NO. _____ TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

LOUIS CHERRY and MARSHA GORDON, Petitioners, v. GAIL WIESNER, CITY OF RALEIGH, AND RALEIGH BOARD OF ADJUSTMENT, Respondents.	)	From Wake County No. COA 15–155
CITY OF RALEIGH, A MUNICIPAL CORPORATION, Petitioner, v. RALEIGH BOARD OF ADJUSTMENT, LOUIS W. CHERRY, III, MARSHA G. GORDON, AND GAIL P. WIESNER, Respondents.	)	

****

GAIL WIESNER'S PETITION FOR DISCRETIONARY REVIEW

****

INDEX

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

NO. _____ TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

LOUIS CHERRY and MARSHA GORDON, Petitioners, v. GAIL WIESNER, CITY OF RALEIGH, AND RALEIGH BOARD OF ADJUSTMENT, Respondents.	)	From Wake County No. COA 15–155
CITY OF RALEIGH, A MUNICIPAL CORPORATION, Petitioner, v. RALEIGH BOARD OF ADJUSTMENT, LOUIS W. CHERRY, III, MARSHA G. GORDON, AND GAIL P. WIESNER, Respondents.	)	

****

GAIL WIESNER'S PETITION FOR DISCRETIONARY REVIEW

****

INTRODUCTION

This case involves the nationally publicized legal challenge to a modernist construction project in Raleigh's Historic Oakwood neighborhood.

Petitioner Gail Wiesner challenged Louis Cherry and Marsha Gordon's proposed construction project because, under applicable law, the design was incongruous with the Historic Oakwood neighborhood. Ms. Wiesner won at the Board of Adjustment level, but the Superior Court later dismissed her case for lack of standing.

In a published decision, the Court of Appeals affirmed, holding that Ms. Wiesner lacked standing. Ms. Wiesner now seeks review of that decision.

This case falls squarely within all three of the N.C.G.S. § 7A-31(c) criteria.

First, the public's interest in this case is extraordinary. The case has drawn intense, national media attention—from *The New York Times* to *The Boston Globe*. No case from the Court of Appeals in recent memory has attracted as much public interest. For this reason alone, this is a case that ought to be reviewed by our state's highest court.

Second, the Court of Appeals' decision clashes with this Court's leading precedents on land-use standing. In *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 669 S.E.2d 279 (2008), this Court reaffirmed a long line of its cases establishing the reduction-in-value rule: that when a proposed land-use project requires government approval, parties challenging that project can establish standing by showing a reduction in their property values. *Id.* In addition, this Court in *Mangum* relaxed the standard by allowing for land-use standing based on non-monetary effects. *Id.*

In the decision below, however, the Court of Appeals overturned this Court's reduction-in-value rule. It expressly held that a showing of a reduction in Ms. Wiesner's property value—a showing backed by two affidavits, including one from a state-certified real estate appraiser—was not enough. The Court of Appeals also adopted a brand-new, heightened standard for land-use standing that cannot be squared with this Court's teachings in *Mangum*. Unless Ms. Wiesner's petition is granted, this Court's precedent on these subjects is effectively a dead letter.

Third, the Court of Appeals' decision is significant to our state's jurisprudence in several respects. It has significant implications for the laws and policies that govern historic preservation. It also demonstrates, through its conflict with other decisions of the Court of Appeals, that there is a strong need to clarify the law in this area. Lastly, the jurisprudential significance of this case emanates from an issue that is critically important to all North Carolina citizens: access to the courts.

For these reasons, this case warrants discretionary review under N.C.G.S. § 7A-31(c).

STATEMENT OF FACTS

The Historic Oakwood Neighborhood

Raleigh's Historic Oakwood neighborhood is a state and national treasure. The entire neighborhood is listed on the National Register of Historic Places. It is also one of Raleigh's General Historic Overlay Districts. (R p 197).

Preserving the "historical heritage of our State" in neighborhoods like Historic Oakwood is a stated goal of the North Carolina General Assembly. N.C.G.S. § 160A-400.1 (2015). By definition, historic districts are "deemed to be of special significance in terms of their

history, prehistory, architecture, and/or culture," and should "possess integrity of design, setting, materials, feeling, and association." *Id.*

The General Assembly has explained that it is necessary to preserve these historic districts as a means of "stabiliz[ing] and increase[ing] property values." *Id.* This preservation, the legislature has determined, "strengthen[s] the overall economy of the State." *Id.*

In view of these important state objectives, buyers of properties in historic districts give up many of the traditional property rights that belong to those who buy property in ordinary neighborhoods. This is because the General Assembly has decided that the individual property rights of these buyers are secondary to the "education, pleasure, and enrichment of the residents of the city or county and the State as a whole"—goals that are achieved by preserving historic districts. *Id.*

One instance in which buyers of properties in historic districts relinquish some of their property rights is when it comes to new construction. Under state law, when property owners want to start a new construction project in historic districts like Historic Oakwood, their proposed projects must be reviewed and approved by special local government preservation commissions. N.C.G.S. § 160A-400.9 (2015).

In Raleigh, this special commission is the City's Historic Development Commission. The Historic Development Commission reviews each application for a construction project to determine whether its proposed design warrants a certificate of appropriateness; without the certificate, construction cannot begin. N.C.G.S. § 160A-400.8 and 400.9 (2015); Raleigh Unified Development Ordinance § 10.1.4. The Historic Development Commission uses a set legal standard: whether the proposed design is "congruous with the special character of the district." (R p 111); Design Guidelines for Raleigh Historic Districts § 1.2.

On the merits, Ms. Wiesner's legal challenge focuses on that issue: whether the modernist design of the Cherry-Gordons' construction project is "congruous with the special character of" Historic Oakwood.

The Parties' Dispute

Ms. Wiesner lives at 515 Euclid Street in Historic Oakwood. (R pp 383, 386). The Cherry-Gordons own the parcel directly across the street. *Id.*

In August 2013, the Cherry-Gordons submitted an application to the Historic Development Commission for a certificate of

appropriateness. (R pp 380–406). The application sought approval for a residential construction project with a modernist design in the middle of Historic Oakwood. (R pp 380–406).

Many residents of Historic Oakwood, including Ms. Wiesner, strongly objected to the proposed modernist design. (R pp 429, 432). They were (and are) confident that, under the law, the modernist design is not "congruous with the special character of [Historic Oakwood]." (R p 111); (R p 432).

The proposed construction project would also negatively impact Ms. Wiesner. The evidence before the Historic Development Commission showed that her home sits directly across from the Cherry-Gordons' property on a narrow street with no sidewalks and especially shallow setbacks. (R pp 384–89). As a result, the proposed modernist construction was less than *fifteen feet* from the curb. (R pp 385–86).

The Wiesner home has a wide front porch and many front windows, which offer her a view of the historic streetscape—one of the benefits of historic districts like Historic Oakwood. (R pp 385–86). Thus, the proposed modernist construction would have dominated the

view from Ms. Wiesner's front windows, front yard, and front porch with an incongruous structure. *Id.*

Furthermore, as Ms. Wiesner testified before the Historic Development Commission, the proposed project would cause a reduction in her property value. (R pp 432–33, 847–54).

Nevertheless, the Historic Development Commission approved the Cherry-Gordon's application to move forward with the modernist construction project. (R pp 453–95).

The Legal Proceedings Below

With the support of many other Historic Oakwood residents, Ms. Wiesner appealed the Historic Development Commission's decision to the Raleigh Board of Adjustment. (R pp 642–45).

Before the Board of Adjustment, Ms. Wiesner renewed her arguments that the modernist design of the construction project was not, under applicable law, "congruous with the special character of [Historic Oakwood]." (R pp 432–33, 847–54).

The Board of Adjustment agreed. (R pp 642–45). The Board reversed the Commission's decision and vacated the certificate of appropriateness. *Id.*

The Cherry-Gordons appealed the Board of Adjustment's decision to the Wake County Superior Court. (R p 64). Among their other contentions, the Cherry-Gordons argued to the Superior Court that Ms. Wiesner—their neighbor directly across the street—lacked standing to seek any relief at all.

In response to these arguments, Ms. Wiesner submitted two affidavits: her own affidavit, and an affidavit from Michael Ogburn, a real estate appraiser. (R pp 216–31).

Ms. Wiesner's affidavit described her own significant experience as a licensed real estate broker, as well as her experience with sales of properties in historic districts. (R pp 222–25) (attached as Exhibit B). She then described how the Cherry-Gordon's proposed construction would "adversely affect the monetary value of [her] property by at least several thousand dollars" because of the "loss in marketability and buyer interest." *Id.* ¶ 14.

Furthermore, her affidavit described the "significant increase in vehicle traffic from non-Oakwood residents" who had come to see "the modernist house built in a historic district without any other modernist homes." *Id.* at ¶ 12. It also described how this "additional traffic has

adversely impacted the value of [her] home in terms of quiet enjoyment and safety." *Id.*

Mr. Ogburn's affidavit, in turn, described his experience as a state-certified residential appraiser and managing partner of an appraisal firm that specializes in residential real estate appraisals. (R pp 226–31) (attached as Exhibit C). It described, and included, a market analysis showing that the Cherry-Gordon's modernist construction project would reduce Ms. Wiesner's property value between approximately 6% and 23%—a potential loss approaching $100,000. *Id.* ¶ 6.

Nevertheless, the Superior Court rejected Ms. Wiesner's affidavits and held that she lacked standing. The Superior Court reversed the Board of Adjustment and reinstated the certificate of appropriateness. (R pp 1257–64).

Ms. Wiesner appealed to the Court of Appeals. (R pp 1265–66). Meanwhile, the Cherry-Gordons assumed the risk of proceeding with construction on the property, knowing that if they lost on appeal, they would be required to demolish it. (R pp 1011, 1014).

In a 16 February 2016 decision (Stroud, J., with Calabria and McCullough, J.J.), the Court of Appeals affirmed the Superior Court and held that Ms. Wiesner lacked standing. *Cherry v. Wiesner*, No. COA15-155 (16 Feb. 2016) (hereafter "Slip Op.") (attached as Exhibit A).

As a result, the Court of Appeals declined to reach the merits. In other words, even though Ms. Wiesner *won* on the merits before the Board of Adjustment, the Court of Appeals held that she was not even entitled to seek relief in the first place.

Ms. Wiesner now seeks review of that decision.

REASONS WHY CERTIFICATION SHOULD ISSUE

I. THE PUBLIC'S INTEREST IN THIS CASE IS EXTRAORDINARY.

The public's interest in this case is much more than "significant." N.C.G.S. § 7A-31(c)(1). It is extraordinary.

State, national, and even international news media have reported—often continuously—on Ms. Wiesner's case. As U.S. News & World Report described it, this litigation "drew national attention."[1]

---

[1] U.S. NEWS & WORLD REPORT (Feb. 16, 2016), http://www.usnews.com/news/us/articles/2016-02-16/court-sides-with-owners-of-modern-house-in-historic-district .

In addition to countless state and local media pieces, this case drew mainstream and law-related media coverage from national outlets, including the following:

- *The New York Times*;
- *The Boston Globe*;
- *U.S. News & World Report*;
- *The Today Show*;
- *The ABA Journal*;
- *Huffington Post*;
- *Vanity Fair*;
- *The Rush Limbaugh Show*; and
- The United Kingdom's *Daily Mail*.[2]

---

[2] The NEW YORK TIMES (July 12, 2014), http://www.nytimes.com/2014/07/13/opinion/sunday/is-an-ugly-house-grounds-to-sue.html?_r=1

THE Boston GLOBE (Mar. 22, 2014), http://www.bostonglobe.com/news/nation/2014/03/21/modern-home-divides-historic-southern-neighborhood/p5vfaLHW42KrD6zbFI5xJI/story.html

U.S. News & WORLD REPORT (Feb. 16, 2016), http://www.usnews.com/news/us/articles/2016-02-16/court-sides-with-owners-of-modern-house-in-historic-district.

It is difficult to remember the last time a case from the North Carolina Court of Appeals drew as much national public interest as Ms. Wiesner's case.

For that reason alone, this is a case that ought to be reviewed by our state's highest court. N.C.G.S. § 7A-31(c)(1).

II. THE COURT OF APPEALS' DECISION CLASHES WITH THIS COURT'S LEADING LAND-USE PRECEDENTS.

This Court's decision in *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 669 S.E.2d 279 (2008), is the leading (and most recent)

THE Today SHOW (May 1, 2014), http://www.today.com/money/neighbors-want-architects-dream-home-torn-down-its-devastating-2D79606820.

THE ABA JOURNAL (July 16, 2014), http://www.abajournal.com/news/article/architects_home_sits_empty_after_unhappy_neighbor_wins_reversal_of_building/; (Feb. 18, 2016), http://www.abajournal.com/news/article/neighbor_didnt_have_standing_to_challenge_modern_house_in_historic_district.

HUFFINGTON POST (Aug. 25, 2014), http://www.huffingtonpost.com/j-michael-welton/nc-judge-hears-arguments_b_5709435.html.

THE Rush LIMBAUGH SHOW (Feb. 18, 2016), http://www.rushlimbaugh.com/daily/2016/02/18.

VANITY FAIR (Apr. 29, 2014), http://www.vanityfair.com/culture/2014/04/oakwood-teardown-historic-district.

THE DAILY MAIL (UK) (Aug. 28, 2014), http://www.abajournal.com/news/article/neighbor_didnt_have_standing_to_challenge_modern_house_in_historic_district.

case on land-use standing. The case involved three landowners—two next-door neighbors, and one "neighbor" over a half-mile away—who challenged the Raleigh Board of Adjustment's approval of a permit for a proposed adult establishment. *Id.* at 641, 669 S.E.2d at 281.

The sole issue before the Court in *Mangum* was if the Court of Appeals had erred by dismissing the neighbors' challenges for lack of standing. In a 6-to-1 decision, this Court reversed the Court of Appeals on that issue.

The *Mangum* Court began its analysis by drawing from the North Carolina Constitution's open-courts clause. *Id.* It then went on to hold that the neighbors had shown standing under a new, relaxed standard. *Id.* In doing so, this Court enunciated important legal principles, which are discussed below.

Now, eight years after this Court reversed the Court of Appeals in *Mangum*, the Court of Appeals has published an opinion in this case that collides with *Mangum* in at least two significant ways:

First, in *Mangum*, this Court reaffirmed a long line of its cases holding that when a proposed land-use project requires government approval, parties challenging that land-use project can establish

standing by showing a reduction in their property values. Now, however, the Court of Appeals says this is not enough.

Second, despite the *Mangum* Court's decision to adopt a relaxed standard for standing based on non-monetary effects, the Court of Appeals adopted a brand-new, heightened standard here—one that is even more strict than the pre-*Mangum* standard. Then, it used this new standard to deny Ms. Wiesner her day in court.

In these ways, the decision below effectively overrules this Court's leading land-use precedents.

A. The Court of Appeals' decision nullifies this Court's reduction-in-value rule—a rule that this Court has applied for nearly half a century.

This Court in *Mangum* reaffirmed a long line of its decisions establishing a bright-line rule: When a proposed land-use project requires government approval, parties challenging that land-use project can establish standing by showing a reduction in their property values. *Mangum* at 646, 669 S.E.2d at 284; *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 503, 434 S.E.2d 604, 610 n.4 (1993) (holding that "adjoining owners" can establish standing with "evidence of a reduction in their property values"); *Jackson v. Guilford County Bd. of*

Adjustment, 275 N.C. 155, 161, 166 S.E.2d 78, 82 (1969) (holding that if "the proposed use is unlawful, as where it is prohibited by a valid zoning ordinance, the owner of adjoining or nearby lands, who will sustain special damage from the proposed use through a reduction in the value of his own property, does have [ ] standing").

Mangum illustrates this reduction-in-value rule. The property owner in *Mangum* needed approval (a special use permit) before it could begin a project to put an adult establishment on its property. *Mangum* at 641, 669 S.E.2d at 281. The neighbors challenged this proposed land-use project as unlawful because, they contended, it did not comply with applicable zoning laws. *Id.* Therefore, to establish standing, they did not need anything more than a showing that their property value would be reduced.[3] *Mangum* at 643, 669 S.E.2d at 282 (quoting *Jackson* at 161, 166 S.E.2d at 82).

The decision below, however, eliminates the Court's longstanding reduction-in-value rule. Worse still, it does so under the same circumstances as in *Mangum*.

---

[3] Indeed, as described below, this Court held that they needed even less.

It is undisputed that the Cherry-Gordons needed approval (a certificate of appropriateness) from the City before they could begin any construction project on their property. N.C.G.S. § 160A-400.9 (2015). It is also undisputed that Ms. Wiesner challenged the proposed land-use project as unlawful because it did not comply with applicable zoning laws—namely, that the Cherry-Gordons failed to meet their burden of satisfying the congruity standard. Therefore, to establish standing under this Court's reduction-in-value rule, Ms. Wiesner did not need anything more than a showing that her property value would be reduced. *See supra* at 15-16.

Yet the Court of Appeals held otherwise. It held that, despite Ms. Wiesner's evidence of the reduction in her property value, this "diminution in value alone is *not* sufficient." (Slip Op. at 14) (suggesting, incorrectly, that this reduction in value is only "*part* of the basis for standing") (emphasis added). In a second part of its opinion, it further held that "allegations of a decrease in value alone are not sufficient."[4] *Id.* at 32. All of this is directly contrary to nearly a half

[4] The Court of Appeals appeared to justify its departure from the reduction-in-value rule by describing this case as a challenge to whether the Cherry-Gordons can "use the property for a single-family

century of this Court's precedent—beginning with *Jackson*, and restated most recently in *Mangum*.

In sum, the Court of Appeals' decision countermands this Court by eliminating the longstanding reduction-in-value rule. For this reason, the case warrants review under the "likely-in-conflict" provisions of N.C.G.S. § 7A-31(c)(3).

B. The Court of Appeals reversed this Court's relaxed standard in Mangum for assessing standing in land-use cases.

1. This Court in *Mangum* enunciated a relaxed standard for showing standing.

This Court in *Mangum* took great care to teach that when neighboring landowners bring land use challenges, the threshold for showing standing should be low.

The Court began its legal analysis in *Magnum* by reminding our lower courts that "[a]s a general matter, the North Carolina

---

residence"—a land-use that the Court noted was "clearly lawful." (Slip op. at 32).

This was a straw man. Ms. Wiesner has never challenged the mere fact that the Cherry-Gordons want to use their property for a single-family residence. Instead, like the neighbors in *Mangum*, she challenges whether the proposed land-use project is unlawful—specifically, that the modernist design of the construction project fails to satisfy the congruity standard under applicable law.

Constitution confers standing on those who suffer harm." *Mangum* at 642, 669 S.E.2d at 281–82. The Court quoted the open-courts clause of the North Carolina Constitution: that "[a]ll courts shall be open," and that "every person for an injury done him in his lands . . . shall have remedy by due course of law." *Id.* (quoting N.C. Const. art. I, § 18).

The Court then applied these constitutionally driven thresholds to consider whether several owners of property near the adult establishment had standing to challenge it. *Id.* It held the neighbors had standing for two reasons:

First, this Court explained that owning property "immediately adjacent to or in close proximity" did "bear some weight on the issue of" standing. *Id.* at 644, 669 S.E.2d at 283.

Second, the neighbors had described a "*probability* of increased traffic, increased water runoff, parking and safety concerns, and adverse secondary effects on their businesses." *Id.* at 642, 669 S.E.2d at 281 (emphasis added). These examples of non-monetary effects, the Court held, were enough to show standing because they established either that "the value of petitioners' properties would be adversely

affected *or* that petitioners would be unable to enjoy the use of their properties." *Id.* at 645–46, 669 S.E.2d at 284 (emphasis added).

The Court held there was standing even though "no witness testified that the proposed establishment would diminish the values of petitioners' properties." *Id.* at 649, 669 S.E.2d at 285 (Timmons-Goodson, J., dissenting). Likewise, the Court held there was standing even though one of the neighbors was located "at least one-half mile from the site of the proposed establishment." *Id.* at 647, 669 S.E.2d at 285 (emphasis added).

Thus, as the dissenting Justice described it, the Court in *Mangum* "relaxe[d] the requirements for standing" in land-use cases. *Id.* at 646, 669 S.E.2d at 284.

2. The Court of Appeals' decision ushers in a radical, new "*Wiesner* standard" for showing standing.

In the decision below, the Court of Appeals departed from the relaxed *Mangum* standard, and instead, adopted a brand-new, heightened standard. Then, it used this heightened standard to deny Ms. Wiesner access to the courts.

The depth of this error is apparent from a simple comparison of the evidence that Ms. Wiesner offered versus what the neighbors in *Mangum* offered.

First, Ms. Wiesner lives directly across the street from the proposed construction. If the neighbor's location a half-mile away in *Mangum* was enough to carry "some weight" in favor of standing, then surely it should have carried at least the same weight here.

Second, beyond what the neighbors showed in *Mangum*, Ms. Wiesner presented myriad evidence that "the value of [her] propert[y] would be adversely affected." *Magnum* at 645, 669 S.E.2d at 284. At the Historic Development Commission level, she testified and submitted documentary evidence about how the proposed construction would reduce the value of her property. (R pp 432–33, 847–54).

Moreover, in response to the opposition's arguments about standing in Superior Court, Ms. Wiesner submitted affidavits showing, among other things, a market analysis from a state-certified real estate appraiser. (R pp 226–31 ¶ 6). This market analysis explained how the modernist construction project directly across the street would drive

down Ms. Wiesner's property value between approximately 6% and 23%—a potential loss approaching $100,000. *Id.*

Third, there was ample evidence of the non-monetary effects described in *Mangum* to show that Ms. Wiesner "would be unable to enjoy the use of [her] propert[y]." *Mangum*, 362 N.C. at 645–46, 669 S.E.2d at 284. At the Historic Development Commission level, there was evidence that her home features a wide front porch and many front windows. (R p 386). Consequently, the proposed construction would have replaced the view of the historic streetscape from Ms. Wiesner's front windows, front yard, and front porch with a view dominated by an incongruous structure. *Id.*

Furthermore, like the neighbors in *Mangum*, Ms. Wiesner described the "significant increase in vehicle traffic from non-Oakwood residents" who came to see "the modernist house built in a historic district without any other modernist homes." (R p 222–25 ¶ 12). Then, like the neighbors in *Mangum*, she described how this "additional traffic has adversely impacted the value of [her] home in terms of quiet enjoyment and safety." *Id.*

Despite all this, the Court of Appeals held that Ms. Wiesner had failed to show standing. As the following chart shows, the Court of Appeals' new, heightened standard cannot be reconciled with the relaxed standard this Court adopted in *Mangum*:

Standard:	**Supreme Court's relaxed, *Mangum* standard**	**Court of Appeals' new, heightened "*Wiesner* standard"**
Neighbor's location:	A half-mile away	Literally *feet* away
Non-monetary effects:	Speculation that traffic and safety will "probably" be affected	Evidence that traffic, safety, and the view from her property *will* be adversely affected
Evidence of loss in property value:	None	Sworn testimony in an affidavit and market analysis from a state-certified real estate appraiser showing a guaranteed reduction in property value—potentially a *six-figure* loss.
Standing?	Yes	No

As these points make clear, the relaxed test for standing that this Court set forth in *Mangum* is now effectively overruled. Unless this

Court allows discretionary review, the Court of Appeals' new, heightened "*Wiesner* standard" will govern whether neighbors can bring land-use challenges from now on.

What is more, the Court of Appeals' error is compounded by how it affirmed the Superior Court's rejection of Ms. Wiesner's affidavits.[5] (Slip op. at 27).

The Court accepted the Superior Court's theory that Ms. Wiesner's affidavits were somehow untimely, even though the applicable land use statutes only allow supplemental affidavits like these in Superior Court, not at the Board of Adjustment level. N.C.G.S. § 160A-393(a), (j) (2015). It did so even though the Board of Adjustment stated that it did not want to hear more evidence about Ms. Wiesner's standing. (R pp 12, 429, 1242). It did so even though Ms. Wiesner *won* at the Board of Adjustment level—a decision which necessarily meant that she had sufficiently rebutted any perceived issue with standing. (R pp 12, 429).

---

[5] To its credit, the Court of Appeals considered Ms. Wiesner's affidavits anyway. (Slip op. at 25–27). As explained above, however, it did so contrary to *Mangum*. *See supra* at 14-24.

Notably, this Court in *Mangum* admonished trial judges who "elevate form over substance" in land-use cases to "deny a party [her] day in court." *Mangum* at 644, 669 S.E.2d at 283. Here, however, this type of decision by the Superior Court appeared to give the Court of Appeals no discomfort.

In sum, the Court of Appeals' decision conflicts badly with this Court's decision in *Mangum*. If the "likely-in-conflict" provision of N.C.G.S. § 7A-31(c)(3) means anything, it means this case warrants review.

III. THIS CASE INVOLVES LEGAL PRINCIPLES OF JURISPRUDENTIAL SIGNIFICANCE.

A. Divergent decisions from the Court of Appeals confirm the need for this Court to clarify the law in this area.

Aside from the fact that the decision below clashes with this Court's decisions, the Court of Appeals' decision cannot even be squared with its own decisions.

As one nonexclusive example, in a 2011 decision, a panel of the Court of Appeals held that a neighbor had standing when a construction project was going to affect her view, which—she posited, without any real estate experience—might cause a reduction in the value of her

property. *Sanchez v. Town of Beaufort*, 211 N.C. App. 574, 710 S.E.2d 350 (2011).

Yet, here, the panel held that Ms. Wiesner lacked standing when the challenged construction would affect her view, which—based on her experience as a licensed real estate broker, and based on the experience of a state-certified appraiser—would cause a substantial reduction in the value of her property. (Slip op. at 18).

As this example shows, the Court of Appeals has reached divergent results when attempting to apply this Court's teachings on land-use standing. This case presents a much-needed opportunity for the Court to clarify its decisions in this area.

B. The Court of Appeals' decision undermines state laws and policies in favor of preserving historic districts.

As described above, there are important state objectives compelling the preservation of residential historic districts. *See supra* at 4-6.

Against the weight of those policies, the Court of Appeals' decision makes it impossible for homeowners in these historic districts to challenge incongruous new construction. If a neighbor directly across

the street, with all of the evidence described above, *lacks* standing to challenge such construction, then no one can.

In this way, this new precedent from the Court of Appeals undermines the state laws and policies described above.

C. The radical "Wiesner standard" has dangerous implications for all future land-use litigants.

At its core, this case is about setting the parameters for when, and how, North Carolinians can access their court system. As a result, the Court of Appeals' new reflections on standing are significant to our state's jurisprudence.

As described above, the people of North Carolina in their Constitution have commanded that our courts must be "open." *Mangum*, 362 N.C. at 642, 669 S.E.2d at 281 (quoting N.C. Const. art. I, § 18). This Court has also explained that there is a "strong policy" in favor of giving citizens "access to the machinery of the courts so that [they] may seek redress for the wrongs committed against [them]." *Black v. Littlejohn*, 312 N.C. 626, 634, 325 S.E.2d 469, 475 (1985).

Here, however, the Court of Appeals blocked Ms. Wiesner's access to the courts in ways that imperil all future land-use litigants.

As described fully above, the Court of Appeals held that Ms. Wiesner's extensive testimony and state-certified appraiser's market analysis were not enough for her to have her day in court. It takes no effort to see how this decision would have dangerous implications for future land-use litigants who seek access to justice—especially those with limited resources.

ISSUES TO BE BRIEFED

In this petition, Ms. Wiesner is not asking this Court to rule on the merits of her case. In other words, she is not asking the Court to rule on whether the modernist design of the Cherry-Gordons' construction project is "congruous with the special character" of Historic Oakwood under applicable law.

Rather, Ms. Wiesner's narrow request is that this Court grant discretionary review for the limited purpose of considering whether to reverse and remand this case to the Court of Appeals with instructions to reach the merits. Accordingly, if the Court grants discretionary review, Ms. Wiesner's appeal will present the following issue:

Did the Court of Appeals err by holding that Ms. Wiesner lacked standing, and by affirming the Superior Court's decisions related to the issue of standing?

CONCLUSION

For the reasons above, Ms. Wiesner respectfully requests that the Court allow her petition for discretionary review.

Respectfully submitted, this the 22nd day of March, 2016.

POYNER SPRUILL LLP

s/ Andrew H. Erteschik
Andrew H. Erteschik
N.C. State Bar No. 35269
aerteschik@poynerspruill.com
P.O. Box 1801
Raleigh, NC 27602–1801
Telephone: 919.783.2895
Facsimile: 919.783.1075

COUNSEL FOR PETITIONER
GAIL WIESNER

PETESCH LAW

s/ Andrew J. Petesch
Andrew J. Petesch
N.C. State Bar No. 35499
andy@peteschlaw.com
127 W. Hargett Street, Suite 500
Raleigh, NC 27601–1351
Telephone: 919.747.8611
Facsimile: 888.848.9605

COUNSEL FOR PETITIONER
GAIL WIESNER

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing by e-mail, and by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following persons at the following addresses which are the last addresses known to me:

Dorothy K. Leapley
Deputy City Attorney
Nicolette Fulton
Associate City Attorney
P.O. Box 590
Raleigh, NC 27602
Counsel for the City of Raleigh

John M. Silverstein
Satisky & Silverstein, LLP
415 Hillsborough Street
Suite 201
Raleigh, NC 27603
Counsel for the Raleigh Board of Adjustment

Joseph S. Dowdy
Phillip A. Harris, Jr.
Kilpatrick Townsend & Stockton, LLP
4208 Six Forks Road
Suite 1400
Raleigh, NC 27609
Counsel for Louis Cherry and Marsha Gordon

This the 22nd day of March, 2016.

s/ Andrew H. Erteschik
Andrew H. Erteschik

EXHIBIT A

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-155

Filed: 16 February 2016

Wake County, Nos. 14 CVS 4003, 14 CVS 4307

LOUIS CHERRY and MARSHA GORDON, Petitioners

v.

GAIL WIESNER, CITY OF RALEIGH, and RALEIGH BOARD OF ADJUSTMENT, Respondents.

CITY OF RALEIGH, a municipal corporation, Petitioner

v.

RALEIGH BOARD OF ADJUSTMENT, LOUIS W. CHERRY, III, MARSHA G. GORDON, and GAIL P. WIESNER, Respondents.

Appeal by respondent Gail Wiesner from order entered on 15 September 2014 by Judge Elaine M. O'Neal Bushfan in Superior Court, Wake County. Heard in the Court of Appeals on 26 August 2015.

Kilpatrick Townsend & Stockton LLP, by Joseph S. Dowdy and Phillip A. Harris, Jr., for petitioner-appellees Louis Cherry and Marsha Gordon.

City of Raleigh Attorney Thomas A. McCormick, by Deputy City Attorney Dorothy K. Leapley and Associate City Attorney Nicolette Fulton, for petitioner-appellee City of Raleigh.

Petesch Law, by Andrew J. Petesch, for respondent-appellant Gail Wiesner.

STROUD, Judge.

Synopsis of Opinion

Gail Wiesner ("respondent") lives across the street from the single-family "modernist" design home of Louis Cherry and Marsha Gordon ("petitioners") in Raleigh's Oakwood neighborhood. Oakwood is a designated historic district, where the design of new construction must be approved by the Raleigh Historic Development Commission ("the Commission"). As required by the rules of the historic district, before building on their vacant lot, petitioners applied for a certificate of appropriateness to build their new home ("the Cherry-Gordon house"). When the Commission held hearings to consider the application, respondent and others objected to petitioners' proposed modernist design because they considered it incongruous with the other houses in the historic district. After a series of hearings, the Commission approved the design, but then the Raleigh Board of Adjustment ("the Board") rejected the design. Petitioners then appealed the Board's ruling to the Superior Court, which reviews decisions of the Board and the Commission to make sure that their rulings comply with the law. The Superior Court reversed the Board's decision, which meant that the Commission's decision to approve the design was affirmed.[1] This opinion addresses respondent's appeal from the Superior Court's ruling.

[1] We refer to the Cherry-Gordon house as an existing home instead of a proposed home, since petitioners elected to proceed with construction of the home despite the pendency of this appeal, understanding the risk that they could be required to demolish it.

The Superior Court did not rule on the question of the Cherry-Gordon house's modernist design and the claim of "incongruity" with the historic district but decided that respondent did not have legal standing to challenge the approval of the design. A person who brings a legal action challenging a land use decision like this one must have "standing" to bring the action. The applicable statute gives "standing" only to an "aggrieved party," as the law defines that term. Although respondent lives across the street from the Cherry-Gordon house, the location of her home does not automatically give her standing to challenge the issuance of the certificate. A nearby landowner has standing to challenge a land use decision like this one only if the new construction will cause him to suffer some type of "special damages" distinct from other landowners in the area. Usually, special damages include economic damages such as a decrease in property value and other direct adverse effects on the property of the landowner challenging the proposed land use, such as smoke, light, noise, or vandalism created by the new property use, which are different from the effects on the rest of the neighborhood. Respondent's claims of damages from the Cherry-Gordon house are all essentially aesthetic, since she believes the house does not fit in with the historic neighborhood and is unpleasant for her to see from her home across the street. Even if she is correct in her assessment of the Cherry-Gordon house's design, respondent has failed to show that she is an "aggrieved party" as the law

defines that term, so the Superior Court's order reversing the Board's decision was correct and we affirm it.

I. Background

On or about 23 August 2013, petitioners filed an Application for Certificate of Appropriateness with the Commission seeking a determination that their plan for the construction of the Cherry-Gordon house on a vacant lot in the Oakwood Historic District of Raleigh was not incongruous with the guidelines of the City of Raleigh. On 9 September 2013, the Certificate of Appropriateness Committee of the Commission ("the Committee") held a hearing on petitioners' application and voted to approve in part their application ("design approval") subject to certain conditions and to defer consideration of the Cherry-Gordon house's windows until a subsequent hearing. On 7 October 2013, the Committee held a second hearing and voted to approve petitioners' application regarding the proposed windows ("window approval"). On 17 September 2013, respondent gave notice of an intention to appeal the Committee's design approval decision to the Board, and on 24 October 2013, respondent gave notice of an intention to appeal the Committee's window approval decision to the Board. On 24 October 2013, petitioners purchased a building permit from the City of Raleigh and began construction of the Cherry-Gordon house pursuant to the certificate of appropriateness.

On or about 7 November 2013, respondent, through counsel, submitted her Application for Review of the Committee's design approval decision with the Board. The Application for Review form includes the following question: "**EXPLAIN TO THE BOARD HOW YOU ARE AN AGGRIEVED PARTY**[.]" (Emphasis in original.) Respondent answered: "As a resident adjacent to the subject property and a property owner in the Oakwood Historic District, I opposed and sought the denial of the Application for Certificate of Appropriateness, No. 135-13-CA, for 516 Euclid Street." Respondent also stated:

> The structure as proposed is incongruous to the Oakwood Historic District. It will harm the character of the neighborhood and contribute to erosion of the neighborhood's value as an asset to its residents, to the surrounding communities, to the businesses it supports, to in-town and out-of-town visitors, and to the City as a whole.

Respondent also alleged that the Committee made various procedural errors.

On or about 6 December 2013, respondent, again through counsel, submitted a substantively identical Application for Review of the Committee's window approval decision to the Board. Under the "**EXPLAIN TO THE BOARD HOW YOU ARE AN AGGRIEVED PARTY**" question, respondent answered:

> As a resident adjacent to the subject property and a property owner in the Oakwood Historic District, I opposed and sought the denial of the Application for Certificate of Appropriateness, No. 135-13-CA, for 516 Euclid Street at both the Sept. 9, 2013 and Oct. 7, 2013 public hearings before the Certificate of Appropriateness Committee.

Respondent also stated:

> The windows proposed for the dwelling structure are incongruous to the Oakwood Historic District. It will harm the character of the neighborhood and contribute to erosion of the neighborhood's value as an asset to its residents, to the surrounding communities, to the businesses it supports, to in-town and out-of-town visitors, and to the City as a whole.

Respondent again alleged that the Committee made various procedural errors.

The Commission answered respondent's pleadings and moved to dismiss her appeal to the Board for lack of standing.[2] On 13 January 2014, the Board held a hearing on respondent's appeal and the Commission's motion to dismiss for lack of standing but postponed rendering its decision until a 10 February 2014 hearing. The Board invited the parties to submit written responses by 31 January 2014. On or about 31 January 2014, respondent filed a brief in which she argued:

> [T]he Record is sufficient to demonstrate that she will suffer special damages distinct from the rest of the community if an incongruous structure is constructed directly across the street from her home. However, should the Board need additional evidence as to special damages, [respondent] requests that she be permitted to present such evidence to the Board.

At a 10 February 2014 hearing, the Board announced its ruling to reverse the Commission's decision but did not directly address the issue of standing.

[2] The record does not provide a date for the Commission's answer and motion to dismiss.

On or about 20 February 2014, petitioners moved to alter or amend the judgment. On or about 10 March 2014, the City of Raleigh filed procedural objections to the Board's proposed findings and conclusions, including an argument that the Board had not addressed the issue of standing. At a 10 March 2014 hearing, the Board announced its ruling denying petitioners' motion and voted to approve the minutes of the 10 February 2014 hearing. The Board's counsel noted:

> With regard to this standing issue, I don't know that the Board is equipped to determine whether or not [respondent] sustained special damages, but I do—do believe that, by continuing with the hearing, that that was tantamount to making a determination that standing did exist. And, certainly, that is something that's preserved on the record for the City [of Raleigh] to appeal.

On 28 March 2014, petitioners filed a petition for writ of certiorari and a motion to stay in the Superior Court in Wake County, arguing that respondent lacked standing, among other arguments. On 31 March 2014, the Clerk of Superior Court for Wake County granted petitioners' petition and issued a writ of certiorari. On 31 March 2014, petitioners moved for a temporary restraining order and a preliminary injunction. On 2 April 2014, the trial court granted petitioners' motion for a temporary restraining order. The trial court ordered that respondent "shall cease, desist and refrain from enforcing" the Board's decision and "any subsequent threat of a Stop Work Order" and that petitioners "shall cease work" on the Cherry-Gordon house, provided that they "are allowed to preserve the property from ruin by wind,

water, mildew, vandalism, as well as potential harm to trespassers[.]" On 2 April 2014, the City of Raleigh also filed a petition for writ of certiorari also arguing that respondent lacked standing, among other arguments. On 2 April 2014, the Clerk of Superior Court for Wake County granted the City of Raleigh's petition and issued a writ of certiorari. On 11 April 2014, the trial court granted petitioners' motion for a preliminary injunction.

On 7 August 2014, in both certiorari proceedings, respondent moved to supplement the record to include two affidavits addressing the issue of standing. On 14 August 2014, respondent answered both petitioners' and the City of Raleigh's petitions and moved to strike certain allegations and exhibits included in petitioners' petition. On 15 August 2014, the City of Raleigh moved to supplement the record to include certain documents that were before the Committee but were missing from the Board's record. On 22 August 2014, petitioners responded to respondent's motion to strike and moved to supplement the record. On 22 August 2014, petitioners also responded to respondent's motion to supplement, noting that respondent could have introduced the two affidavits about nine months earlier when she first appealed to the Board. The trial court held a hearing on 25 and 26 August 2014. On 25 August 2014, the City of Raleigh orally moved to consolidate the two certiorari proceedings. On 8 September 2014, the trial court granted the City of Raleigh's motion to supplement the record and motion to consolidate.

On 15 September 2014, the trial court entered an order in which it (1) concluded that respondent lacked standing and thus reversed the Board's decision; (2) affirmed the Commission's decisions; (3) denied respondent's motion to supplement the record; and (4) denied respondent's motion to strike and petitioners' motion to supplement the record as moot. On 3 October 2014, respondent gave timely notice of appeal.

II. Discussion

Respondent argues that the trial court erred in (1) concluding that she lacked standing to appeal the Commission's decisions to the Board; (2) finding that respondent had the opportunity to allege standing before the Board; (3) denying respondent's motion to supplement the record; (4) failing to determine what competent, material, and substantial evidence was before the Committee; (5) concluding that competent, material, and substantial evidence in the whole record supported the Committee's findings of fact and that the Committee's decisions were not arbitrary; and (6) concluding that the Committee did not act outside the scope of its authority or apply improper standards or interpretations of standards. Because we hold that respondent lacked standing to appeal the Committee's decisions to the Board, we do not address issues (4), (5), and (6).

A. Standing

i. Standard of Review

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction, and is a question of law which this Court reviews de novo." *Smith v. Forsyth Cty. Bd. of Adjust.*, 186 N.C. App. 651, 653, 652 S.E.2d 355, 357 (2007) (citations, quotation marks, and brackets omitted).

ii. Analysis

The party invoking jurisdiction has the burden of proving the elements of standing. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). As a jurisdictional requirement, standing relates not to the power of the court but to the right of the party to have the court adjudicate a particular dispute. North Carolina courts began to use

> the term "standing" in the 1960s and 1970s to refer generally to a party's right to have a court decide the merits of a dispute. Standing most often turns on whether the party has alleged "injury in fact" in light of the applicable statutes or caselaw. Here, we must also examine the forms of relief sought. *See* [*Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*], 528 U.S. 167, 185, 145 L. Ed. 2d 610, 629 (2000) ("a plaintiff must demonstrate standing separately for each form of relief sought").

Id. at 114, 574 S.E.2d at 52 (citations omitted).

Since standing is a jurisdictional requirement, the party seeking to bring her claim before the court must include allegations which demonstrate why she has standing in the particular case:

> Since the elements of standing are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

Id. at 113, 574 S.E.2d at 51 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 364 (1992)) (brackets omitted). "It is not necessary that a party demonstrate that injury has already occurred, but a showing of immediate or threatened injury will suffice for purposes of standing." *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 642-43, 669 S.E.2d 279, 282 (2008) (quotation marks omitted).

In the context of an appeal regarding a land use decision such as this case, N.C. Gen. Stat. § 160A-400.9(e) sets forth both the proper court to consider the appeal and the requirements of standing for parties seeking review:

> An appeal may be taken to the Board of Adjustment from the commission's action in granting or denying any certificate, which appeals (i) may be taken by *any aggrieved party*, (ii) shall be taken within times prescribed by the preservation commission by general rule, and (iii) shall be in the nature of certiorari. Any appeal from the Board of Adjustment's decision in any such case shall be heard by the superior court of the county in which the municipality is located.

N.C. Gen. Stat. § 160A-400.9(e) (2013) (emphasis added).

Thus, "any aggrieved party" may appeal a decision of a board of adjustment[3] to the superior court in the county where the municipality is located. *See* N.C. Gen. Stat. § 160A-400.9(e). Our case law has further defined the term "aggrieved party," particularly in the context of land use disputes:

> Aggrieved parties include owners of property upon which restrictions are imposed and those who have sustained pecuniary damage to real property in which they have an interest. Not only is it the petitioner's burden to prove that he will sustain a pecuniary loss, but he must also allege the facts on which the claim of aggrievement is based. The petition must therefore allege the manner in which the value or enjoyment of petitioner's land has been or will be adversely affected. Examples of adequate pleadings include allegations that the rezoning would cut off the light and air to the petitioner's property, increase the danger of fire, increase the traffic congestion and increase the noise level. Once the petitioner's aggrieved status is properly put in issue, the trial court must, based on the evidence presented, determine whether an injury has resulted or will result from the zoning action.

Kentallen, Inc. v. Town of Hillsborough, 110 N.C. App. 767, 769-70, 431 S.E.2d 231, 232 (1993) (citations, quotation marks, and brackets omitted). "[T]o be considered an 'aggrieved person' and thus have standing to seek review, a party must claim special damages, distinct from the rest of the community." *Casper v. Chatham Cty.*, 186 N.C. App. 456, 458, 651 S.E.2d 299, 301 (2007).

[3] "The board of adjustment shall hear and decide appeals from decisions of administrative officials charged with enforcement of the zoning or unified development ordinance and may hear appeals arising out of any other ordinance that regulates land use or development[.]" N.C. Gen. Stat. § 160A-388(b1) (2013).

A reduction in value of property may be part of the basis for standing, but diminution in value alone is not sufficient:

> A property owner does not have standing to challenge another's *lawful* use of her land merely on the basis that such use will reduce the value of her property. However, where the challenged land use is prohibited by a valid zoning ordinance, the owner of adjoining or nearby lands, who will sustain special damage from the proposed use through a reduction in the value of his own property, does have a standing to maintain an action to prevent the use.
>
> Additionally, in [*Mangum*], our Supreme Court held that the petitioners in that case had standing to maintain their suit where the petitioners: (1) challenged a land use that would be unlawful without a special use permit; (2) alleged they would suffer special damages if the use is permitted; and (3) provided evidence of increased traffic, increased water runoff, parking, and safety concerns, as well as the secondary adverse effects that would result from the challenged use. 362 N.C. at 643-44, 669 S.E.2d at 282-83. Recently, this Court applied the standard set forth in [*Mangum*] and concluded that a petitioner challenging her neighbor's application for a use permit on the basis that the proposed use would reduce the value of the petitioner's property was sufficient to establish the petitioner had standing. [*Sanchez v. Town of Beaufort*, 211 N.C. App. 574, 579, 710 S.E.2d 350, 353-54, *disc. review denied*, 365 N.C. 349, 717 S.E.2d 745 (2011).]
>
> We discern no meaningful distinction between [*Mangum*], *Sanchez*, and the present case. Here, petitioners testified to their concerns that the alleged unlawful approval of the Training Facility would increase noise levels, had the potential to result in groundwater and soil contamination, and threatened the safety of anyone on their property due to stray bullets. These problems, petitioners contend, would result in a decrease in their property values. We conclude this evidence was sufficient to establish standing to challenge [the intervenor-

> respondent's] proposed land use.

Fort v. Cnty. of Cumberland, 218 N.C. App. 401, 404-05, 721 S.E.2d 350, 353-54 (citations and quotation marks omitted), *disc. review denied*, 366 N.C. 401, 735 S.E.2d 180 (2012).

The fact that respondent owns property "immediately adjacent to or in close proximity to the subject property" also bears some weight on the issue of whether the party will suffer special damages, but status as an adjacent landowner alone is insufficient to confer standing. *Mangum*, 362 N.C. at 644, 669 S.E.2d at 283.

In *Kentallen*, the petitioner was an adjoining landowner who challenged the issuance of a special exception permit to the respondents allowing construction of a "thirty-foot by thirty-five-foot addition to a metal storage building" which was "located less than the required twenty feet from the rear boundary" of the respondents' lot; the building was a nonconforming use under the applicable ordinance. *Kentallen*, 110 N.C. App. at 768, 431 S.E.2d at 231-32. The petitioner alleged that the view of the building "would not be visually attractive." *Id.*, 431 S.E.2d at 231-32. This Court held that the petitioner was not an aggrieved party:

> In this case, [the petitioner's] allegation that it is the "owner of adjoining property" does not satisfy the pleading requirement, in that there is no allegation relating to whether and in what respect [the petitioner's] land would be adversely affected by the [Board of Adjustment for the Town of Hillsborough's] issuance of the special exception permit. Furthermore, the evidence presented before the Board, that the requested construction would increase "the

> negative impact" on the petitioner's property and "would not be visually attractive," is much too general to support a finding that [the petitioner] will or has suffered any pecuniary loss to its property due to the issuance of the permit.

Id. at 770, 431 S.E.2d at 233 (brackets omitted).

Vague, general allegations that a property use will impair property values in the general area also will not confer standing. In *Lloyd v. Town of Chapel Hill*, this Court held that the parties' allegation that they "owned property in the immediate vicinity of that upon which variances [from a town ordinance] had been sought and that grant of the variances would materially adversely affect the value of [their] property" did not demonstrate "special damages distinct from the rest of the community." *Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 351, 489 S.E.2d 898, 900 (1997) (citation, quotation marks, and brackets omitted). Similarly, in *Davis v. City of Archdale*, this Court held that the parties' allegation that rezoning ordinances would diminish the value of their property because they would increase "traffic on roads which already carry traffic volumes in excess of capacity and [would] increase[] demands upon already overburdened public utilities" did not demonstrate "special damages distinct from those of the rest of the community." *Davis v. City of Archdale*, 81 N.C. App. 505, 508, 344 S.E.2d 369, 371 (1986). In these cases, although the challengers to the land use alleged impairment of property values, the allegation was general for the entire neighborhood or area and not specific to a certain parcel of

property. *See id.*, 344 S.E.2d at 371; *Lloyd*, 127 N.C. App. at 351, 489 S.E.2d at 900. And we note that even assuming that respondent's allegations are true and the proposed use will actually adversely affect property values in the general vicinity, because this type of effect is not distinct to the particular landowner who is challenging a land use, this factor alone does not confer standing. *See Davis*, 81 N.C. App. at 508, 344 S.E.2d at 371; *Lloyd*, 127 N.C. App. at 351, 489 S.E.2d at 900.

Several cases have provided examples of the types of special damages which will give a landowner standing to challenge a land use decision. In *Mangum*, our Supreme Court held that several adjacent and nearby landowners' allegations that the issuance of a special use permit for the construction of an adult establishment would cause "vandalism, safety concerns, littering, trespass, and parking overflow from the proposed business to [the parties'] adjacent or nearby lots" demonstrated special damages. *Mangum*, 362 N.C. at 645-46, 669 S.E.2d at 283-84. Similarly, in *Sanchez*, the petitioner's home was in a waterfront historic district across the street from the "Carpenter Cottage"; the respondent purchased the Carpenter Cottage and applied for a permit to demolish the cottage and build a one-and-one-half story structure which would block the petitioner's view of the water. *Sanchez*, 211 N.C. App. at 575-76, 710 S.E.2d at 351-52. The petitioner objected to the height of the respondent's proposed structure. *Id.* at 576, 710 S.E.2d at 352. The historic commission denied the application due to the proposed structure's height; the

respondent appealed to the board of adjustment, which found that the commission's height limitation was "arbitrary and capricious" and remanded to the commission for issuance of a permit. *Id.* at 577, 710 S.E.2d at 352. The superior court affirmed the decision of the board of adjustment, and this Court affirmed. *Id.* at 577, 583, 710 S.E.2d at 352, 356. On the issue of standing, this Court noted the petitioner's allegations that the proposed structure "would interfere with her use of her property by causing her to lose her private waterfront view" and that "the loss of this view would reduce the value of [her] property by at least $100,000" as sufficient to show that she suffered special damages. *Id.* at 579, 710 S.E.2d at 353-54.[4]

In this case, respondent alleged that she would suffer special damages because the Cherry-Gordon house is "directly across the street from her home" and that its architectural incongruity would "harm the character of the neighborhood and contribute to erosion of the neighborhood's value[.]" On appeal, her arguments are purely aesthetic or are not distinct to her property. She notes that her

> home sits directly across from the Cherry-Gordon property on a narrow street with no sidewalks. The front setbacks are especially shallow, with the two-story Cherry-Gordon dwelling only less than fifteen feet from the curb. [Respondent's] home features a wide front porch and many front windows.
>
> At the September 2013 [Commission] meeting,

[4] But as to the substantive issue—the approval of the proposed structure—the petitioner lost, since this Court agreed with the board of adjustment that the commission's height limitation was arbitrary. *Id.* at 582-83, 710 S.E.2d at 356. In other words, the damage to the petitioner's property value and view gave her standing but did not determine her claim on the merits. *See id.*, 710 S.E.2d at 356.

> [respondent] opposed the 516-COA application for including multiple incongruous elements. Taking that allegation of incongruity as true, the Cherry-Gordons' proposed design would have dominated the view and vista from [respondent's] front windows, porch and yard with an incongruous structure. [Respondent] also addressed several adverse effects that would result [from] such incongruity, including reduced property values and impaired enjoyment of the neighborhood.

(Citations omitted.)

But these allegations do not demonstrate special damages *distinct to respondent*, other than the view from her front porch; rather, respondent alleges a generalized damage to the overall neighborhood—"reduced property values and impaired enjoyment of the neighborhood." The mere fact that respondent's home is "directly across the street" from the Cherry-Gordon house does not constitute special damages. *See Mangum*, 362 N.C. at 644, 669 S.E.2d at 283; *Kentallen*, 110 N.C. App. at 770, 431 S.E.2d at 233. Respondent's allegation is akin to the allegations in *Kentallen*, *Lloyd*, and *Davis*, where this Court held that the party had failed to allege special damages. *See Kentallen*, 110 N.C. App. at 770, 431 S.E.2d at 233; *Lloyd*, 127 N.C. App. at 351, 489 S.E.2d at 900; *Davis*, 81 N.C. App. at 508, 344 S.E.2d at 371; *Sarda v. City/Cty. of Durham Bd. of Adjust.*, 156 N.C. App. 213, 215, 575 S.E.2d 829, 831 (2003) ("Petitioners' mere averment that they own land in the immediate vicinity of the property for which the special use permit is sought, absent any allegation of special damages distinct from the rest of the community in their Petition, is

insufficient to confer standing upon them.") (citation and quotation marks omitted). Respondent makes no allegation of damages particular to her property like the allegation of potential "vandalism, safety concerns, littering, trespass, and parking overflow" in *Mangum* or the allegation of the loss of a waterfront view and the resulting reduction of market value of the property in *Sanchez*. *See Mangum*, 362 N.C. at 645-46, 669 S.E.2d at 283-84; *Sanchez*, 211 N.C. App. at 579, 710 S.E.2d at 353-54. Because respondent has failed to even *allege* special damages, she is not an aggrieved party and thus lacks standing to contest the Committee's decisions. *See Casper*, 186 N.C. App. at 458, 651 S.E.2d at 301; N.C. Gen. Stat. § 160A-400.9(e).

iii. Respondent's Opportunity to Allege Standing

Respondent responds that she did not have an opportunity to allege standing before the Board. But respondent's argument is not so much that she did not have the opportunity but that she did not realize that she needed to make a showing of her special damages. She actually had multiple opportunities to allege standing before the Board. After retaining counsel, respondent submitted two separate Applications for Review of the Committee's decisions to the Board. The Applications for Review were on forms provided for this purpose. The form has some instructions and questions with blanks for answers. The second page of the form includes the following section of instructions:

> General Statute 160A-400.9(e) provides that "An appeal may be taken to the Board of Adjustment from the

> Commission's action in granting or denying any certificate, which appeals (i) may be taken by any aggrieved party, (ii) shall be taken within times prescribed by the preservation commission by general rule, and (iii) shall be in the nature of Certiorari. Any appeal from the Board of Adjustment's decision in any such case shall be heard by the Superior Court of the County in which the municipality is located."
>
> Appeals in the nature of Certiorari means that the Board of Adjustment may review your case, but any review must be on the record of the case presented to the Commission and no new evidence can be introduced at this hearing.
>
> To clearly present your case, attach to this application the adopted minutes of the Commission meeting(s) **(attached hereto as Exhibit A)**,[5] copies of your COA application, any exhibits presented to the Commission during the hearing(s), copies of pertinent excerpts from the rules of procedure of the Commission, and any other relevant documents that were presented at the hearing. These copies must be obtained from the Commission to ensure that they are from the official record of the case. The Commission will forward any physical evidence in the record (photos, material samples, audiotape, etc.) to the [Board] for review during the hearing on your appeal.
>
> **EXPLAIN TO THE BOARD HOW YOU ARE AN AGGRIEVED PARTY:**

The Application for Review form quotes the applicable statute, N.C. Gen. Stat. § 160A-400.9(e), as we discussed above, and explains the appeal process. In boldface and capitalized letters, the Application for Review form then asks the applicant to explain why she has standing, since only an "aggrieved party" may have standing to

[5] Respondent inserted this portion in bold in her first Application for Review and attached the minutes of the Committee's 9 September 2013 hearing as Exhibit A. The remainder of the text quoted is from the form itself.

challenge the Commission's decision. Respondent argues: "Allowing the City [of Raleigh] to successfully challenge standing on the basis of an application that uses the word 'aggrieved,' but without any language as to special damages, would be contrary to the concept and principles of notice pleading." Essentially, respondent argues that her application was sufficient to give "notice" of the basis for her claim, and that she should not be required to set forth specific allegations of her special damages, particularly since the Application for Review form did not set forth a definition of the term "aggrieved party." But the Application for Review form goes above and beyond the call of duty in setting forth the applicable statute and general appeal procedure. Ignorance of the law is no excuse; a party does not need notice that she must allege standing because standing is a jurisdictional prerequisite and the complaining party bears the burden of alleging in its pleadings that it has standing. *See Smith*, 186 N.C. App. at 653, 652 S.E.2d at 357; *Kentallen*, 110 N.C. App. at 769, 431 S.E.2d at 232; *Neuse River Found.*, 155 N.C. App. at 113, 574 S.E.2d at 51; N.C. Gen. Stat. § 160A-400.9(e). In addition, even after the Commission moved to dismiss her appeal for lack of standing and the Board invited the parties to submit written responses, respondent failed to allege special damages.

Respondent also notes that the Board did not properly consider the issue of standing and if it had, she would have sought to supplement her evidence earlier in the process. Essentially, this argument is that the Board failed to directly address

her standing and if it had, she would have submitted additional evidence. We agree that the Board should have explicitly ruled upon the Commission's motion to dismiss for lack of standing, but as the Board's counsel noted at the 10 March 2014 hearing, the Board obviously found that respondent had standing since otherwise it would not have considered respondent's appeal and ruled in her favor. But standing is a jurisdictional issue, which this Court would have to consider on appeal *de novo*, even if the Commission had not filed a motion to dismiss raising this defense, and even if the Commission, Board, and Superior Court had all failed to address it. *See Fort*, 218 N.C. App. at 404, 721 S.E.2d at 353 ("Whether a party has standing to maintain an action implicates a court's subject matter jurisdiction and may be raised at any time, even on appeal.") (citation and quotation marks omitted).

Even though the Board failed to directly rule upon the motion to dismiss, this does not relieve respondent of her burden to allege standing in her pleadings since standing is a jurisdictional prerequisite. *See Smith*, 186 N.C. App. at 653, 652 S.E.2d at 357; *Kentallen*, 110 N.C. App. at 769, 431 S.E.2d at 232; *Neuse River Found.*, 155 N.C. App. at 113, 574 S.E.2d at 51; N.C. Gen. Stat. § 160A-400.9(e). In any event, the Commission raised the issue of respondent's standing in its first responsive pleading, thus highlighting the need for support for her status as an aggrieved party. In sum, we hold that respondent had multiple opportunities to allege standing before the

Board. We therefore hold that the trial court did not err in concluding that respondent lacked standing despite the Board's failure to directly address the issue.

B. Respondent's Motion to Supplement the Record

Respondent next contends that the trial court erred in denying her motion to supplement the record to include two affidavits addressing the issue of standing. One was her own affidavit and the other an affidavit from Michael R. Ogburn, a real estate appraiser.

i. Standard of Review

N.C. Gen. Stat. § 160A-393(j) provides that the trial court "may, *in its discretion*, allow the record to be supplemented with affidavits, testimony of witnesses, or documentary or other evidence if, and to the extent that, the record is not adequate to allow an appropriate determination of the following issues: (1) Whether a petitioner or intervenor has standing." N.C. Gen. Stat. § 160A-393(j) (2013) (emphasis added). "To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Terry's Floor Fashions, Inc. v. Crown Gen. Contr'rs, Inc.*, 184 N.C. App. 1, 17, 645 S.E.2d 810, 820 (2007) (citation omitted), *aff'd per curiam*, 362 N.C. 669, 669 S.E.2d 321 (2008).

ii. Analysis

Respondent moved to supplement the record to include two affidavits addressing the issue of standing. Respondent's brief fails to state any reason why the trial court's decision not to allow supplementation of the record was "manifestly unsupported by reason[.]" *See id.*, 645 S.E.2d at 820 (citation omitted). The legal authority cited for her claim of abuse of discretion is a general reference to our Supreme Court's statement in *Mangum* that

> the North Carolina Constitution confers standing on those who suffer harm: "All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18.

See Mangum, 362 N.C. 642, 669 S.E.2d at 281-82 (brackets and ellipsis omitted). This statement is true, but it does not explain how the trial court may have abused its discretion in denying respondent's request to supplement the record. As discussed above, the initial appeal form directed respondent to state why she was an "aggrieved party," but she failed to allege any special damages. The Commission raised the issue of respondent's standing before the Board, and respondent again had multiple opportunities before the Board to present evidence to support her standing but failed to do so. In fact, respondent's motion to supplement was not filed until 7 August 2014, about nine months after her initial Application for Review in which she had the burden of demonstrating why she would have standing to obtain review and only 18 days before the 25 August 2014 hearing before the Superior Court. This delay alone

could justify the trial court's discretionary denial of her motion. In addition, respondent had already submitted a tremendous amount of information as part of her opposition to the Commission's approval; the record in this case is over 1,200 pages.

We also note that the affidavits which she proffered as supplements add very little new substantive information to the already voluminous record and would not have provided a basis for standing. Respondent's own affidavit details the location of her home, her education and experience as a real estate broker, her opinion that the Cherry-Gordon house is "significantly incongruous" with the Oakwood Historic District, and details regarding the neighborhood. The only item of alleged impact upon respondent's property which could arguably be considered as distinct from the entire neighborhood noted in the affidavit is her complaint of increased traffic from people "gawk[ing]" at the "modernist house[.]" As "an example" of the Cherry-Gordon house's impact on her property, she avers:

> [N]ews reporters and other media agents staked out in front of and around my property waiting to ambush me with the intention of obtaining unscheduled interviews. Upon information and belief, it is [petitioners] and their agents who have fomented a significant amount of media coverage in this matter. This unwanted attention creates ingress and egress problems as well as a significant amount of anxiety for my husband and [me]. As a result of stories published in, among others, the News & Observer, Vanity Fair, Boston Globe, Seattle Times, and New York Times as well as a feature on the Today Show, I have received dozens of unsolicited emails and phone calls

> expressing rude, harassing, and graphic commentary on my involvement in this matter, even though I am only exercising my statutory right to seek review of a COA approval.

Even if the Cherry-Gordon house has generated increased "gawk[er]" traffic and unwanted media attention, respondent's affidavit indicates that the traffic increased due to the publicity surrounding the challenge to the construction of the Cherry-Gordon house. This is simply not the sort of increased traffic our prior cases have addressed as part of the basis for standing of an adjacent property owner to challenge a permit, since traffic is not generated by the usual or intended use of the Cherry-Gordon house or property itself but is generated only by the media coverage of the controversy surrounding its construction. The Cherry-Gordon house is a 2,580-square-foot single-family residence, and the record shows that it would generate exactly the same type of "traffic" in its normal use as respondent's home or any other single-family residence of similar size.

The second affidavit provides some additional information regarding respondent's allegations regarding impairment of property values. The affidavit of Michael R. Ogburn details Mr. Ogburn's qualifications as a real estate appraiser and his opinion that respondent's property "will be adversely affected in terms of property value and marketability by the existence of the [Cherry-Gordon house] and that those effects, from a residential housing market standpoint, would be significant." This affidavit could arguably demonstrate a claim of special damages due to a decrease in

respondent's property value (and not to the property values in the neighborhood generally), but as noted above, allegations of a decrease in value alone are not sufficient. *See Fort*, 218 N.C. App. at 404, 721 S.E.2d at 353 ("A property owner does not have standing to challenge another's *lawful* use of her land merely on the basis that such use will reduce the value of her property."). Although the parties dispute whether the Cherry-Gordon house is architecturally congruous with the Oakwood Historic District, petitioners' use of the property for a single-family residence is clearly lawful, and Mr. Ogburn's affidavit does not address any sort of secondary impacts upon respondent's property, such as traffic, noise, light, odors, runoff, or any other sort of potential damage generated by the use of petitioners' property. Overall, the trial court's decision to deny the motion to supplement was entirely reasonable, and we hold that the trial court did not abuse its discretion in denying respondent's motion to supplement the record.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judges CALABRIA and McCULLOUGH concur.

EXHIBIT B

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14 CVS 4003

LOUIS CHERRY and MARSHA GORDON,

Petitioners,

v.

GAIL WIESNER, CITY OF RALEIGH, and RALEIGH BOARD OF ADJUSTMENT,

Respondents.

AFFIDAVIT OF GAIL WIESNER

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14 CVS 4307

CITY OF RALEIGH,
a municipal corporation,

Petitioner,

v.

RALEIGH BOARD OF ADJUSTMENT, LOUIS W. CHERRY, III, MARSHA G. GORDON, and GAIL P. WIESNER,

Respondents.

AFFIDAVIT OF GAIL WIESNER

Gail Wiesner, being first duly sworn, hereby affirms that:

1. I am legally competent to make this affidavit and make it of my own personal knowledge, except where I specify that it is made on information and belief.

2. My husband, David Wiesner, and I own property located at 515 Euclid Street, Raleigh, Wake County, North Carolina, PIN 1704913741, which is improved with a single family home that serves as our principal place of residence (the "Wiesner Property").

3. The Wiesner Property is located within one of the City of Raleigh's General Historic Overlay Districts known as Oakwood, directly across street from the property owned by Louis Cherry and Marsha Gordon at 516 Euclid Street, PIN 1704913661 ("Cherry Property"). The Cherry Property is also located within the boundaries of the Oakwood Historic District ("Oakwood").

4. I opposed the approval of a Certificate of Appropriateness ("COA") sought by Mr. Cherry and Mrs. Gordon for the construction of a single family home ("Cherry House") based on my analysis and conclusion that the proposed design of the Cherry House was not compatible or congruous with the requisite development standards set out in the Design Guidelines for Raleigh Historic Districts ("Design Guidelines").

5. I believe that my sworn testimony and written statement submitted to the Raleigh Historic Development Commission through its COA Committee during the public hearing on the 516 Euclid Street COA application combined with my Raleigh Board of Adjustment ("RBOA") application seeking review of the COA issued for the Cherry House are sufficient to establish my standing in this proceeding. Nevertheless, I am submitting this affidavit to ensure that the Court has all the facts, which establish the special damages I will suffer if the Cherry House is built under the approved COA.

6. I timely appealed the Cherry House COA approval to the RBOA. I attended RBOA meetings on December 9, 2013, January 13, 2014, and February 10, 2014. I was prepared to testify at all those meetings consistent with the facts asserted in this Affidavit had the RBOA requested additional evidence. I was not able to attend the March 10, 2014 RBOA meeting because I was out of State assisting a family member who was recovering from a significant illness. Upon information and belief, the RBOA did not seek additional evidence related to special damages at that meeting.

7. I currently work as an independent Real Estate Broker and have been licensed by the State of North Carolina since January 28, 2003. I hold a Bachelors of Science degree from the University of New Orleans and two additional degrees from Louisiana State University – one in life sciences and another in nursing. My husband and I have renovated and rehabilitated a number of older homes, one of which was in an historic district. I have also been involved in approximately six to eight sales of residential properties in Raleigh historic districts.

8. My husband and I purchased the unimproved lot at 515 Euclid Street on or about March 2008. We then sought and were ultimately granted a COA from the RHDC in order to build a new single-family residence, in which we now reside. I am very familiar with the COA application approval process, the Design Guidelines for Raleigh Historic Districts, and the various architectural styles and features prevalent in Oakwood.

9. I also regularly represent clients in buying and selling residential property in Wake County both within and outside of historic districts. As part of my role in that process, I have provided hundreds of property and property value evaluations to my clients based on my education, training, experience, and an analysis of the relevant market.

10. It is my position that the design of the Cherry House is significantly incongruous with the homes in the Oakwood Historic District and is especially incompatible with the historic homes in that district, which contribute to the District's special character as defined in the Design Guidelines. The result is an architectural outlier that is highly differentiated from and even oppositional to the area where it is located.

11. Euclid Street is narrow and, upon information and belief, less than fifty (50) feet separate the two properties. A common feature in Oakwood, my house is located close to the street, which contributes to the welcoming feel of the neighborhood. In addition, my home features a wide front porch, which was a design element my husband and I included to encourage interaction with our neighbors and enjoyment of the special character of the neighborhood in which we were investing. In describing the special character of Oakwood, the Design Guidelines note "the houses are generally tightly spaced and often located close to side lot lines. This dense group of buildings, which are also set close to the sidewalk, give a certain intimacy and rhythm to the neighborhood." (p. 86). The construction of an incompatible and incongruous two-story structure, which is only set back 6-10 feet from their property line, effectively wipes out our front vista and view.

12. While the properties along Euclid Street enjoy the full benefits and protections of the City's General Historic Overlay District, the street is narrower and experiences less traffic that many other streets within Oakwood. However, since the construction of the Cherry House began, we have experienced a significant increase in vehicle traffic from non-Oakwood residents as they gawk at the modernist house built in a historic district without any other modernist homes, much less any that are contributing structures. The additional traffic has adversely impacted the value of our home in terms of quiet enjoyment and safety. As Oakwood is a common visitor destination in the City of Raleigh, I fully expect the traffic increase to hold if the incongruous modernist house is allowed to remain as approved. It is and will continue to be a major sideshow and distraction within Oakwood and, more specifically, Euclid Street.

13. As an example of the impact the Cherry House has had on my property, I have experienced on numerous occasions news reporters and other media agents staked out in front of and around my property waiting to ambush me with the intention of obtaining unscheduled interviews. Upon information and belief, it is Mr. Cherry, Mrs. Gordon, and their agents who have fomented a significant amount of media coverage in this matter. This unwanted attention creates ingress and egress problems as well as a significant amount of anxiety for my husband and I. As a result of stories published in, among others, the News & Observer, Vanity Fair, Boston Globe, Seattle Times, and New York Times as well as a feature on the Today Show, I have received dozens of unsolicited emails and phone calls expressing rude, harassing, and graphic commentary on my involvement in this matter, even though I am only exercising my statutory right to seek review of a COA approval.

14. In my professional opinion, based on my education, training, and experience, the existence of an incongruous and anomalous structure directly across from my property will adversely affect the monetary value of my property by at least several thousand dollars. That adverse effect can be attributed, in large part, to a loss in marketability and buyer interest. Upon information and belief, at least one potential buyer seeking to purchase a residence in Oakwood has already elected not to consider a home for sale due to its proximity to 516 Euclid Street.

15. All of the above will cause substantial and irreparable harm to my property and the quiet enjoyment thereof. The damages suffered by me, including the decrease in the value of my property, will result in special damages to me, which are distinct from the rest of both the Oakwood and Raleigh communities.

16. The Design Guidelines specifically describe Raleigh Historic Districts as "valuable assets to the identity of the City" designed "to protect and enhance the existing character of a community." (p. 2). It is my contention that the design of the Cherry House is wholly inconsistent with Oakwood's special character, especially in its use of incongruous massing, scale, proportion, orientation, form, façade, roof shape, windows, doors, materials, detail, pattern, texture, and finish. An unlawfully issued COA does not enhance or protect the existing character of Oakwood. As such, the value of a City asset is adversely impacted. Such harm is particularly significant and pronounced to an adjacent property owner such as myself, resulting in special damages.

This the 18th day of July, 2014.

Gail Wiesner

SWORN to before me this 18th

day of July, 2014

Notary Public for Washington State

My Commission Expires: 10/31/2015

SAYMOR S KIM
Notary Public
State of Washington
Commission Expires October 31, 2015

EXHIBIT C

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14 CVS 4003

LOUIS CHERRY and MARSHA GORDON,

Petitioners,

v.

GAIL WIESNER, CITY OF RALEIGH, and RALEIGH BOARD OF ADJUSTMENT,

Respondents.

AFFIDAVIT OF MICHAEL R. OGBURN

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14 CVS 4307

CITY OF RALEIGH,
a municipal corporation,

Petitioner,

v.

RALEIGH BOARD OF ADJUSTMENT, LOUIS W. CHERRY, III, MARSHA G. GORDON, and GAIL P. WIESNER,

Respondents.

AFFIDAVIT OF MICHAEL R. OGBURN

Michael R. Ogburn, being first duly sworn, hereby affirms that:

1. I am legally competent to make this affidavit and make it of my own personal knowledge, except where I specify that it is made on information and belief.

2. I have been duly certified as a residential appraiser by the State of North Carolina since 1991. I currently serve as managing partner of Birch-Ogburn & Co., which specializes in

EXHIBIT
2

residential real estate appraisals. My address is 3236 Trenton Road, Raleigh, North Carolina.

3. I received a Bachelor of Arts degree in Economics from North Carolina State University in 1973. My additional education, training and experience is as follows:

Professional Designations

- GRI: Graduate of the Realtors Institute, North Carolina Real Estate Foundation, 1975
- SRA: Senior Residential Appraiser, Appraisal Institute, 1991

Appraisal Courses

- Introduction to Appraising Real Property, Society of Real Estate Appraisers, successful exam challenge, 1984
- Residential Valuation, American Institute of Real Estate Appraisers, 1984
- Applied Residential Property Valuation, North Carolina State University, 1985
- Professional Practice & the Society of Real Estate Appraisers, Society of Real Estate Appraisers, 1990
- Introduction to Income Property Appraisal, Wake Technical College, 1991

Continuing Education Instructor

- Appraising This Old House, The Continuing Education Center
- Market Extractions, The Continuing Education Center

State Certification

- Certified Residential, A2590, 1991 to Present

Offices Held

- Candidate Guidance Committee Chairman, Eastern Chapter 190 of the Society of Real Estate Appraisers, 1992
- Regional Subchapter President, Appraisal Institute of North Carolina, 1995
- Board of Directors, Appraisal Institute of North Carolina, 1995

Employment History

- 1971-1973: Part time sales associate, Ogburn Realty Co., Raleigh, NC
- 1973-1976: Full time sales associate, Ogburn Realty Co., Raleigh, NC
- 1976-1980: Owner, Prestige Builders, Inc., Raleigh, NC
- 1980-1984: Sales Manager, Ogburn Realty Co., Raleigh, NC
- 1980-1985: Dean, Ogburn Real Estate Licensing School, Raleigh, NC
- 1984-1991: Independent fee appraiser, Robert M. Birch Appraisals, Raleigh, NC
- 1991-Present: Managing partner, Birch-Ogburn & Co., Raleigh, NC

National Registry

- HUD Roster

4. During the months of April and May 2014, I conducted a market analysis (attached hereto as **Exhibit A**), including the collection of relevant data and analysis of that data, focused on two properties: 515 Euclid Street, Raleigh, North Carolina, owned by David and Gail Wiesner ("Wiesner Property"), and 516 Euclid Street, Raleigh North Carolina, owned by Louis Cherry and Marsha Gordon ("Cherry Property"). The purpose of that market analysis was to determine what, if any, impacts to the Wiesner Property would result from the construction and occupation of a modernist single-family dwelling on the Cherry Property as approved by the Raleigh Historic Development Commission in September and October of 2013.

5. I personally visited the Wiesner and Cherry Properties during the last week of February 2014. At the time of my visit, the exterior of the dwelling on the Cherry Property appeared to be approximately fifty (50) percent complete. I also reviewed the approved design plans for the dwelling. In my profession opinion, I would classify the building as being of modernist design and nonconforming with the surrounding properties, including the Wiesner Property. My personal observations of the subject sites were consistent with my analysis and conclusions.

6. In conducting that analysis, I utilized comparable circumstances in which a nonconformity disrupted an otherwise conforming area. I identified three studies addressing such a scenario, which I had previously conducted without reference or relation to the Euclid Street matter. In each of those studies, my conclusion was that a loss to value of properties adjacent to the nonconforming development, ranging from 5.92% to approximately 23%, was attributable to the introduction of that nonconforming development. For a $400,000 single family dwelling, that would represent a loss to property value between $23,680 and $92,000. Even an adverse impact on the Wiesner Property of only half of the minimum percentage loss shown in the other studies would represent a diminution in property value of over $10,000.

7. Based on my (1) personal observations of the Wiesner Property and Cherry Property, (2) review of the approved design plans for the modernist dwelling, (3) analysis of the comparable real estate data, and (4) education, training and experience, my conclusion and professional opinion is that the Wiesner Property will be adversely affected in terms of property value and marketability by the existence of the approved modernist dwelling on the Cherry Property and that those effects, from a residential housing market standpoint, would be significant.

{NEXT PAGE IS SIGNATURE PAGE}

This the 24th day of July, 2014.

Michael R. Ogburn

SWORN to before me this 24th

day of July, 2014

Linda M Rich

Notary Public for North Carolina

My Commission Expires: 4-21-2016

LINDA M RICH
NOTARY PUBLIC
WAKE COUNTY, NC

Market Impact Study

File No. 14-30

Borrower/Client	DAVID & GAIL WIESNER			
Property Address	EUCLID STREET			
City	RALEIGH	County WAKE	State NC	Zip Code 27604
Lender				

To whom it may concern:

I have been asked to render an opinion as to whether the construction of a modernist, architiectural style, single family dwelling in Oakwood at 516 Euclid St. would have an adverse impact on the immediately surrounding properities. According to the principle of conformity:

Principle Of Conformity

Category - Real Estate Glossary - Real Estate Terminology

An appraisal principle that holds that use conformity is desirable in creating and maintaining higher values and that maximum value is realized when a reasonable degree of homogeneity of improvements or similarity of properties is present in an area.

Real Estate Definition - homogeneous

homogeneous - an appraisal term meaning a clustering of similar structures and property uses such as single-family homes of similar size and age. From an appraiser's point of view, homogeneity stabilizes and protects values. See also heterogeneous

Composed of parts all of the same kind or of the same kind or nature; essentially alike.

Heterogeneity

Definition

The quality or state of being heterogeneous; different in kind; unlike; incongruous.

Real Estate Definition - external obsolescence

external obsolescence - an appraisal term referring to the loss in value attributable to factors outside the property itself, such as changed economic conditions, changes in zoning, and construction of nearby nuisances.

From these definitions, it appears that any nonconformity has the potential to create and adversely effect the value of the surrounding properties. The question would be does a dwelling of dissimilar architectural style, age and using dissimilar building materials conform? In that it is a single family dwelling, yes, but in other ways the answer would be no. As such, it would be reasonable to concluded that this would create some adverse effect on the surrounding properties.

I have done several studies, present and past to measure the efects of an external loss to property value. The most recent is as of May 16, 2014. As my study area I selected the subdivision of Village at Pilot Mill. This is located behind Peace College, and along one street, faces the shopping area @ Seamart. The street that faces the Semart area is Haynes St. A search of the entire subdivision for the preceding two years, 05/16/2012 to 05/16/2014 found there to have been 19 closed sales, ranging in price from $340,000 to $440,000 with a median $419,000 for 2,293 sf and a SP/SF of $169,20. Doing the same search for just Haynes St found 5 closed sales ranging from $365,000 to $440,000 with a median sales price of $388,500 for 2,293 sf and a SP/SF of $159.18. As the time frame of the study and median square footage is the same, it is reasonable to conclude the difference in median sales price and median SP/SF is attributable to the external effect of looking onto the shopping area instead of other residences. The difference is median sales price is a loss of 7.28%, the difference is SP/SF is a loss of 5.92%

The second study was conducted to see if proximity to a school with an athletic stadium had an effect on market value.

1. Athens Drive High School, adjacent to Athens Drive is a subdivision known as Lake Johnson Harbour, between January 1, 2009 and July 20, 2011 there were 10 sold properties in that subdivision. Three of those sales were very proximate to the school, 1016, 1008 and 1004 Sheetbend Lane. Those three

EXHIBIT A

File No. 14-30

Borrower/Client	DAVID & GAIL WIESNER			
Property Address	EUCLID STREET			
City	RALEIGH	County WAKE	State NC	Zip Code 27604
Lender				

sales had a median sales price of $183,000 and median SP/SqFt (sales price/square footage)of $137.64. The remaining 7 sales, not as proximate to the school sold for a median sales price of $185,000 and median SP/SqFt of $143.82. The largest difference is in the SP/SqFt a difference of $6.18, which is a loss of $6.18/$137.64 = 4.4%.

2. Enloe High School, adjacent to Enloe High is a subdivision known as Victoria Place, between January 1, 2009 and July 20, 2011 there were 10 sales in the subdivision. Three of those sales were very proximate to the school, 464,452 and 412 Dickens Drive. Those three sales had a median sales price of $114,450 and median SP/SqFt of $76.56. the remaining 7 sales had a median sales price of $116,000 and a median SP/SqFt of $93.47. The largest difference is the SP/SqFt of $16.91, which is a loss of $16.91/$76.56 = 22.1%.

3. Cary High School, adjacent to Cary High is the neighborhood of Tanglewood, between January 1, 2009 and July 20, 2011 there were 17 sales in the market area, with three sales very proximate to the school. Those three sales, 630 Ashe Avenue, 614 Birch Circle and 522 Elm Street sold for a median sales price of $220,000 with a median SP/SqFt of $84.68. The remaining 14 sales sold for a median sales price of $224,900 and a median SP/SqFt of $96.76. The largest difference is in the Sp/SqFt of $12.08, which is a loss of $12.08/$84.68 = 14.3%.

The third study was for a site that forced the subject house to be builit looking almost directly into the rear of another house,

304 LAKE BOONE TRAIL SOLD OFF A PORTION OF ITS LOT A NUMBER OF YEARS AGO AND A NEW HOUSE WAS BUILT ON THE NEWLY CREATED LOT, SEE ATTACHED TAX PARCEL MAP, CREATING AN IMPAIRED VIEW VERY SIMILAR TO THAT OF THE SUBJECT, WITH TWO DWELLINGS VERY AND ATYPICALLY PROXIMATE TO EACH OTHER.304 LAKE BOONE TRAIL WAS PUT ON THE OPEN MARKET AND SOLD 05/07/2007, PER MLS # 918184, FOR $535,000. THE PROPERTY IS SHOWN AS HAVING 9 ROOMS, 3 BEDROOMS, 2.5 BATHS AND 2760 SF OF LIVING AREA. THE HOUSE WAS TOTALLY RENOVATED AND HAD ADDITIONS MADE IN 2002 BY PROFESSIONAL ARCHITECT. THE HOUSE SOLD FOR $193.84 PER SQUARE FOOT. A SEARCH OF MLS RECORDS FOR THE 12 MONTHS PRIOR TO THE SALES DATE, 05/07/2006 THROUGH 05/07/2007 FOR DWELLINGS IN THE SUBJECT'S NEIGHBORHOOD OF BUDLEIGH,WITH BETWEEN 2,500 AND 3,100 SF OF LIVING AREA WAS MADE, FINDING 7 SALES OTHER THAN THE 304 LAKE BOONE TRAIL HOUSE. THESE PROPERTIES AVERAGED HAVING 4 BEDROOMS, 3 BATHS AND 2,727 SF OF LIVING AREA, W ITH A MEDIAN SALES PRICE OF $220.02 PER SQUARE FOOT AND AN AVERAGE SALES PRICE OF $208.51 PER SQUARE FOOT. USING THE LOWER OF THE TWO, $193.84/$208.51 = .9296% OR ABOUT 7% LESS ROUNDED. USING THE MEDIAN, $193.84/$220.02 = .881% OR ABOUT 12% LESS ROUNDED.

4909 FALLS OF NEUSE ROAD IS LOCATED ON THE CORNER OF FALLS OF NEUSE ROAD AND CEDARHURST, AND IS ALSO ACROSS THE STREET FROM THE SHOPPING CENTER, SEE ATTACHED TAX PARCEL MAP. 4909 FALLS OF THE NEUSE WAS PUT ON THE OPEN MARKET FOR SALE PER MLS # 1832679 AND SOLD ON 06/25/2012. THE PROPERTY IS SHOWN AS HAVING 7 ROOMS, 3 BEDROOMS, 2.5 BATHS AND 1842 SF OF LIVING AREA, WHICH IS $92.29 PER SQUARE FOOT. A SEARCH OF MLS RECORDS FOR THE AREA BETWEEN SIX FORKS ROAD, MILLBROOK ROAD, FALLS OF NEUSE ROAD AND ST ALBANS DRIVE, RANCH STYLE HOUSES, PRECEDING 12 MONTHS, FOUND 11 CLOSED SALES NOT INCLUDING 4909 FALLS OF NEUSE, W ITH AN AVERAGE OF 3 BEDROOMS, 2 BATHS AND 1626 SQUARE FEET OF LIVING AREA. THE MEDIAN SALES PRICE OF THESE DWELLINGS IS $125.00 PER SQUARE FOOT AND THE AVERAGE IS $120.28 PER SQUARE FOOT. USING THE AVERAGE, $92.29/$120.28 = .7673 OR ABOUT 23% LESS AND USING THE MEDIAN, $92.29/$125 = .7383 OR ABOUT 26% LESS.

The conclusion of all the studies is that being adjacent to or proximate to a nonconformity does have an adverse effect on value, therefore it is reasonable to conclude that the nonconformity of the modernist style dwelling on 516 Euclid will adversely affect its surrounds.

7/24/14