SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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

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Re: ***Pilot Point Assoc. of Owners et al. v. City of Lewes Bldg. Inspector, et al.***
C.A. No. S10A-08-008 RFS

Decision on Petition of a Writ of Certiorari. Affirmed.

Submitted: August 8, 2011
Decided: October 25, 2011

Dear Counsel:

This is the Court's decision on a petition after the issuance of a writ of certiorari. Petitioners are the Pilot Point Association of Owners by and through the Council of Unit Owners for the Pilot Point Association of Owners ("the Council"), Edward Kingman ("Kingman"), David Hoag ("Mr. Hoag") and Phyllis Hoag ("Mrs. Hoag"). Respondents are the City of Lewes Building Inspector ("building inspector"), the Board of Adjustment of the City of Lewes ("City") and Lawrence Sullivan ("Sullivan"). For the reasons stated

herein, the Board's decision is affirmed.

Facts. This case pertains to a condominium, which is "a common interest community in which portions of real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions."[1] A condominium is created by filing a declaration of the condominium with the Recorder of Deeds.[2]

The Pilot Point Condominium ("Pilot Point") consists of 60 units distributed among several buildings on land leased from the City. For at least 20 years, the Council approved decks that encroached approximately eight feet into the common area. The Pilot Point declaration does not include this provision.

Sullivan is the owner of Unit 35. In 2009, a Pilot Point inspection showed that Sullivan's deck, among others, was unsafe. Sullivan's deck encroached eight feet into the common area of the condominium and had been approved by the Council, as had others like it.

After the inspection, Sullivan sought the Council's approval for a new deck that would create a ten-foot encroachment. The Council denied his request because the new deck would be an enlargement of the existing deck. However, the Council had previously

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[1]Title 25 *Del. C.* § 81-103 (12).

[2]Title 25 *Del. C.* 81-201(a).

approved three decks similar to the one Sullivan proposed.

Sullivan also applied for a building permit. His application was denied by the City's assistant building inspector, Ed Gilpin. The denial was made in deference to an objection filed by the Council. Nonetheless, Sullivan took preliminary steps toward construction, but later ceased construction pending resolution of the issues.

The Council filed a Complaint in Chancery Court seeking, among other things, a temporary restraining order on current construction[3] and a permanent injunction prohibiting other unit owners from any construction that would encroach into the common area without approval from the Council.

The Council argued that there was an agreement between unit owners and the Council that allowed for deck encroachments into the common areas. Chancery dismissed the Complaint because there was insufficient evidence of an enforceable agreement.[4] The Court stated that without written standards approved by 100 percent of the owners, and filed with the Recorder of Deeds, there was nothing for the Court to enforce. Thus, unit owners were unrestricted in the nature of deck improvements they might make. The Court made it clear that the Council was responsible for obtaining unanimous approval of the owners to obtain a binding agreement for enforcement

[3]In addition to Sullivan, unit owners Harry Bonk, Wayne Hawkins and Shauna Thompson were named as Defendants. They are not parties to this action.

[4]Record at Ex. 11.

purposes.

Following the Chancery Court decision, the building inspector issued a building permit to Sullivan, who completed his deck according to his original proposal.

The Council filed an appeal to the Board, seeking recision of Sullivan's building permit to be followed by tearing down the deck and forcing Sullivan to begin anew.[5] Count I alleged that Sullivan was not the owner of the land in dispute, and therefore not authorized to build into the common area. Count II sought a stay of the construction work. After a hearing, the Board denied the appeal based on Chancery's decision and on its finding that the building inspector acted properly in issuing Sullivan's permit.

In August 2010, the Council filed this petition, alleging errors of law on the part of the Board.

Standard of review. The Court's function on review of an administrative decision is to determine whether the decision is supported by substantial evidence and is free from legal error.[6] Certiorari is, in effect, an appeal of the Board's decision, which is confined to the record.[7]

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[5]Transcript of Board Hearing (May 18, 2010) at 57-59. The transcript is subsequently referred to as 'Tr. Bd. Hrg."

[6]*General Motors Corp. v. Freemen*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

[7]*Kirkwood Motors, Inc. v. Bd. of Adjustment of New Castle County*, 2000 WL 710085 (Del. Super.)(citing *Chadwick v. Janaman*, 349 A.2d 742, 743 (Del. 1975)).

No error in the Board finding that the permit was properly issued. The Council argues first that the Board erred in upholding the issuance of Sullivan's building permit because Sullivan did not have title to the common area and because Chancery required a unanimous agreement by all unit owners for a permit that would allow an impingement into the common area. At the Board hearing, Appellant's lawyer stated that he did not have time to obtain the agreement prior to completion of Sullivan's deck. This argument is addressed, *infra*.

Delaware case law does not support the Council's position as to title. The Council relies on *Taylor v. The Bd. of Adjustment of the Town of South Bethany*,[8] where the Delaware Supreme Court stated that a board of adjustment is generally without authority to decide issues of title but that disputed ownership may be a basis for denying a building permit.

The Council also cites to *MacDonald v. Bd. of Adjustment of the Town of Dewey Beach*.[9] This Court stated that boards of adjustment generally may not determine title incident to granting a permit, adding that the proper forum for a title challenge is the courts. Contrary to the Council's assertions, these cases do not impose on the Board an affirmative duty to resolve title disputes, nor do any other Delaware cases. The Board made no error in denying the argument that the building inspector improperly issued

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[8]502 A.2d 979 (Del. 1985).

[9]558 A.2d 1083, 1088 (Del. Super. 1989).

Sullivan's permit.

In fact, the building inspector awaited the outcome of the Chancery Court action before issuing the permit. In light of the Chancellor's ruling that there was no basis for enforcing any standards for encroachment, the building permit was properly issued.

No enforceable agreement. The Council argues that the Board committed reversible error by not upholding an agreement or understanding between Council and the building inspector. On June 30, 2009, Kingman, a Council member, sent a letter to Ed Gilpin referencing a "courtesy agreement" between the Council and the building inspector that the City would not issue building permits until approved by the Council. Gilpin testified that prior to June 30, 2009, the policy, if it could be called that, had been a casual one designed to prevent the building inspector's office from getting involved in owners' disputes. The record does not contain an agreement signed by either Gilpin or any other building permit official.

Gilpin described his job as working with property owners or their contractors to determine whether building plans meet state law, the City Code and the Zoning Code. His job does not entail involvement with community restrictions. Moreover, the City Code does not provide for agreements between a building permit official to enter into such agreements with homeowners' associations.

In addition, the Board argues to the Court that the Chancery decision prohibited

the Council from objecting to deck construction permits in Pilot Point. The Court agrees. The Board appropriately found that the building inspector had acted correctly and in deference to the Chancery Court ruling.

Res judicata. Respondents argue that the Council's claims are barred by the doctrines of *res judicata* and collateral estoppel. *Res judicata* applies when five factors are met.[10] The first factor is that the prior court had jurisdiction over the subject matter and the parties, which in this case is undisputed.

The second factor is that the parties in both actions are the same or are in privity with one another. Privity is a legal determination as to whether the relationship among the parties is sufficiently close to support preclusion.[11] Parties are in privity for *res judicata* when their interests are identical or sufficiently aligned so that they were actively and adequately represented in the first suit.[12] In this action, the Council brought the action against Sullivan, whereas in Chancery the Council sought the injunction against, among others, Sullivan. Thus, the parties are the same, permitting preclusion.[13]

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[10]*Bailey v. City of Wilmington*, 766 A.2d 477, 481 (Del. 2001).

[11]*Aveta Inc. v. Cavallieri*, 23 A.3d 157, 180 (Del. Ch. 2010)(citations omitted).

[12]*Id.* (citations omitted).

[13]As to Kingman and Mrs. Hoag, they are named petitioners in this case. At equity, they were members of the Council when the Chancery Court action was filed. The Council does not exist unless it has members. Kingman and Mrs. Hoag clearly had the same interests as the Council in that, as members, they participated in deciding to bring the action in Chancery. Parties are in privity for *res judicata* purposes when their interests are identical or closely aligned in the first suit. Kingman and Hoag's status as members of the Council when the Council brought the Chancery Court action meets this test, in that, as members of the Council, they

The third factor is that the cause of action is the same in both cases or the issues decided in the prior action must be the same as those raised in the present case.[14]

The Court of Chancery found that there was no "prior agreement" regarding deck measurements and that the Court therefore had nothing to enforce. Before the Board, the Council's attorney stated:

> We are following [the] Chancellor's direction and saying we need to put a brake on this unbridled usurpation of the common element state. And since we can't do it or couldn't do it in Chancery Court, I'm trying to do it legally in a legal procedure in the attack of the building permit and take it up to the, through the legal course.[15]

In fact, the Council was not following Chancery's direction to obtain and file an agreement among unit owners as to deck restrictions. Instead, the Council pursued an action at law, shifting blame to the building inspector for issuing Sullivan's permit. However, the Appellant's lawyer's arguments before the Board and this Court are direct challenges to the Chancellor's decision.

Counsel argued that under the Chancellor's decision, not only Sullivan, but any unit owner could build into the common area.[16] He argued that the Chancellor's decision

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participated on some level in bringing the action, which was brought in order to establish the parties' legal obligations.

[14]*Bailey*, at 481.

[15]Tr. Bd. Hrg. (May 18, 2010) at 62.

[16]Tr. Bd. Hrg. (May 19, 2010) at 48.

meant that the City could grant any type of building permits for Pilot Point.[17] He complained about the difficulty of following the Chancellor's direction to obtain and file standards for encroachments into the common area.[18] For this reason, he stated "we have to draw a line in the sand some place and some time through some legal mechanism."[19]

Thus, the issue before Chancery was enforcing standards for encroachments into the common area. The issue before the Board was the same, but approached from a different perspective. Before Chancery, the avenue was enforcing an informal agreement between the Council and the unit owners. Before the Board, the avenue was restricting building permits. The issue of whether Sullivan should be precluded from building his proposed deck was litigated in equity and at law. The issue was fully heard and resolved by Chancery prior to the Board appeal. The third factor is met.

The fourth factor is that the issues in the prior action must be decided adversely to the party's contention is the instant case. The fifth factor is that the prior adjudication must be final.[20] In his final decision, the Chancellor resolved the issue of deck restrictions against the Council.

The five factors for *res judicata* are met, and the Council's claim regarding

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[17]*Id.* at 46.

[18]*Id.* at 47.

[19]*Id.*

[20]*Bailey,* at 481.

enforcing restrictions against Sullivan is barred.

The requirements for collateral estoppel are also met. These requirements are: (1) a question of fact essential to the judgment, (2) be litigated and (3) determined (4) by a valid and final judgment.[21] There is no requirement that the parties be the same or that they be in privity.[22] As a necessary step in resolving the Council's claim in equity, the Chancery Court determined as matters of fact that no enforceable agreement existed establishing deck restrictions and that the Council had previously acquiesced to common area encroachments. These issues were fully litigated and resulted in a final order dismissing the Complaint for lack of sufficient evidence. Thus, the Council is estopped from raising the same claim in this action.

City building code. The Council raises an issue that it did not raise below. Picking up on comments made during the Board's deliberations, the Council now argues that Pilot Point is a non-conforming use under the City zoning map because it is located within the Old Town Development District, which prohibits properties from having any more than 25 percent multi-family uses. Pilot Point is 100 percent multi-family dwellings. Section 197 of the Zoning Code states that a non-conforming building may not be altered in a way that increases its nonconformity.

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[21]*Messick v. Star Enterprise*, 655 A.2d 1209, 1211 (Del. 1995).

[22]*HealthTrio, Inc. v. Margules*, 2007 WL 544156, *9 (Del. Super.).

This objection is waived because it was not presented below.[23] In any event, Sullivan's deck would not increase the multi-family non-conformance of Pilot Point. The Council's argument fails on the merits.

Conclusion. For all these reasons, the Council's appeal is **DENIED** and the Board's decision is **AFFIRMED.**

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary

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[23] *Beiser v. Bd. of Adjustment of Town of Dewey Beach*, 1991 WL 236966, at *4 (Del. Super.).