IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

ELLEN B. LYNCH, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 2266-S
	)	
THE CITY OF REHOBOTH, et al.,	)	
	)	
	)	
Defendants.	)	

MASTER'S REPORT

Date Submitted: November 12, 2003
Draft Report (Bench Ruling): November 12, 2003
Final Report: May 28, 2004
(On Motion to Dismiss)

George F. Gardner, III, Esquire, Parkowski, Guerke & Swayze, P.A., Dover, Delaware: Attorney for Plaintiffs.

Collins J. Seitz, Jr., Esquire, M. Edward Danberg, Esquire and Max B. Walton, Esquire, Connolly, Bove, Lodge & Hutz, LLP, Wilmington, Delaware; Walter W. Speakman, Jr., Esquire, Brown, Shiels, Beauregard & Chasanov, Dover, Delaware: Attorneys for City of Rehoboth Beach Defendants.

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GLASSCOCK, M.

The plaintiffs are owners of real property in Rehoboth. The defendants are the City of Rehoboth and its commissioners. The plaintiffs seek to enjoin the enforcement of an ordinance, enacted by the defendants, which purports to rezone the plaintiffs' property from a commercial to a residential designation. According to the plaintiffs, the rezoning was unconstitutional and otherwise unlawful.

The defendants have moved to dismiss the complaint. After oral argument on the motion, I issued a draft bench report finding that the motion should be denied.[1]

The defendants have taken exception to the draft report on two grounds. They argue 1) that the complaint was prematurely filed, was not refilled during the period mandated by the statute of repose, and thus is void as untimely; and 2) the complaint should be dismissed for failure to join an indispensable party. This is my final report on those issues.

Discussion

A. The Statute of Repose

On February 18, 2003 the commissioners in the City of Rehoboth Beach adopted an ordinance which purported to rezone the plaintiffs' properties. The

[1]I also found that the complaint failed to invoke equitable jurisdiction, a finding I withdrew in a final report on that issue. Final Report, May 17, 2004.

plaintiffs filed this suit on April 15, 2003 challenging that validity of the commissioner's actions. The rezoning ordinance itself was published on May 23, 2003. According to the Rehoboth City code, §1-16 a rezoning ordinance does not become "operative" "until it has been adopted in a manner prescribed by law and until it has been published."

10 Del. C. §8126 (a) provides that:

> "No action suit or proceeding in any court, whether in law or equity or otherwise, in which the legality of any ordinance, code, regulation or map, relating to zoning, or any amendment thereto, . . . is challenged, whether by direct or collateral attack or otherwise, shall be brought after the expiration of sixty (60) days from the date of publication in a newspaper of general circulation in the county or municipality in which such adoption occurred, of notice of the adoption of such ordinance, code, regulation map or amendment."

The defendants argue that the statute of repose imposes a period during which suit may be filed commencing on the date of publication and ending 60 days thereafter. Because the plaintiffs here filed suit after the defendants had adopted the rezoning but *before* publication, the defendants argue that the suit was not filed within the period called for by statute and is therefore untimely. I read the statute differently. It is clear to me that the statute is meant to require quick resolution of claims of invalidity brought against municipalities promulgating zoning ordinances. It provides a cut-off for such

claims of 60 days after the time of official notice: that is, after publication. Nothing in the statute of repose, §8126, indicates that a suit may not be filed challenging the actions of the governmental body *before* publication, however. That is, the statute provides a closing date for the period during which appeal may be taken but does not impose a commencement date. Moreover, there is nothing in the clear intent of the statute which requires that suit be filed after, rather than before, publication.

The defendants point out that, pursuant to §1-16 of the city code, the ordinance is not effective until it has been both "adopted in the manner prescribed by law" (the vote of the commissioners) and until it has been published. They suggest that, if this and similar suits are not dismissed as untimely, an absurd result could follow. The ordinance in question might never be published, and never take effect, leaving the defendants in the position of defending the enactment of a purely nugatory ordinance. That objection is more theoretical than practical. First, nothing in the record indicates that the town officials responsible for publication have any discretion to do other than publish, once the ordinance has been adopted by vote of the commissioners. Second, if in some unusual situation, an otherwise valid suit were brought against an ordinance which, because of failure to publish, had no force of law, the defense of mootness could there be raised. In our case, of course, the ordinance was published, and has taken effect. There is no public policy reason to construe the statute of repose in a way

which would render the complaint here invalid; to the contrary, the public policy in deciding suits on their merits would be contravene by such an interpretation. *See, e.g.*, Hackett v. Board of Adjustment, Del. Supr., 749 A.2d 596, 597 (2002). Moreover, there is no prejudice to the defendants here in my finding that the suit was timely filed (other than, of course, loss of the opportunity to avoid an examination on the merits due to a technically-premature filing).

The defendants argue, however, that, independent the statute of repose, the "doctrine of premature filing" indicates that this suit was filed prematurely and is thus void. The defendants cite no cases involving challenges to zoning and planning actions of counties or municipalities. Instead, they seek to import this rationale from the body of law applicable to appeals from decisions of boards of adjustment. *See* Covey v. Board of Adjustment of Sussex County, Del. Supr., C.A. No. 01A-08-002 (May 7, 2002) (Letter Op.); McDonald's Corp. v. Zoning Board of Adjustment for the City of Wilmington, Del. Supr., C.A. No. 01A-05-011, Goldstein, J. (January 10, 2002) (ORDER). After review of those cases, however, it is apparent to me that they rely on the applicable statute of repose and not, independently, on a "premature filing doctrine." For instance, in Covey (Letter Op.) at 1, the Court states that

> "The power of an appellate court to exercise jurisdiction over a controversy rests upon the perfecting of an appeal within the time period fixed by statute. Perfection is

> achieved by filing a notice of appeal with the court in the statutorily prescribed manner. Thus, failure to perfect an appeal within the applicable time period prevents an appellate court from exercising jurisdiction."

(Citation omitted). The applicable statutes of repose in these cases, involving appeal from boards of adjustment, are found at 9 Del. C. §6918 and 22 Del. C. §328. Those statutes provide that the appeal "shall be presented to the Court *within 30 days after* the filing of the decision in the office of the board." (Emphasis added). Thus, those statutes provide a window within which suit must be filed for the appellate court to take jurisdiction, beginning with "the filing of the decision," and ending "30 days after the filing of the decision."

As in Covey and the other cases cited by the defendants, if suit here had not been filed within the period called for in the statute of repose, I would be without jurisdiction to consider this matter further. However, 10 Del. C. §8126 is fundamentally different from the statute at issue in Covey. Section 8126 simply provides that plaintiffs may not bring suit "after the expiration of 60 days from the date of publication in a newspaper of general circulation." The statute sets a date after which appeal cannot be taken, but (unlike 9 Del. C. §6918) does *not* set a time before which appeal is prohibited. The

statute of repose ran here on or about July 23, 2003. Because plaintiffs's appeal was taken before that date, it is not barred by the statute of repose.[2]

The defendants also cite Christiana Town Center LLC v. New Castle County, Del. Supr., C.A. 03A-04-007, Gebelein, J. (July 18, 2003)(Mem. Op.) That case involved a claim that the New Castle County Board of Licence Inspection and Review had issued a legally deficient opinion. The Board had made an oral ruling, after which a certiorari appeal was taken. The Board then composed a written decision, which was filed with the county Department of Land Use. According to the applicable Rules of Procedure, the decisions of the Board took effect when a written decision was signed and filed. The Superior Court found that the complaint there, coming before the decision was reduced to writing, was premature. Since there was no statute of

[2]The plaintiffs point to the following facts and contentions in their opposition to the defendants exceptions: The commissioners adopted the rezoning on February 18, 2003; this appeal was taken on April 15, 2003, 56 days after the actions complained of; counsel for the defendants entered an appearance on May 2, 2003 and on May 14, requested, and were granted, a 60-day exception of time to answer the appeal; publication of the rezoning ordinance took place on May 23, 2003, 94 days after the acts complained of; the defendants filed the certified record on July 14, 2003, but that filing did not disclose to the plaintiffs that the ordinance had been published, or when; the defendants filed their verified answer on July 14 without raising specifically the "premature filing" issue; and that defendants' opening brief on their motion to dismiss, which provided actual notice to the plaintiffs of the date of publication, came after the running of the statute of repose. Plaintiffs' Memorandum, at 4. The plaintiffs argue that, in light of these averments, it would be inequitable to apply the statute of repose here. Because I conclude that the complaint was timely filed, I need not reach plaintiffs' equity argument.

limitations involved, the remedy for the defect was simply to refile the petition for certiorari.

To the extent that Christiana Town Center is persuasive here, I do not find it dispositive. The regulation in that case stated that a Board decision was effective only after reduced to writing, signed by Board members, and filed with the Department. Presumably, this gave members of the Board the ability to state the reasons for their decision, and to revisit and revise that decision up until the time of filing with the Department, which would then be responsible for putting the Board's decision into practice. In the instant case, however, the zoning regulation (according to counsel at oral argument) was written out and published *before* being considered by the defendants. Once the defendants had acted, nothing in the record indicates that anyone connected with the City had any discretion to alter or reverse the decision of the Commissioners. That decision simply awaited the ministerial function of publication by a City employee to become effective.[3] As I have pointed out above, the purpose of making the zoning ordinance take effect on publication was to give notice to the public, and not to afford the opportunity for revision by the Commissioners. Therefore, and unlike in Christiana Town Center, the actions of the defendants which plaintiffs claim

[3]The defendants argue that publication cannot be a mere ministerial act because it is an "important prerequisite" to the ordinance taking effect. A ministerial act is one done without the exercise of discretion, however. It does not imply an act which is merely symbolic or nugatory.

were unlawfully had all been completed at the time the complaint was filed. Nothing in that case convinces me that the complaint here is void as premature.[4]

B. Failure to join an indispensable party

Plaintiffs failed to join Daniel Simpson as a party in this action. Mr. Simpson is the holder of a contingent remainder interest. The property at issue was originally held by Samuel Burton. On Mr. Burton's death, the property passed to his wife, Amelia, for life, and a remainder interest passed to his eight children, including Violet Simpson. Later, Violet died, leaving a life estate in her remainder interest to her husband, Daniel Simpson, and the remainder of her remainder interest to her son Samuel. Thus (according to the defendants) at the time this suit was filed Daniel held a life estate in the remainder interest of an undivided one-eighth of the property formerly owned by Samuel Burton and currently subject to the life estate held by Amelia Burton. I assume for purposes of this motion to dismiss that at the time the complaint was filed, Daniel Simpson was an indispensable party.

Plaintiffs failed to join Daniel Simpson, according to them, because they believed (erroneously) that the contingent remainder interest reposed not in Daniel Simpson but

[4]The same distinction, of course, also applies between the publication of the ordinance at issue here and the preparation and filing of written Board of Adjustment decisions before which appeal was found premature in Covey and McDonald's Corp.

in his son, Samuel. Samuel Simpson was named as a plaintiff in the complaint. After suit was filed, the plaintiffs discovered their mistake, and Daniel Simpson transferred his contingent remainder interest to Samuel, on August 12, 2003. The defendants argue that this suit must be dismissed because Daniel Simpson was an indispensable party; because the complaint at the time of filing was therefore invalid because all indispensable parties had not been joined; and because that defect was not cured (by the Daniel-Samuel transfer) until some three weeks after the statute of repose ran on July 23, 2003. The defendants point out that an amended complaint adding an indispensable party may not be filed after the statute of repose has run. *See* Council of Civic Associations of Brandywine Hundred, Inc., v. New Castle County, Del. Ch., 12048, Hartnett, V.C. (Sept. 21, 1993) (Response to Remand); Southern New Castle County Alliance, Inc. v. New Castle County Council, Del. Ch., 18752, Jacobs, V.C. (July 20, 2001)(Letter Op.); Hackett, 749 A.2d 596. The situation here, however, is different from those in the cited cases. Plaintiffs here do not seek to amend the complaint. Instead, they point out that, whatever the defect in the failure to join Daniel Simpson, there is no presently-existing defect because Daniel Simpson is no longer an indispensable party.

An amended complaint after the limitations period is not permissible because it is in conflict with the intent of the statute of repose, which favors certainty of zoning

ordinances and quick resolution of any claimed defects. In furtherance of that intent, 10 Del. C. §8126(a) is jurisdictional in nature and imposes a limitation period (60 days) draconian in its brevity.

The plaintiffs here, however, do not seek to amend the complaint. They simply seek to proceed under their original complaint, which I have found was timely filed. Of course, if an indispensable party were not present in this action, that fact would (subject to a Rule 15 and 19 analysis) be grounds to dismiss. The defendants would have the right to such a dismissal to protect them from potential multiplicity of suits, inconsistent adjudications, etc. The rule also protects the rights of property owners whose interests would go unrepresented absent their joinder. Here, however, there is no indispensable party currently un-joined. *See* Court of Chancery Rules, Rule 19(a).[5] Nothing in the case law or defendants' arguments persuades me that this case must be dismissed based upon the non-joinder of the holder of a remainder interest in the affected property whose interested never vested and which has, in any case, been

[5]Even if I were to find Daniel Simpson an indispensable party under Rule 19, the rule would then compel me to decide in "equity and good conscience" whether the matter should go forward. Rule 19(b) sets out four factors to consider in that regard: 1)possible prejudice resulting from proceeding without the party; 2)to what extent any such prejudice can be avoided or mitigated; 3)whether a judgement rendered absent the party will be adequate; and 4) whether the plaintiff will have an adequate remedy if the matter is dismissed. All of these factors are either neutral or cut against dismissing this action.

transferred to a party. Such a result would amount to a failure of justice based on a hyper technicality.

C. Conclusion

For the foregoing reasons, the defendants' exceptions to my draft report are denied. For the sake of clarity, I withdraw those portions of my draft report to which the defendants took exception and substitute therefor this written final report. Those portions of my draft bench report which dealt with issues to which no exception has been taken shall remain in force and effect and I adopt them as my final report.

Pursuant to agreement of the parties, the period for taking exceptions to this and other final reports is stayed pending the issuance of a final report on the remaining issues in this matter. No party need take exception until that time, and all exceptions are preserved pending that final report.

/s/ *Sam Glasscock, III*
Master in Chancery

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