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Re: Upfront Enterprises, LLC v. The Kent County Levy Court
C.A. No. 2678-VCN
Date Submitted: January 25, 2008

Dear Counsel:

This matter involves Respondent Kent County Levy Court's (the "County") enactment of an ordinance imposing a moratorium (the "Moratorium Ordinance") on the acceptance of certain land use applications. The facts are set forth in the Court's June 22, 2007 letter opinion.[1] There, the Court relied upon 9 *Del. C.*

[1] *Upfront Enters., LLC v. The Kent County Levy Court*, 2007 WL 182709 (Del. Ch. June 22, 2007). The letter opinion was issued on June 20, 2007. A revised letter opinion, without material change, was issued on June 22, 2007.

§ 4911(a) which requires that any County ordinance changing "any . . . provisions of any zoning regulation" be submitted to the Regional Planning Commission (the "Planning Commission") before it can become effective. The Court concluded that the Moratorium Ordinance caused a change to the County's zoning regulations. The Moratorium Ordinance was not submitted to the Planning Commission. As a result, the Court determined that:

> [T]he Court must apply 9 *Del. C.* § 4911(a) to the County's enactment of the Ordinance. The initial, and in this instance outcome determinative, step is to read the legislation and, because it is unambiguous, to give its words their plain meaning. Under that standard, the Court must conclude that the Ordinance caused a change in the County's zoning regulations and that its enactment without prior review by the Planning Commission precludes it from being effective. . . . Upfront is entitled to a declaration that the Ordinance is not effective.[2]

The Court directed the parties to confer and to submit a form of order to implement its letter opinion. From the proposed forms of order, the Court drafted and entered on June 22, 2007, an order that provided:

> The Ordinance, designated as #LC-06-53, adopted by the Kent County Levy Court on January 16, 2007, and sometimes referred to as the "Moratorium Ordinance," be, and the same hereby is, declared and decreed to be not effective by force of 9 *Del. C.* § 4911, and final

[2] *Id.* at *4.

> judgment thereon be, and the same hereby is, expressly entered in accordance with Court of Chancery Rule 54(b).

Subsequently, the Petitioner sought clarification of the Court's letter opinion and implementing order. This letter opinion is in response to that request.[3]

* * *

This request for clarification addresses the meaning of the phrase "not effective" used in both the Court's letter opinion and the implementing order. The question is whether the Moratorium Ordinance became "not effective" as of the date this Court issued its order, or whether, as a result of its improper enactment, the Moratorium Ordinance was never effective. For clarity, the Court will use the phrase void *ab initio*[4] to refer to the latter alternative.

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[3] This issue was raised within the context of Petitioner's Second Motion for Summary Judgment. That motion has been fully briefed, and there is no need for oral argument, in particular because the question posed involves the meaning to be given to the Court's Order of June 22, 2007. There are no disputed material facts, and only a narrow question of law is presented. The potential ramifications of determining whether the order invalidated the Moratorium Ordinance *ab initio* are not clearly delineated in the record. That may suggest a question of fact, but the precise issue for the Court is purely one of law.

[4] The parties use this phrase in briefing on the issue, and it is the clearer phrasing. It means "null from the beginning." BLACKS LAW DICTIONARY 1573 (6th ed. 1990).

In *Green v. County Council of Sussex County*,[5] this Court found that a certain County Council's rezoning ordinance—which changed the zoning classification of a tract in Sussex County from medium-density residential to general commercial—was inconsistent with the County's comprehensive development plan.[6] Actions inconsistent with the County's comprehensive development plan exceed the power delegated to the County Council.[7] As a result, the rezoning ordinance was "of no legal effect."[8] In other words, despite the

[5] 508 A.2d 882 (Del. Ch. 1986), *aff'd*, 516 A.2d 480 (Del. 1986). Other cases in Delaware reach the same result. The challenge, however, is found in the imprecision of language, or rather, the imprecision with which language is employed. Courts may rule that an ordinance is "null and void." *See e.g.*, *Delta Eta Corp. v. City Council of City of Newark*, 2005 WL 1654581, at *4 (Del. Super. April 29, 2005) (declaring that a municipality's restriction was "null and void and may not be enforced"). "Null and void" is defined as "that which binds no one or is incapable of giving rise to any rights or obligations under any circumstances, or that which is of no effect." BLACKS LAW DICTIONARY 1067 (6th ed. 1990). Perhaps, that phrase is less than clear. If it is, uses of merely "void," or even "invalid" also fail to capture the concept in exacting fashion. Use of those terms is also common. *See e.g.*, *Comm'rs of Town of Slaughter Beach v. County Council of Sussex County*, 1983 WL 142509, at *3 (Del. Ch. Nov. 16, 1983) ("failure to comply with the statute voids the zoning action"); *4th Generation Ltd. v. Bd. of Adjustment of City of Rehoboth Beach*, 1987 WL 14897, at *8 (Del. Super. July 16, 1987) ("municipal ordinance which conflicts with a state statute is always invalid"). Thus, the Court looks to *Green* because its use of the phrase "no legal effect" appears to capture the idea at issue. Of course, as stated above, void *ab initio* seems the clearest expression, although infrequently employed. At least one court has employed that phrase in addressing a nearly identical setting. *See Crouthamel v. Bd. of Albany County Comm'rs*, 951 P.2d 835, 839 (Wyo. 1998) (the failure to follow statutory procedural requirements in adopting a ten month moratorium resulted "in a void, or invalid" moratorium and, "[t]herefore, the ten month moratorium was void *ab initio*").
[6] *Green*, 508 A.2d at 882.
[7] *Id.* at 884.
[8] *Id.*

Council's purported reclassification of the land to general commercial, it remained, all the while, medium-density residential. The professed reclassification had "no legal effect."[9]

The same is true here. Although the Levy Court has the power to adopt the Moratorium Ordinance,[10] the failure to first submit it to the Planning Commission, as required by 9 *Del. C.* § 4911(a), "preclude[d] it from being effective."[11] Accordingly, because the Moratorium Ordinance never became effective in the first instance, and, thus, never had any legal consequence, the Court's letter opinion and the implementing order should be read as having found and determined the Moratorium Ordinance void *ab initio*.[12] It follows that the County's rejection of any land use application submitted by the Petitioner during the period between adoption and invalidation of the Moratorium Ordinance cannot

[9] *Id.*
[10] *See McKeown v. The Kent County Levy Court*, C.A. No. 3302-VCN (Del. Ch.) Bench Ruling (May 29, 2009).
[11] *Upfront Enters., LLC*, 2007 WL 182709, at *4.
[12] During review of the form of order, the parties discussed the phrase "null and void *ab initio*," but it was not included in the final form. Nothing of substance can be taken from omission of the phrase. The language used was not so much the product of negotiation as it was the Court's choice in the circumstances.

be sustained solely by reference by the Moratorium Ordinance,[13] and Petitioner is entitled to summary judgment to that effect.

**IT IS SO ORDERED.**

Very truly yours,

***/s/ John W. Noble***

JWN/cap
cc: William E. Manning, Esquire
William W. Pepper, Sr., Esquire
Register in Chancery-K

[13] Ordinances, of course, are presumed valid, and invalidating them on what amounts to a retroactive basis can carry unforeseen consequences. The County properly points out these considerations, but it fails to identify any concrete resulting inequity. The difficulty with accepting the County's argument for prospective effect is that it would allow the County, during the period between adoption and invalidation of the Moratorium Ordinance, to gain and to maintain the full value of its improper (or, more accurately, ineffective) legislative act. The County's adoption of an "emergency" moratorium ordinance shortly after entry of the order does nothing to dispel this notion. That the Moratorium Ordinance did not serve to preclude acceptance of a particular land use application does mean that any land use application rejected because of the Moratorium Ordinance must be deemed duly filed. Whether any other ground existed for rejection of any specific application is a question that cannot be resolved on this record.