a maintenance or performance bond. If the commission determines that a certificate of appropriateness should not be issued, the commission shall forthwith place upon its records the reasons for the determination and may include recommendations respecting the proposed construction, reconstruction, alteration, or demolition. The secretary of the commission shall forthwith notify the applicant of the determination transmitting to the applicant an attested copy of the reasons and recommendations, if any, of the commission.
>
> (c) A final determination of the commission upon an application for certificate of appropriateness is subject to judicial review in the same manner and subject to the same limitations as a final decision of a board of zoning appeals under IC 36-7-4. However, notwithstanding IC 36-7-4-1609, upon notice of the filing of the petition for judicial review, all proceedings and work on the subject premises are automatically stayed.

Ind. Code § 36-7-11.1-10.

surface parking lot. The property in question is part of the Secondary Area of the Lockerbie Square Historic District, bounded on the west by Cleveland Street, on the north by Michigan Street, on the east by East Street, and on the south by Allegheny Street. The People's Club supported the Athenaeum's request to demolish the building, but opposed the property being used as a parking lot on a long-term basis as the historic plan's recommended land use for the property was residential. The Commission issued the certificate of appropriateness . . . . [ ]

[ ] On April 28, 2016, Dan Jacobs submitted an application for a certificate of appropriateness for the Block 20 project on the property. The application describes the project as a "229 space parking garage, wrapped with 67 apartment units," with retail space on the first floor. Jacobs held several meetings with Commission staff members, appeared at two preliminary review hearings, and made numerous changes to the plans in response to concerns voiced by the Commission and community members. By the time of the final hearing, the plans called for a five-story, multi-use building with sixty-seven apartment units, retail and gallery space on the first floor, a roof deck, and 261 internal parking spaces, including sixty-seven spaces for residents and 194 spaces for the public. The final hearing was scheduled for August 3, 2016.

On July 27, 2016, the Remonstrators[2] submitted a letter to the Commission outlining their objections to the project. The Remonstrators are all residents of the Lockerbie Glove Factory Town Homes, fifty-eight single family homes adjacent to the proposed development by virtue of being situated on the east side of East Street. [ ] The Remonstrators raised several objections to Jacobs' application for certificate of appropriateness, including:

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[2] This term refers to those challenging the building project, a group with significant overlap to Appellants in the case at bar.

1) that the covenant prohibits anything other than residential use on the property; 2) the project violates the historic plan in multiple ways; 3) the project will increase noise in certain areas; 4) the project will adversely affect traffic on East Street; and 5) "[s]ome parts of the so-called residential portion of the development seem more like short-term leasing, which fits more the description of a hotel . . . ."

At the final hearing on August 3, 2016, the People's Club voiced its "strong support" of the project. The Remonstrators, represented by James Gilday, Treasurer of the Glove Factory HOA, spoke in opposition to the application, raising as their "main point" the multiple violations of the historic plan. The Remonstrators asked the Commission to "fulfill its duty to enforce the historic plan and disregard all other considerations to the contrary by rejecting this proposal." A Commission staff member then addressed the Commission:

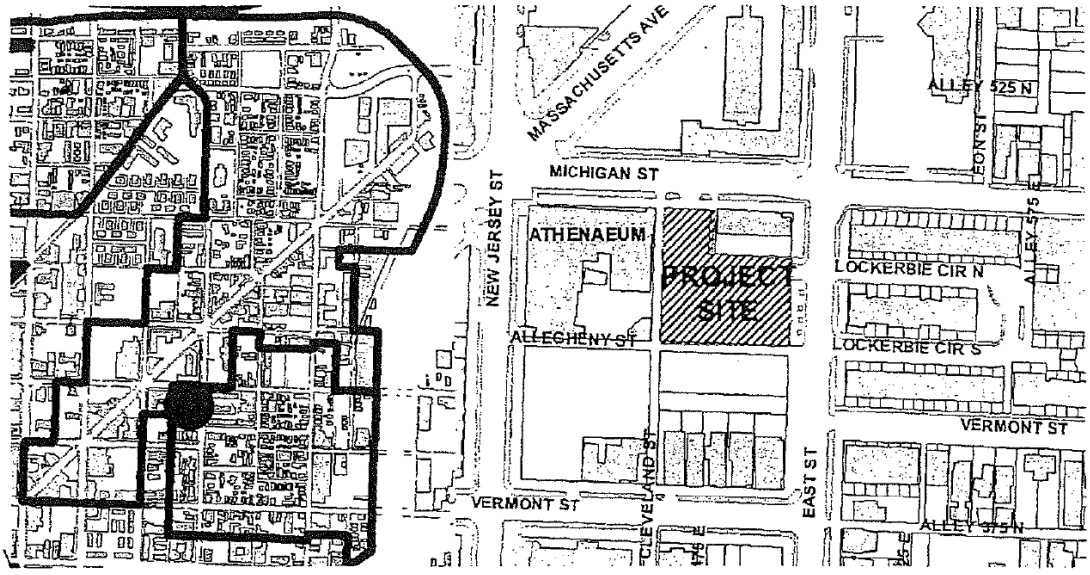
> We've had probably a dozen meetings on this project over the last couple of months. And I think the comment that was made earlier about the design evolving for the better, staff would agree with that. And in addition to what's in the staff report, I would like to address some of the comments that were just made . . . . I would like to reiterate that the Lockerbie Square [historic] plan is a set of recommended guidelines for any project. Staff is not aware of anything in the plan being necessarily [a] requirement, so that somebody would be in violation of if they didn't comply with that, but rather a set of guidelines to direct staff in making a recommendation on the proposed design, which is what we did in the staff report.

> Commission staff recommended the application for a certificate of appropriateness be approved, and the recommendation was approved by the Commission five to one. [ ]
>
> The Remonstrators then filed a petition for judicial review in Marion Superior Court. [ ] After briefing and oral argument on the petition for judicial review, the trial court issued its Findings of Fact, Conclusions of Law and Judgment denying the Remonstrators' petition and affirming the Commission's award of a certificate of appropriateness:
>
> > After the multiple hearings, the [Commission], in its expert discretion, voted to issue the Certificate of Appropriateness to Jacobs. [The Remonstrators'] arguments are generally invitations to reweigh the evidence properly considered by the [Commission], which this Court declines to do. [The Remonstrators] have not carried their heavy burden of proving that the [Commission's] decision in this matter was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or unsupported by substantial evidence.

Lockerbie Glove Factory Town Home Owners Ass'n, Inc. v. Indianapolis Historic Pres. Comm'n, 106 N.E.3d 482, 486 (Ind. Ct. App. 2018) (internal citations omitted).

On appeal, we affirmed the trial court.

[4] We create the relevant area here:



Location at border between Lockerbie Square and Chatham-Arch & Mass Ave.

Appellant's App. Vol. II p. 59.

Present Litigation

[5] The dispute concerning Block 20 continues. After we affirmed, Appellants filed a Verified Complaint for Declaratory and Injunctive Relief on April 26, 2021. Appellants claimed that the construction of Block 20 did not match the COA, that the COA had expired without being properly extended, and that these defects were in violation of Indiana statutes governing historic preservation. Specifically, Appellants alleged:

> [Appellants] are interested and affected parties who have private rights and are authorized to and [sic] bring this action, among other authority, pursuant to Indiana Code ("IC") §§ 36-7-1-1.1-12(b), as well as §§ 36-7-113-58 and 36-7-1 1.3-5(7) and (8).

* * * * *

> [Appellants] have been damaged as a result of [the Commission's] unlawful actions.

Appellant's App. Vol. II pp. 29, 45. The complaint did not specify how Appellants had been damaged.

[6] Appellees[3] filed a motion for judgment on the pleadings on July 30, 2021. Specifically, the motion asserted that Appellants failed to allege a concrete injury and, thus, lacked standing. Appellants conceded that they did not allege any specific injury but contended that they were not legally required to do so. After a series of discovery disputes not pertinent to the present appeal, the trial court eventually—on December 29, 2021—granted Appellees' motion for judgment on the proceedings. This appeal ensued.

Discussion and Decision

[7] Appellants argue that the trial court erred in granting Appellees' motion for judgment on the pleadings. "Like a motion to dismiss for failure to state a claim pursuant to Trial Rule 12(B)(6), a motion for judgment on the pleadings under Trial Rule 12(C) tests the sufficiency of the complaint to state a redressable claim, not the facts to support it." *Circle Ctr. Dev. Co. v. Y/G Indiana, L.P.*, 762 N.E.2d 176, 178 (Ind. Ct. App. 2002) (citing *Book v. Hester*, 695 N.E.2d 597, 599 (Ind. Ct. App. 1998); *Nat'l R.R. Passenger Corp. v. Everton by Everton*, 655 N.E.2d

[3] Appellees are the Indianapolis Historic Preservation Commission, Daniel C. Jacobs, who proposed the Block 20 project, and The Athenaeum Foundation, Inc., who owns the property.

360, 363 (Ind. Ct. App. 1995)). "A judgment on the pleadings is proper only when there are no genuine issues of material fact and when the facts shown by the pleadings clearly entitle the moving party to judgment." *Id*. (citing *Bledsoe v. Fleming*, 712 N.E.2d 1067, 1069 (Ind. Ct. App. 1999)). "A trial court should grant such a motion only when it is clear from the pleadings that the non-moving party cannot in any way succeed under the facts and allegations therein." *Id*. "In reviewing a trial court's decision on a motion for judgment on the pleadings this court conducts a de novo review." *Id*. (citing *Eskew v. Cornett*, 744 N.E.2d 954, 956 (Ind. Ct. App. 2001), *trans. denied*). "We look only to the pleadings in making this assessment. We will accept as true the well-pleaded material facts alleged. The moving party is deemed to have admitted well-pleaded facts in favor of the nonmovant, and this court will draw all reasonable inferences in favor of the nonmovant." *Id*. (internal citations omitted).

[8] A trial court may grant a motion for judgment on the pleadings if the party bringing the action lacks standing to do so. *See, e.g., Midwest Psychological Ctr., Inc. v. Ind. Dep't of Admin.,* 959 N.E.2d 896, 909 (Ind. Ct. App. 2011). Because standing is a "threshold issue," *Solarize Ind., Inc. v. S. Ind. Gas & Elec. Co.*, 182 N.E.3d 212, 216 (Ind. 2022), we address it first. We conclude that the Appellants lack standing, and thus, the issue is dispositive.

[9] Standing "determines whether a litigant is entitled to have a court decide the substantive issues of a dispute." *Solarize*, 182 N.E.3d at 216; *see also City of Gary v. Nicholson*, 190 N.E.3d 349 (Ind. 2022); *Serbon v. City of E. Chicago*, No. 21A-

PL-1046, 2022 WL 3348998 (Ind. Ct. App. Aug. 15, 2022). To be entitled to such a substantive judicial decision, "a plaintiff must be a 'proper person' to invoke the court's authority." *Solarize*, 182 N.E.3d at 216. (quoting *Horner v. Curry*, 125 N.E.3d 584, 589 (Ind. 2019)). In order to have a justiciable dispute, Appellants must have standing. *Nicholson*, 190 N.E.3d at 351.

[10] Indiana courts have recognized four types of standing: (1) common-law standing, sometimes referred to as judicial standing or constitutional standing; (2) public standing; (3) the related concept of taxpayer standing; and (4) statutorily defined standing. *See, e.g.*, *Serbon* at *5. Appellants only argue that they possess statutory standing. Specifically, Appellants argue that they have standing on the basis of Indiana Historic Preservation Statutes: Indiana Code Sections 36-7-11, 36-7-11.1, and 36-7-11.3. Appellants claim to be "interested parties or persons by virtue of their ownership and/or occupation of LS District real estate 'to a depth of two (2) ownerships of the perimeter of the [Subject Real Estate]. I.C. § 36-7-1 1.3-5(7).'" Appellants' Br. p. 27. Appellants assert that they have not alleged any specific injuries because: "The reason is simple - there is no such legal requirement." *Id*.

[11] Appellees argue that Appellants have "failed to demonstrate how any of Appellees' alleged actions have affected them in any way, let alone subjected them to a constitutionally cognizable injury." Appellees' Br. p. 21. Appellees further contend that, "even when the legislature creates a statutory protection and authorizes a plaintiff to sue a defendant to vindicate that protection, that is not enough to create standing by itself." *Id*. at 23. Finally, Appellees assert that

"Appellants failed to show how the mere alleged statutory violations caused them *any* injury—and it was their burden to do so." *Id*. at 27 (emphasis in original).

[12] Appellants' arguments with respect to standing require us to rely upon our well-established canons of statutory construction, which we recite as follows:

> Words are to be given their plain, ordinary, and usual meaning, unless a contrary purpose is shown by the statute or ordinance itself. Where possible, every word must be given effect and meaning, and no part is to be held meaningless if it can be reconciled with the rest of the statute. The goal in statutory construction is to determine and effect legislative intent. Courts must give deference to such intent whenever possible. Thus, courts must consider the goals of the statute and the reasons and policy underlying the statute's enactment. If the legislative intent is clear from the language of the statute, the language prevails and will be given effect.

Minser v. DeKalb Cnty. Plan Comm'n, 170 N.E.3d 1093, 1100 (Ind. Ct. App. 2021) (quoting *Rollett Fam. Farms, LLC v. Area Plan Comm'n of Evansville-Vanderburgh Cnty.*, 994 N.E.2d 734, 738 (Ind. Ct. App. 2013)).

[13] Appellants' primary argument concerning standing derives from Indiana Code 36-7-1-21 which defines "interested party" for purposes of general historic preservation in the State of Indiana. Appellants correctly concede, however, that the statute is inapplicable to Marion County, which has its own statutes governing historical preservation. *See* Appellants' Br. pp. 23-24 ("Although the City of Indianapolis and Marion County are exceptions, and the General

Historic Preservation Statute ostensibly does not apply there, does not mean that the provisions in Ch.11, analogous or otherwise, are not instructive . . . ."). Appellants further concede that they "did not allege standing as an interested party under the General Historic Preservation Statute." *Id*. at 24.

[14] Indiana Code Chapter 36-7-11.1 governs historic preservation in Marion County. Appellants allege that Appellees are in violation of Chapter 11.1. Indiana Code Section 36-7-11.1-12(b) provides:

> The commission, or any enforcement official of the consolidated city designated by the commission, may enforce this chapter, any ordinance adopted under it, and any covenants or conditions required or imposed by the commission by civil action in the circuit or superior court. Any legal, equitable, or special remedy may be invoked, including mandatory or prohibitory injunction or a civil fine. These enforcement actions (except those seeking a civil fine) may also be brought by *any interested person* or affected owner.

(emphasis added).

[15] Appellants argue that: (1) this section provides for a private right of action[4]; and (2) they are interested persons for purposes of bringing such an action. Chapter

[4] When a civil cause of action is premised on an alleged violation of a duty imposed by statute, we must first determine whether the statute in question confers a private right of action. *Roberts v. Sankey*, 813 N.E.2d 1195, 1198 (Ind. Ct. App. 2004). This determination begins with an examination of legislative intent. *Id.* "This primarily includes looking to whether the statute is designed to protect the general public and whether the statutory scheme contains an enforcement mechanism or remedies for violation of the duty." *Id.* It seems plausible that by including a mechanism for enforcing the Marion County preservation statutes, the legislature did indeed intend to create a cause of action for "interested persons." We need not definitively decide this question, however, as we explain *supra*, and, accordingly, leave it expressly for another day.

11.1 does not define "interested person." Appellants contend that the definition is to be found in Chapter 11.3, which provides rules for "Municipal Preservation." We note that the section that Appellants point to defines "interested party" rather than "interested person." Indiana Code Section 36-7-11.3-5 provides in pertinent part: "As used in *this chapter*, 'interested party' means . . . [e]ach owner or occupant owning or occupying primary or secondary property to a depth of two (2) ownerships of the perimeter of the property." Thus, Appellants argue that we should apply the definition for "interested party" found in Chapter 11.3 as the meaning of "interested person" in Chapter 11.1.

[16] Appellants also argue that, in an effort to harmonize the statutes with the inapplicable General Historic Preservation Statute, we should conclude that Appellants have "a private right of action to enforce and prevent violation of a provision of *this chapter* or an ordinance adopted by a unit under *this chapter*," Ind. Code § 36-7-11-21(b) (emphases added); and that "the interested party does not have to allege or prove irreparable harm or injury to any person or property to obtain relief under this section." I.C. § 36-7-11-21(c). If we are to accept Appellant's argument, the fact that they have alleged no injury below is of no moment because, as they claim, "there is no such legal requirement." Appellants' Br. p. 27.

[17] An allegation of injury to the party invoking standing is a constitutionally irreducible minimum requirement. *See Nicholson*, 190 N.E.3d at 352 ("Indiana law is clear that standing requires an injury[.]"). Even if we were to accept

Appellants' re-arranging of the statutory deck chairs in an attempt to import definitions from one Chapter of the Code to another, they are not exempt from the dictates of the Indiana Constitution. *See also id.* at *2 ("'[A] person lawfully domiciled in Indiana' may have a statutory cause of action. But this does not mean the person has necessarily sustained an injury essential to obtaining judicial relief."). Chapter 11.1 does not mention standing or injury. And Appellants concede that they have not alleged an injury.

[18] As our Supreme Court stated in *Nicholson*:

> Indiana law is clear that standing requires an injury. *See, e.g., Holcomb v. Bray*, 187 N.E.3d 1268, 1286 (Ind. 2022) (citing *Solarize Indiana, Inc. v. Southern Indiana Gas and Elec. Co.*, 182 N.E.3d 212, 217 (Ind. 2022)). But the plaintiffs, acknowledging they have alleged no injury, argue instead that lack of injury is "irrelevant" here because they have statutory and public standing. We disagree. Because the plaintiffs allege no injury, there is no justiciable dispute.

Id. at 351; *see also TransUnion LLC v. Ramirez*, ___ US. ___, 141 S. Ct. 2190, 2205 (2021) (holding that merely because a statute grants a person a statutory right and authorizes a person to sue to vindicate that right does not grant to such a plaintiff automatic standing); *Raines v. Byrd*, 521 U.S. 811, 820 n.3, 117 S. Ct. 2312, 2318 (1997) (holding that a statute cannot eliminate "standing

requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing").[5]

[19] In their reply brief, Appellants make the following argument:

> The Legislature effectively defined historic preservation statute violation to be the injury to property for which there is a "remedy by due course of law." Ind. Const, Art. 1, § 12. There is no injury-in-fact requirement under the applicable Indiana Historic Preservation Statutes. To hold otherwise means this Court must rule that they, in particular Ch. 11.3-58(c), Ch. 11.1-12(b) and Ch. 11-21, are unconstitutional, and do so on its own volition, because Defendants failed to make this allegation below[6], or now walk the Court through the required analysis to overturn the Statutes -Ch's 11,11.1 and 11.3.
>
> The plain and ordinary meaning of the Indiana Historic Preservation Statutes is that Plaintiffs are exempt from any injury-in-fact requirement. Chapter 1 1.3-58(c) is unambiguous and means that interested parties or persons such as Plaintiffs are exempt from having to allege or prove irreparable harm or injury to them, any other person, their property or any other property.

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[5] We note here an interesting parallel found in another of our doctrines—that of justiciability—and relevant here, given the relief sought by Appellants:

> "In order to obtain declaratory relief, the person bringing the action must have a substantial present interest in the relief sought." *Hibler v. Conseco, Inc.*, 744 N.E.2d 1012, 1023 (Ind. Ct. App. 2001). "The basis of jurisdiction under the Declaratory Judgment Act is a justiciable controversy or question, which is clearly defined and affects the legal right, the legal status, or the legal relationship of parties having adverse interests." *Little Beverage Co., Inc. v. DePrez*, 777 N.E.2d 74, 83 (Ind. Ct. App. 2002).

Midwest Psychological Ctr., Inc. v. Indiana Dep't of Admin., 959 N.E.2d 896, 903 (Ind. Ct. App. 2011).

[6] There is, of course, no such requirement.

Appellant's Reply Br. p. 11 (emphasis in original).

[20] Thus, Appellants, apparently for the first time,[7] claim that they *have* suffered an injury, and then in the next breath assert that they are exempt from proving an injury. More importantly, however, we must reject the suggestion that requiring a showing of injury for standing purposes commits us to ruling that the statutes in question are unconstitutional. None of the relevant statutes are violative of Article 1, Section 12 of the Indiana Constitution. It does not follow from the fact that the remedies are unavailable to Appellants that the remedies do not exist.

[21] Appellants ask us to interpret Chapter 11.1 as granting standing to the undefined "interested person" even in the absence of injury. To do so would be to refashion our doctrines of justiciability into a spear aimed at the heart of the Distribution of Powers Article of the Indiana Constitution. Ind. Const. art. 3. *See also Nicholson*, 190 N.E.3d at 351-52; *Solarize*, 182 N.E.3d at 216 n.3 (holding that the legislature cannot expand—or restrict—beyond constitutional limits the class of persons who possess standing). This we decline to do. Neither can we conclude that the legislature intended to contravene the Indiana Constitution.

[22] Given that Appellants concede they alleged no injury below, and injury is a constitutionally minimum requirement to establish standing, we conclude that

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[7] "'[A]n argument raised for the first time in a reply brief is waived.'" *Kirchgessner v. Kirchgessner*, 103 N.E.3d 676, 682 (Ind. Ct. App. 2018) (quoting *U.S. Gypsum, Inc. v. Ind. Gas Co.*, 735 N.E.2d 790, 797 n.5 (Ind. 2000)).

the trial court did not err in granting Appellee's motion for judgment on the pleadings.

Conclusion

[23] The trial court did not err in granting Appellees' motion for judgment on the pleadings. We affirm.

[24] Affirmed.

Riley, J., and Mathias, J., concur.