IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

SPYROS MAROULAS, INC.,	:	
	:	**C.A. No: K10A-12-003(RBY)**
Petitioner,	:	
	:	
v.	:	
	:	
CITY OF MILFORD BOARD OF APPEALS,	:	
	:	
	:	
Respondent.	:	

Submitted: May 18, 2011
Decided: August 22, 2011

Upon Consideration of Petitioner's Writ of Certiorari
GRANTED

ORDER AND OPINION

Basil C. Kollias, Esq., Cooch and Taylor, P.A., Wilmington, Delaware for Petitioner.

Timothy G. Willard, Esq., Fuqua, Yori & Willard, P.A., Georgetown, Delaware for Respondent.

Young, J.

Spyros Maroulas, Inc. v. City of Milford
K10A-12-003 (RBY)
August 22, 2011

SUMMARY

The Petitioner, Spyros Maroulas Inc.("Spyros") appeals from the City of Milford Board of Appeals (the "Board") decision to condemn its properties. This action was initiated by Spyros, pursuant to the filing of a writ of *certiorari* challenging the Board's decision to condemn Spyros' property. The Board filed a Motion to Dismiss, arguing that the Court has no jurisdiction because Spyros was late in filing its petition. This Court denied the Respondent's Motion to Dismiss in a January 20, 2011 Order. Before the Court now is the writ of *certiorari.* The lower tribunal, while not exceeding its jurisdiction committing errors of law, did proceed irregularly. Hence, the Plaintiff's Writ for *certiorari* is **GRANTED.**

FACTS

Spyros is the owner of two properties, 205 and 207 Northwest Front Street, Milford, Delaware. On November 17, 2010, the Board confirmed a city building inspector's order of condemnation and demolition for 205 and 207 Northwest Front Street. Spyros petitioned this Court for judicial review by writ of *certiorari.*

This cause of action began in 2006, when the Board condemned adjoining properties to Spyros' properties. On November 26, 2006, the rear wall of 201 Northwest Front Street ("201 property") collapsed. As a result the building was declared unsafe and condemned by the City of Milford ("City"). A notice was sent to the owner of the 201 property, Ms. Starr Fiocca ("Fiocca"), who also owned 203 Northwest Front Street ("203 property"). On December 1, an engineer's report indicated that the 201 property should be demolished, and that the 203 property could be repaired.

On February 6, 2007, a second notice of condemnation was sent to Fiocca, stating that the property building must be demolished. In March, an engineer was retained by the City, who recommended that the 201 Property be demolished, and the 203 property be repaired. This was consistent with the previous engineer's report. Subsequently, Fiocca negotiated the sale and transfer of the 201 and 203 properties. Both properties were sold to Downtown Properties, LLC ("Downtown").

On December 28, 2007, Downtown received a permit to demolish the 201 property. During the course of the demolition, the rear wall of the 203 property was damaged, which caused a partial collapse of the 203 property. As a result, in January, 2008, Downtown informed the City that both properties needed to be demolished. On January 28, 2008, the City informed Mr. Dan Bond ("Bond"), of Downtown Properties, that an engineer's report was required prior to the demolition of the 203 property.

The City was concerned about the partition wall between the 203 property and 205 Northwest Front Street (the "205 Property"), which is owned by Spyros. In order to obtain the necessary permit for the 203 property, Bond was required to have an engineer's report executed. On February 5, 2008, Bond wrote Spyros requesting his engineer be permitted to examine the 205 and 207 property. Spyros provided an engineer's report on March 14, 2008, which indicated that the party wall was not structurally sound.

As of May 1, 2008, Downtown had not yet submitted an engineer's report to the City, as required. This delay, the plaintiff contends, added to the further deterioration of the properties. On May 16, 2008, the City sent another letter to

Downtown, which inquired about Downtown's intentions with regard to the demolition of the 201 and 203 properties. The City also requested action because of the unsafe conditions of the buildings. In May, Downtown and Spyros both acquired engineers to determine the extent of the damage caused by the 201 demolition.

On October 10, 2008, the City sent a letter to Downtown, citing alleged violations of the 2006 International Property Maintenance Code, which mandated that the work be completed, as required by the the code official's order. On October 28, 2008, Bond send an e-mail to the City, acknowledging his intent to rebuild the party wall that was damaged between the 203 and 205 properties. On November 3, after it received the stamped drawings from Downtown, the City issued a permit for the repair of the wall between the two properties. The permit was not picked up from the City, nor paid for by Downtown.

On March 19, 2009, Downtown contacted the City and indicated that further funding was needed before moving forward with the demolition and rebuilding of the party wall. On May 5, 2009, the City sent another notice to Downtown, indicating that the structure was unsafe, stating that Downtown had forty-five days to begin the repair of the party wall between the 203 and the 205 properties, and the demolition of the 201 and 203 properties.

Subsequently, Downtown met with the City, and indicated that it could not make the repairs, due to safety concerns. Downtown requested the City to condemn the 205 property. Thereafter, on June 19, 2009, the City had another engineer's report commissioned. The report indicated that: the 203 property should be demolished; the party wall between the 203 and 205 properties should be replaced,

or; both the 205 and 207 should demolished, based upon the financial considerations of the situation.

A meeting was called for on September 9, 2009, for all interested parties to discuss moving forward. On September 25, 2009, the City called for another meeting of the property owners to discuss how to proceed cooperatively.

On January 12, 2010, an engineer's report was provided to the City, which indicated the unsafe conditions of the properties. Specifically, the condition of the 205 and 207 properties was described as follows:

> severely deteriorated floor joists...significant moisture and fungal damage...brick masonry in poor condition..excessive deflection of the floor framing...pigeons living in the third floor framing...pigeons living in the third floor...live bird droppings, nesting material eggs and dead birds inside the building. As to the condition of 207 the engineer reported that the roof appeared to be in poor condition...numerous severely deteriorated floor joists...structural members have been improperly reinforced...significant moisture and fungal damage...standing water in the basement...brick masonry in poor condition...timber post are without adequate support...settlement of th e foundations and excessive deflection of the floor framing at the 1st and 2nd floors.

On January 20, 2010, the first condemnation notice was sent to Spyros, indicating that the 205 and 207 properties were condemned. On January 21, 2010, the condemnation was appealed, by Spyros, to the City Manager, Mr. David Baird. On January 22, 2010, Bond wrote the City that he would attempt to work with Spyros, to arrange a single contractor, to perform the demolitions. Spyros had its engineer inspect the 205 and 207 properties. A report was issued on February 8.

On March 4, 2010, the City Manager held a hearing to review the Code Official's decision to condemn the 205 and 207 properties. On April 28, 2010, the City issued a decision affirming the City Official's decision to condemn the properties. Spyros' engineer prepared a report, which was submitted in response to the order affirming condemnation.

Thereafter, the City of Board of Appeals was convened to review the condemnation. The Board is designed to be comprised of three people: an appointed architect and an appointed contractor, as "permanent" members, and the City Manager, referred to as a "standing member." This July 15, 2010 hearing was before the Board, but it consisted of just two members. The third member, the City Manager, had rendered the April 28, 2010 decision. As a result, the City Manager recused himself, because of his decision below. The hearing proceeded with a quorum of the Board, without any objection. Testimony and documentation was presented to the Board at that hearing.

There was testimony from both Downtown and Spyros, regarding their affected properties. During Bond's testimony for Downtown, he testified that he would pay to reconstruct the party wall and to demolish the 201 and 203 properties. Bond requested that the City complete the repairs; and, in return, secure a lien on Downtown's properties for payment of the bill to demolish. Board member French, the architect, requested that a site visit be scheduled. That visit occurred on July 27, 2010, as reflected by the record. The two Board members, engineers from both parties, the City clerk, the City Solicitor, Spyros and counsel were all present at the site visit. Minutes were taken at the visit. The City Solicitor instructed everyone

only to observe without any comments.

On August 4, 2010, the Board considered comments from all parties, Petitioner, and counsel. On August 17, 2010, the Board reconvened, where additional evidence was added to the record. Mr. French read into the record the relevant law, and then the findings and decision of the Board. The record was then closed, with no objection. A motion to approve the Board's resolution was made by a Board member, and approved. The Board decided it would affirm the condemnation, and was to reconvene again in ninety days, as part of its decision to affirm. The Board allowed the Petitioner to provide information pursuant to IPMC 115.5, that the cost of restoration does not exceed 50% of the value of the building. This condition did not make the decision to condemn conditional, according to the Board. However, it made the remedy to demolition conditional on a cost/benefit analysis.

In November, 2010, the Board reconvened. After testimony, the Board concluded that Spyros did not comply with the August 17th condition. The Petitioner could not demonstrate that the value to repair did not exceed fifty percent of the value of the properties. On November 19th, based on the Board's decision, the City Code Official sent the Notice of Condemnation/Demolition.

In December, the City sent Spyros a notice indicating that the 205 and 207 properties were to be demolished on January 3, 2011. Immediately thereafter, Spyros filed for judicial review by writ of *certiorari.* On December 23, Spyros filed for a Temporary Restraining Order to halt the January 3 demolition. The demolition was approved on December 30, 2010.

STANDARD OF REVIEW

The Delaware Supreme Court has held:

> A writ of certiorari invokes one of the oldest common law writs, and its origins are obscure in the history of medieval England...The purpose of the writ is to permit a higher court to review the conduct of a lower tribunal of record. Review on certiorari is not the same as review on appeal because review on certiorari is on the record and the reviewing court may not weigh evidence or review the lower tribunal's factual findings. The reviewing court does not consider the case on its merits; rather, it considers the record to determine whether the lower tribunal exceeded its jurisdiction, committed errors of law, or proceeded irregularly. A decision will be reversed on jurisdiction grounds only if the record fails to show that the matter was within the lower tribunal's personal and subject matter jurisdiction. A decision will be reversed for an error of law committed by the lower tribunal when the record affirmatively shows that the lower tribunal has proceeded illegally or manifestly contrary to law.[1]

Narrow standards exist for reversing a lower tribunal's decision based on error of law, irregularity of the proceedings, or a tribunal's exceeding its jurisdiction.[2] The Delaware Supreme Court held that a lower court's record in a common law writ of certiorari "is nothing more than the initial papers, limited to the complaint initiating the proceedings, the answer or response (if required), and the docket entries."[3]

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[1] *Christiana Town Center, LLC v. New Castle County*, 865 A.2d 521 (Del. 2004).

[2] *Id.*

[3] *Maddrey v. Justice of the Peace Court 13*, 956 A.2d 1204, 1216 (Del. 2008).

PARTIES CONTENTIONS

The Petitioner raises three arguments, each of which it contends is based on errors of law, as to why the Board's decision should be reversed. Spyros asserts that: (1) the Board erred by not convening a full panel of three members to hear its appeal; (2) the Board erred by affirming the condemnation; and (3) the Board erred by not timely demolishing and condemning the properties adjoining 205 and 207 Northwest Front Street.

Specifically, Spyros contends that the Board exceeded its jurisdiction because it did not base the decision to condemn Spyros's property on the record, or make a finding necessitating the condemnation. Furthermore, the Board did not make a final judgment on the record. Therefore, Spyros contends, the Board proceeded irregularly.

The Respondent contends that a quorum of the Board was present satisfying the requirement of a three member Board, as mandated under the Rules. Second, the Board contends that the Board's final resolution was read into the record, during the hearing. Third, the Board contends that it proceeded in accordance with the Rules, condemning property that was unsafe to the public.

First, the Court will address the Petitioner's contention that the Board exceeded its jurisdiction and did not create an adequate record. Next, the Court will address, the issue of whether the Board proceeded irregularly with two members.

DISCUSSION

A. The Record and the Board's Jurisdiction

Spyros contends that the City of Milford issued a condemnation order for 205

and 207, without inspecting the properties, without providing an adequate record, and by exceeding its jurisdiction. Spyros contends this was a violation of Section 108.1 of the City of Milford building Code, constituting an unconstitutional taking. That, Spyros argues, is beyond the Board's jurisdiction.

Reversal on jurisdictional grounds is appropriate "only if the record fails to show that the matter was within the lower tribunal's personal and subject matter jurisdiction."[4] Reversal for irregularities of proceedings occurs "if the lower tribunal failed to create an adequate record for review."[5] Neither of the above situations exists in this case.

Under the facts of this case, it does not appear that the Board proceeded illegally or contrary to law. It appears that a sufficient record exists, and, that the Board acted within its jurisdiction. The Board and the City have authority, jurisdiction, and an obligation to condemn properties when appropriate.[6]

The City of Milford Code provides for general condemnation authority both for public safety and for public use.[7] The Board was within its jurisdiction. On July 27, 2010, there was a site visit as reflected by the record, which does in fact exist. The Board issued its final resolution on August 17, 2010. Spyros received notice of the site visit and the Board's final decision.

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[4] *Id.*

[5] *Id.*

[6] International Property Maintenance Code §108.1.1 (2006).

[7] International Property Maintenance Code §110.1 (2006).

Accordingly, Petitioner's assertions for reversal, based on allegations of deficient condemnation decision making and failure to provide proper record, are not well taken and fail.

B**. The Number of Board Members**

The Building Code of the City of Milford governs the Board of Appeals. It requires that the Board of Appeals is to consist of three members: the City manager, a design professional, and a member from the contracting industry. The statute creates a definitive number of members to hear an appeal. The issue here is whether the Board can proceed, and conduct business, with two members.

The City of Milford has adopted the 2006 International Property Maintenance Code ("IPMC"). The Respondent contends that Chapter 88 of the Milford Code provides minor revisions to the IPMC. Section 1112 of Chapter 88A(4) reads as follows:

> **R112.5 Application for appeal**. Any person shall have the right to appeal a decision of the Code Enforcement Official to the Board of Appeals. An application for appeal shall be based on a claim that the true intent of the code or the rules legally adopted thereunder have been incorrectly interpreted, that the provisions of this code do not apply or that an equivalent form of construction is to be used. The hearing fee shall be $300.
>
> **R112.6 Membership of Board**. The Board of Appeals shall consist of three members: the City Manager or his designate, a design professional (architect or engineer), and a representative of the contracting industry. The City Manager or his designate will be a standing member of the Board of Appeals. The initial term of the design professional shall be two years and the initial terms of the representative of the contracting

> industry shall be for one year. The term of all subsequent appointment shall be two years.
>
> **R112.7 Alternate Members**. The chief appointing authority shall appoint an individual of his choice to be an alternate during those times where one of the permanent members is unable to attend an appeals hearing or in cases where a conflict of interest may exist. Said appointment shall be made for a two-year term and shall not extend beyond the political term limit of the appointing authority.

In this case, the Board convened with two members, Mr. French (an architect), and Mr. Johnson (a Contractor), who were appointed by City Council as permanent members of the Board of Appeals. Mr. Wheedleton (an Architect) was appointed as an alternate, pursuant to R112.7. The third member, the City Manager, rendered the April 28, 2010 decision. As a result, the City Manager recused himself, because the issue confronting the Board was the propriety of his decision below. The hearing proceeded with a quorum of the board, without any objection. Various testimony and documentation was presented to the Board, and no objection was raised to the Board proceeding with two members.

The Respondent contends that the City Manager is distinguishable from the two permanent board members, who convened to make the decision. The City Manager may be replaced by his designee, whereas the permanent members require an alternate to be chosen by counsel if a conflict arises. Furthermore, the Respondent contends, that the lack of objection to the process, the presence of a quorum, and the reasonable interpretation of distinguishing the standing member from the permanent member, establish that the Board did not proceed irregularly.

The Court cannot agree. Pursuant to the Building Code, three members will comprise the Board. The Code does not literally specify whether the "standing member" is also a "permanent member." However, pursuant to 112.7, if a conflict of interest is present, then a replacement will need to be appointed. Rule 112.7 states that where "one of the permanent members is unable to attend an appeals hearing ***or*** in cases where a conflict of interest may exist," an alternate would need to be appointed.

In this case, the City Manager was a standing member. He was not replaced when the conflict of interest arose. The Code requires that the Board be comprised of three members. When a permanent member is presented with a conflict of interest, the code requires a replacement be appointed. Superficially, it might seem to make a difference that an alternate was not appointed, because the Board functions by way of majority vote. Yes, in a panel of three, one dissenter could have substantial input on at least one of the original members, changing the total voting consideration by the Board.

Moreover, while the Code indicates that the City Manager is a "standing member," it does not indicate which members are encompassed within the language of "permanent members." At the least, it certainly does not suggest that the City Manager is <u>not</u> to be considered a "permanent member." It appears that the only function of the modifier, "permanent," is to distinguish those members from *ad hoc* members. That is, the evident intent of the City was to have a Board considering condemnations to be one with some consistency. One-third (the City Manager) would have the "institutional memory" of how decisions were made over a, usually,

prolonged period of time. The other two-thirds would be replaced in a fashion that, normally, neither was new to the process for any determination. Thus, each consideration would be expected to have had the benefit of experienced people in the process as a majority of those makeup the determination. When one-third and in this case the typically most experienced, is missing without replacement, the intent of the process providing for the make-up of the Board is violated. In this case, because the conflicted Board member, the City Manager, was not replaced, I'm constrained to find that the Board proceeded irregularly.

CONCLUSION

For the foregoing reasons, the Petitioner's writ of certiorari is **GRANTED**.

SO ORDERED.

/s/ Robert B. Young
J.

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