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Re: Sterling Property Holdings, Inc. v.
New Castle County, et al.
C.A. No. 20408-NC
Date Submitted: January 7, 2004

Dear Counsel:

Defendant New Castle County (the "County"), together with Defendant New Castle County Planning Board and Defendant New Castle County Department of Land Use, has moved for judgment on the pleadings as to paragraphs 44–46 of Plaintiff Sterling Property Holding Inc.'s ("Sterling") Complaint. The County claims that Sterling, through these paragraphs, seeks to challenge the validity of § 40.01.130 (the "Sunsetting Law") of its Unified Development Code beyond the time allowed by the land use statute of repose, 10 *Del. C.* § 8126 (the "Statute of Repose"), and, therefore, this

claim must be dismissed. Sterling responds by arguing that the Statute of Repose is not applicable in this instance because (1) it is not challenging the legality of the Sunsetting Law and (2) the Sunsetting Law is not a zoning ordinance within the scope of the Statute of Repose. For the reasons that follow, I grant the County's motion for judgment on the pleadings.

I. BACKGROUND

On December 31, 1997, the County completed extensive revisions to its land use regulations and adopted what is known as the Unified Development Code ("UDC"), which is a compilation of all development oriented regulations of the County, including regulations on zoning, subdivisions, design, concurrency, impact fees, and signs.

As part of the UDC, the County adopted the Sunsetting Law, which provides in pertinent part:

> B. **Plans recorded before the adoption of these regulations.** Construction of development or improvements shown on a record plan for a major subdivision or major land development shall commence within five (5) years from December 31, 1997. . . .
> C. The applicant shall bear the burden of providing evidence to the Department establishing that construction had commenced within the five (5) year period.
> D. If construction has not commenced within five (5) years, the preliminary plan and the record plan shall be resubmitted and reviewed by the Technical Advisory Committee to determine if the conditions of approval of the original record major subdivision or land development

> plan have changed or have been altered by the subsequent adoption of, or amendments to, this Chapter. Based on the comments of the Technical Advisory Committee, the Department shall either:
> . . . .
> 2. Disapprove the record plan and give written notice to the owner of the specific areas of noncompliance. The modifications necessary to bring the plan into compliance with this Chapter shall be incorporated into a revised preliminary plan and resubmitted. . . .[1]

Thus, if the owner of a major land development project, which had been approved and recorded by December 31, 1997, when the UDC came into effect, did not commence construction before December 31, 2002, the approval would expire and any subsequent development effort would be governed by the land use regulations then in effect.

Sterling is, and has been, the record owner of lands known as "Red Lion Village." Sterling obtained approval for a Record Major Land Development Plan (the "Plan") in 1975. The Plan authorized the development of a manufactured home community consisting of 680 dwelling units on 135 acres of land situated on the west side of Church Road, south of the Pulaski Highway, and north of Red Lion Road. The property is zoned NCmm (Manufactured Mobile).

For some reason, Sterling never sought approval for construction under the Plan until December 12, 2002, when Sterling's engineer submitted final construction plans for

[1] UDC § 40.01.130B–D.

Red Lion Village to the County. The County formally approved these construction documents on December 30, 2002, and scheduled the pre-construction meeting, the last formal step necessary to commence construction, for the next day, December 31, 2002.

Sterling alleges that when it arrived for the meeting it was informed by the County's Department of Land Use (the "Department") that the meeting had been cancelled.[2] On February 4, 2003, the Department issued a letter which constituted its final decision that the Plan had been voided under the Sunsetting Law as the result of Sterling's failure to commence construction on or before December 31, 2002. Sterling sought unsuccessfully to appeal this decision.

By its Complaint, Sterling seeks a permanent injunction preventing application of the Sunsetting Law to the Plan because of the alleged bad faith conduct of the County in canceling the pre-construction meeting, a taking without compensation of Sterling's

[2] Sterling recites the reasons given for the cancellation: (1) that Sterling was not in good standing pursuant to County Code § 40.31.901D as a result of "erosion and sediment issues" at a shopping center known as "Christiana Town Center" and "home warranty issues" arising from a residential development known as "Farmington" and (2) lack of a signed Land Development Improvement Agreement and bond. Sterling asserts that it had no ownership interest in either Christiana Town Center or Farmington and that neither a Land Development Improvement Agreement nor bond was required for a pre-construction meeting to take place. The reasons for the cancellation are not pertinent to the pending motion.

property rights, the vested rights doctrine, and a denial of due process. The Complaint also attacks the Sunsetting Law:

> 44. The "Sunsetting Law" found at County Code § 40.01.130 is either totally invalid or must be modified so that plans do not run until at least July 13, 2003. Counties only possess those powers which they are expressly granted, and if powers are not expressly conferred, then they are plainly prohibited and forbidden. The County was not delegated the express authority to enact an ordinance providing for the sunsetting of subdivision or land development plans until House Bill 666 became law on July 13, 1998. Since nothing in the law says that it is retroactive, it only has a prospective (*i.e.*, "going forward") effect.
> 45. The "Sunsetting Law" was adopted on December 31, 1997, before the County was expressly authorized to adopt such an ordinance. Thus, it was void *ab initio*. In the alternative, the "Sunsetting Law" would not be legally effective until July 13, 1998, therefore only allowing sunsetting of the Plan on July 13, 2003.
> 46. The "Sunsetting Law" is also invalid to the extent that it constitutes a subdivision regulation. The New Castle County Regional Planning Commission must propose and approve any land regulations pursuant to 9 *Del. C.* § 3003. County Code § 40.33.300 indicates that "subdivision regulations" include Article 1 of Chapter 40 of the County Code. The "Sunsetting Law" is contained in Article 1 of the County Code. Since it was not adopted pursuant to the statutorily mandated procedure, it was therefore void *ab initio*.[3]

The County's motion for judgment on the pleadings asserts that Sterling's claim set forth in these paragraphs is now time-barred by the Statute of Repose.

[3] These paragraphs specifically attack the Sunsetting Law. Not at issue are questions arising under administration of the Sunsetting Law, such as whether Sterling did commence construction or whether the County is estopped from enforcing it.

II. ANALYSIS

A. Standard of Review

In evaluating a motion for judgment on the pleadings under Chancery Court Rule 12(c), the Court accepts all well-pled facts as true and construes any inferences from those facts in the light most favorable to the nonmoving party.[4] The motion may be granted where the nonmoving party would not be entitled to judgment under any possible set of facts arising out of the allegations.[5]

B. The Statute of Repose

The Statute of Repose precludes actions contesting zoning, subdivision, and land development ordinances and regulations, which are brought more than 60 days after publication of notice of the challenged action. It reads in pertinent part:

> 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, or any regulation or ordinance relating to subdivision and land development, or any amendment thereto, enacted by the governing body of a county or municipality, is challenged, whether by direct or collateral attack or otherwise, shall be brought after the expiration of 60 days from the date of publication in a newspaper of general circulation in the county or municipality in which

[4] *Weiss v. Samsonite Corp.*, 741 A.2d 366, 371 (Del. Ch. 1999); *Atl. Millwork Corp. v. Harrington*, 2002 WL 31045223, at *1 (Del. Super. Sept. 12, 2002).
[5] *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 612 (Del. 1996); *Meades v. Wilmington Hous. Auth.*, 2003 WL 939863, at *2 (Del. Ch. Mar. 6, 2003).

> such adoption occurred, of notice of the adoption of such ordinance, code, regulation, map or amendment.[6]

As a statute of repose, the provisions of 10 *Del. C.* § 8126 are jurisdictional and therefore may not be waived.[7] The strict 60-day limit in the statute is designed to promote predictability and stability in land use matters.[8]

In this case, it is undisputed by either party that: (1) proper notice of adoption of the ordinance implementing the UDC, including the Sunsetting Law, was duly published;[9] (2) the UDC, including the Sunsetting Law, was enacted on December, 31 1997; and (3) that Sterling's Complaint in this action was filed on July 2, 2003. Therefore, the Statute of Repose will time bar this portion of the Complaint if (1) Sterling is challenging the legality of the Sunsetting Law within the meaning of the Statute of

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[6] 10 *Del. C.* § 8126(a).
[7] *S. New Castle County Alliance, Inc. v. New Castle County Council*, 2001 WL 855434, at *1 (Del. Ch. July 2, 2001); *Council of Civic Orgs. of Brandywine Hundred, Inc. v. New Castle County*, 1993 WL 390543, at *6 (Del. Ch. Sept. 21, 1993).
[8] *Brandywine Hundred*, 1993 WL 390543, at *6. Even Sterling agrees with this principle. It notes in its brief that "[t]here is certainly a great deal of wisdom in providing but a short time period for persons to challenge the approval of a re-zoning or the approval or disapproval of a final subdivision plan." Pls. Answering Br. In Opp'n to Defs.' Mot. for J. on the Pleadings at 18.
[9] Notice was printed in the classified section of the News Journal on at least 3 occasions. Defs.' Opening Br. in Supp. of their Rule 12(c) Mot. for J. on the Pleadings, Ex. C.

Repose, and (2) the Sunsetting Law is "related to" subdivision and land development or zoning within the meaning of the Statute of Repose.

1. Sterling is Challenging the Legality of an Ordinance, Code or Regulation

According to the County, the Complaint presents a challenge to the legality of the Sunsetting Law within the scope of the Statute of Repose. It claims that this is the only fair reading of Sterling's contention that "[t]he 'Sunsetting Law' found at County Code § 40.01.130 is either totally invalid or must be modified,"[10] that "it was void *ab initio*,"[11] and that it is "invalid to the extent that it constitutes a subdivision regulation."[12]

Sterling responds by arguing that it is not challenging the validity of an ordinance itself, but instead, one part of the UDC which was adopted by ordinance — the Sunsetting Law.[13] I take this rather curious argument to mean that because Sterling is

[10] Compl. ¶ 44.
[11] *Id.* ¶ 45.
[12] *Id.* ¶ 46.
[13] Sterling articulates its argument as follows:

> Additionally, Sterling is not challenging the legality of any ordinance, including [the ordinance which enacted the UDC]. Sterling is instead challenging the validity of the Sunsetting Law, contained in portions of § 40.01.130 of the County Code. In other words, Sterling is challenging part of a section in the UDC, not the Ordinance that adopted the UDC. Thus, the provisions of § 8126(a) are not applicable to paragraphs of 44 through 46 of the Complaint based upon the plain reading of the unambiguous statutory provision.

challenging only a portion of the UDC, and not its entirety, it is not challenging the legality of the ordinance. As Sterling properly notes, "the Court is bound to apply the plain meaning of the statutory language if there is no ambiguity"[14] and "[t]he Court should not apply an interpretation to a statute which leads to a ridiculous or absurd result."[15] Application of these well-settled principles, however, does not yield the result sought by Sterling.

The Statute of Repose, by its terms, prohibits any "action, suit, or proceeding, in any court, whether in law or equity or otherwise, in which the legality of . . . any regulation or ordinance relating to a subdivision and land development . . . is challenged." Because the Sunsetting Law was adopted by ordinance as part of the UDC, Sterling must, by definition, be challenging at least a portion of an ordinance or code. Thus, the plain language of the Statute of Repose bars any challenge to any regulation or any ordinance

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Pl.'s Answering Br. at 17. Sterling points out that the Statute of Repose acts to preclude challenges to the "legality" of the ordinance. It claims not to be challenging the legality of the ordinance, but its "validity." The words are different, but their meanings are sufficiently similar to defeat this argument. For example, "valid" is defined as "having legal strength or force" and "legal" is defined as "deriving authority from law." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1290, 2529 (unabridged ed. 1993).

[14] Pl.'s Answering Br. At 17 (citing *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985)).

[15] *Id.* (citing *Newtowne Vill. Serv. Corp. v. Newtowne Road Dev. Co., Inc.*, 772 A.2d 172, 175 (Del. 2001)).

or code (assuming for present purposes, the necessary subject matter) more than 60 days after publication. Sterling cannot avoid the impact of this 60-day bar by claiming to challenge only part of an ordinance. If a litigant could avoid the application of the Statute of Repose simply by challenging only a part of an ordinance, the statute would be of unduly limited effect and the legislative intent of 10 *Del. C.* § 8126 would be contravened.

Furthermore, Sterling's argument that the ordinance is invalid because the County lacked the authority to adopt it[16] has already been rejected by this Court as an argument that would allow a litigant to avoid the application of the Statute of Repose. In addressing a similar argument in *Council of South Bethany v. Sandpiper Development Corp.*,[17] this Court observed:

> . . . Sandpiper's position appears to be that whenever a claim is advanced that a zoning ordinance is invalid by reason of having been enacted in violation of statutory procedural requirements, that claim falls outside the scope of any statute of limitations. No authority is cited for that proposition, and in my view, both authority and logic compel the precise opposite conclusion.

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[16] In its brief, Sterling urges this Court to follow the reasoning of *Hartman v. Buckson*, 467 A.2d 694 (Del. Ch. 1983), where the Statute of Repose did not preclude challenge a to a zoning ordinance more than five years after its adoption. However, *Hartman* provides no support for Sterling's claim because the municipality had not complied with the appropriate publication procedures.

[17] 1986 WL 13707 (Del. Ch. Dec. 8, 1986).

> Sandpiper's proposition is refuted by the statute of limitations itself (10 *Del. C.* 8126(a)), which does not carve out any exception for claims based upon alleged statutory invalidity.[18]

Consideration of both the statute and case law leads to the conclusion that Sterling is challenging the legality of an ordinance or code within the meaning of the Statute of Repose. Any other view would frustrate the apparent purpose of the Statute of Repose and allow litigants to challenge zoning ordinances piecemeal — one section at a time — as long as they did not challenge the entire ordinance at once.

Sterling's argument that the Statute of Repose cannot be applied in this instance because Sterling had no knowledge of the detrimental effect of the ordinance until its application ignores the plain language of the Sunsetting Law. Furthermore, Sterling's assertion that the General Assembly could not have intended to bring all County zoning ordinances within the purview of the statute is directly contradicted by the legislature's choice of the words: "any ordinance, code, regulation, or map." Indeed, the only logical interpretation of this statute is that to bring predictability and stability to land use matters, the General Assembly did indeed intend to bring every zoning ordinance within the scope of the Statute of Repose.[19]

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[18] *Id.* at *2.

[19] Sterling's contention that because the UDC contains a general severability provision, the County must have intended that challenges to the ordinance could have been brought

Accordingly, Paragraphs 44-46 of the Complaint constitute a challenge to the legality of the Sunsetting Law within the meaning of the Statute of Repose.

2. The Sunsetting Law is Related to Subdivision and Land Development

The Statute of Repose applies to the challenge of the "legality of any ordinance code, regulation or map, *relating to zoning*, or any amendment thereto, or any regulation or ordinance relating to subdivision and land development, or any amendment thereto enacted by the governing body of a county or municipality."[20] The County notes that the Sunsetting Law is an ordinance that is part of the UDC and expressly applies to

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is without merit. First, a general severability provision is "little more than a formality of legislative draftsmanship" and of little weight in determining intent. 2 NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 44:10 (6th ed. 2001). *See also Newark Landlord Ass'n v. City of Newark*, 2003 WL 22724663, at *4 (Del. Ch. Nov. 17, 2003) ("Severability statutes are treated 'only as aids to interpretation and not as commands.' Second, less weight attaches to general severability provisions than specific severability clauses in enactments because a general clause is questionable evidence of subsequent legislative intent." (quoting 2 SINGER § 44:13)). Finally, these provisions are designed to save a statute from a finding of a constitutional violation, 2 SINGER, § 44:11, and the Statute of Repose does not protect any statute from a constitutional challenge. *See Baldini W., Inc. v. New Castle County*, 852 F. Supp. 251, 255 (D. Del. 1994). Contrary to Sterling's claim, this provision is not treated as surplusage if § 8126 is not interpreted, against its plain meaning, to allow challenges to a zoning ordinance after the 60-day time bar. A better interpretation is that the severability provision will take effect if (1) a successful challenge to the validity of a statute is made within the 60 days provided by the statute of repose, or (2) a court concludes that a portion of the ordinance is unconstitutional.

[20] 10 *Del. C.* § 8126(a) (emphasis added).

"development or improvements shown on a record plan for a major subdivision or major land development." Thus, the County contends that the sunsetting provision is a regulation or ordinance relating to subdivision and land development within the meaning of the Statue of Repose. Sterling replies that the "Sunsetting Law" has no effect on the zoning category (in this case NCmm) but only on the validity of plans and therefore it is not related to zoning or land development.

"Relate" is defined as "to show or establish a logical or causal connection between."[21] The Court, by broadly construing the Statute of Repose,[22] must conclude that the Sunsetting Law relates to "subdivision or land development" within the meaning of the Statute of Repose. The Sunsetting Law, by its express terms, is applicable to "a record plan for a major subdivision or major land development." It is no stretch of logic to find that an ordinance which voids a major subdivision plan is related to "subdivision development."

The scope of the Statute of Repose is broader than Sterling is willing to concede. That it is not limited to protecting rezonings is made clear by *Council of South Bethany*

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[21] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1916.

[22] This Court has recognized that the provisions of the Statute of Repose are "very broad." *Bay Colony Ltd. P'ship v. County Council*, 1984 WL 159382, at *2 (Del. Ch. Feb. 1, 1984).

and *Acierno v. New Castle County*,[23] both of which recognize that the Statute of Repose applies to challenges to ordinances that have the effect of voiding record plans. The consequence of the Sunsetting Law that disturbs Sterling is, in effect, the voiding of an approved plan (or concept). This Court, in *Council of South Bethany*, acknowledged "the interest of local communities in stable land use regulatory arrangements and in freedom from the uncertainty and disruption that would result if such arrangements were permitted to remain legally vulnerable for long periods."[24] In this instance, the County concluded that land development approvals could not continue indefinitely for inactive projects. It adopted an ordinance that set a five-year life-span for then existing approvals. Under Sterling's view, the County could be required to wait until the expiration of the five-year period (or perhaps longer) before it could know whether, subject, of course, to certain to exceptions, its policy of limiting the duration of existing land use approvals would survive challenge. I, therefore, will adhere to the teachings of *South Bethany* and *Acierno*, and conclude that the Statute of Repose includes within its scope actions which challenge ordinances and regulations that void (or will cause the voiding of) record plans, as well as those actions which determine a zoning category for a particular parcel of land

[23] 2000 WL 718346 (D. Del. May 23, 2000).
[24] *Council of South Bethany*, 1986 WL 13707, at *2.

or approval a subdivision plan. Accordingly, I find that Sterling's challenge to the Sunsetting Law is a challenge to an ordinance or regulation relating to subdivision and land development.[25]

III. CONCLUSION

Paragraphs 44–46 of the Complaint clearly challenge the legality of the Sunsetting Law, which is an ordinance or regulation "relating to subdivision and land development." By the Statute of Repose, 10 *Del. C.* § 8126(a) Sterling had a 60-day period in which to challenge this ordinance after notice of its enactment was properly published. Since this challenge was commenced more than five years after the publication, Sterling is time barred. Therefore, Sterling would not be entitled to judgment on this issue under any

[25] The Statute of Repose provides certainty to a landowner who seeks to develop his property. If, for example, he has obtained a desired rezoning or approval of his subdivision (or other development) plans, he can move forward with his investment after 60 days without a challenge with the comfort that subsequent judicial action will not impair his investment expectations. To the extent that protection of reasonable expectations supporting investment is the principal purpose of the Statute of Repose, that policy is of little moment in this context. Here, the County is the beneficiary and application of the Statute of Repose protects (at least directly) only its regulatory interests. Nevertheless, the General Assembly chose very broad language to define the reach of the Statute of Repose. It is in the nature of a statute of repose that hardships may result, *see, e.g.*, *Cheswold Volunteer Fire Co. v. Lambertson Const. Co.*, 489 A.2d 413, 420 (Del. 1985), but the legislative judgment is expressed unambiguously in the Statute of Repose. That effectively precludes further judicial inquiry into whether the scope of the statute should be limited to protecting landowners who have secured an approval for development of their particular parcels.

possible set of facts arising out of the Complaint. Accordingly, the County's motion for judgment on the pleadings with respect to Paragraphs 44–46 of the Complaint is granted.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-NC