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Re: Upfront Enterprises, LLC v. The Kent County Levy Court, et al.
C.A. No. 2678-VCN
Date Submitted: April 17, 2007

Dear Counsel:

Defendant Kent County Levy Court (the "Levy Court") enacted an ordinance imposing a moratorium on the acceptance of certain land use

applications.[1] A state statute, 9 *Del. C.* § 4911(a), 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 moratorium ordinance was not submitted to the Planning Commission. Plaintiff Upfront Enterprises, LLC ("Upfront"), a land developer, brought this action to challenge the moratorium ordinance. Prompted by the parties' cross-motions for summary judgment, the Court concludes that the Levy Court failed to comply with the straightforward and unambiguous requirement of state law that an ordinance, such as the moratorium ordinance, be submitted to the Planning Commission. It follows that the ordinance was not validly adopted and is not now effective.[2]

* * *

The parties have filed cross-motions for summary judgment, and they have identified no material fact in dispute. Accordingly, "the Court shall deem the

[1] The members of the Levy Court have also been named as defendants in their official capacities. At times, the Levy Court and its members are referred to, collectively, as the "County."

[2] Upfront purported to file this action as a class action. No class certification motion has been presented. Other similarly situated developers (or land owners) have either been given leave to intervene or have an intervention motion pending.

motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[3]

* * *

On January 16, 2007, the Levy Court enacted an ordinance, #LC-06-53, titled, "An Ordinance to Amend Kent County Code, Vol. I, Chapter 158 Moratoriums, as amended, by Adding a New Subsection Relating to Acceptance of Major Subdivision Applications and Conditional Use Site Plan Applications for Cluster Developments and Planned Unit Developments" (the "Ordinance"). It provided in part, at Section 1:

> This moratorium shall be imposed for a period of 270 days beginning on [January 16, 2007]. During this time period, [subject to certain exceptions not relevant here], no application for Major Subdivision Sketch Plan Review, Major Subdivision Preliminary Plan Review, Conditional Use Site Plan Review for Cluster Development, or Conditional Use Site Plan Review for Planned Unit Development shall be accepted for processing by the Department of Planning Services and Regional Planning Commission.

The Levy Court identified the purpose of the moratorium: to allow time to adopt revisions to the Kent County Code to assure adequate public facilities for new

[3] Ct. Ch. R. 56(h).

residential subdivisions[4] and to adopt a new comprehensive plan. The Ordinance has never been submitted to the Planning Commission.

Upfront had acquired a parcel in Kent County, Delaware in May 2006 with the intent of developing a residential subdivision. It had proceeded in the normal course through various steps of the County's land use approval process. Its progress, however, was halted earlier this year. In early February, it attempted to submit preliminary subdivision applications. That effort was thwarted by the Ordinance.[5]

* * *

The County exercises its land use powers in accordance with a delegation by the General Assembly. Thus, its land use actions must be consistent with those legislative acts through which those powers were delegated. Although a land use

[4] The Levy Court recently enacted ordinances purportedly for that purpose.

[5] Upfront attacks the Ordinance on several fronts. Although the Court focuses on its contention that the Ordinance could not have been validly adopted without compliance with 9 *Del. C.* § 4911(a), other claims include: that the adoption of the Ordinance violated the Levy Court's rules of procedure and 9 *Del. C.* § 4110(g)(3) because the public hearing on the Ordinance was scheduled without a majority vote of a quorum of Levy Court or a specific directive of the president of the Levy Court; that the Freedom of Information Act, 29 *Del. C.* ch. 100, was violated because adequate notice of the public hearing was not given and the agenda was not properly constructed; and that the Levy Court implemented the moratorium for improper purposes.

ordinance, as with all of the County's ordinances, is presumed valid, it will be declared invalid if it fails to meet the standards prescribed legislatively.[6]

* * *

This is a case of statutory construction.[7] "It is well settled that statutory language, where possible, should be accorded its plain meaning. Moreover, when a statute is clear and unambiguous, there is no need for statutory interpretation."[8]

The question of whether the Levy Court was required to submit the Ordinance for Planning Commission consideration before it could adopt the Ordinance is governed by 9 *Del. C.* § 4911(a), which provides:

> The county government may, from time to time, make amendments, supplements, changes or modifications (herein called "changes") with respect to the number, shape, boundary or area of any district or districts, or any regulation of, or within, such district or districts, or any other provision of any zoning regulation or regulations, but no such changes shall be made or become effective until the same shall have been proposed by or be first submitted to the [Planning] Commission.[9]

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[6] *See*, e.g, *Farmers for Fairness v. Kent County*, 2007 WL 1413247, at *5 (Del. Ch. May 1, 2007).

[7] That may overstate the task confronting the Court. The pending motions can be resolved by reading the plain language of the controlling statute.

[8] *Sostre v. Swift*, 603 A.2d 809, 813 (Del. 1992) (citations and internal punctuation omitted).

[9] Similar provisions, 9 *Del. C.* § 2607 and 9 *Del. C.* § 6911, are applicable to New Castle County and Sussex County, respectively. The statute actually requires submission to the "Zoning Commission." That body has been replaced by the Regional Planning Commission which exercises all of the powers and performs all of the duties of the Zoning Commission. 9 *Del. C.* § 4904.

Thus, if the Ordinance was a "change" to "any . . . provision of any zoning regulation," it fails because of the absence of Planning Commission consideration.[10] Accordingly, the Court turns to that inquiry.[11]

* * *

The County contends that the Ordinance is simply "legislation addressing the administration and management of County business by temporarily suspending the Planning Department's acceptance of land use applications."[12]

The Ordinance was codified within the County Code in Chapter 158 which deals generally with moratoriums—not specifically with zoning or land use issues. The Code placement chosen by the County cannot be dispositive because, otherwise, that simple sleight of hand would allow the County to avoid the requirement of Planning Commission review by nothing more than creative labeling.

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[10] If compliance with 9 *Del. C.* § 4911(a) was required, the enactment process failed not only because there was no Planning Commission review but also because certain additional public notice requirements were not met. *See* 9 *Del. C.* § 4911(b).

[11] The question presented is a narrow one. The parties have blended the question of whether the Ordinance worked a change in any zoning regulation with other interesting questions which need not be resolved now. They include: May a zoning moratorium be imposed administratively without adoption of an ordinance? Does the County have the authority to impose any moratorium on zoning and land use matters? If so, would that authority be found in the State's delegation of zoning power or the more general grant of police power?

[12] Resp'ts' Reply Br. at 2.

The Ordinance, according to the County, was adopted under its general enabling statute and is merely administrative in nature.[13] The Ordinance does serve an administrative function in that it materially alters the flow of work (*e.g.*, acceptance and other handling of certain land use applications) through the County's planning staff and the Planning Commission.[14] That the Ordinance has an administrative impact, however, does not automatically remove it from the scope of 9 *Del. C.* § 4911(a) because it may have an administrative effect while also forcing a change in a zoning regulation.

* * *

It is difficult to envision a more dramatic change to a zoning regulation than a municipality's decision not to accept applications. Of course, in this instance, the County has limited the duration of the Ordinance to 270 days. Nonetheless, for a substantial period of time, the applicant is deprived of any opportunity to move forward with its efforts to obtain land use approval. To attempt to characterize that as merely "administrative" is to ignore the effect of the Ordinance. Moreover, the

[13] *See* 9 *Del. C.* § 4110.
[14] Undoubtedly, many matters of county governance carried out under the authority of 9 *Del. C.* ch. 41 may affect to some extent the land use planning and development process of the County without incurring the need to comply with 9 *Del. C.* § 4911. Examples would include general personnel issues and routine budgetary allocations.

County has not offered any reason why a moratorium was necessary as an internal administrative matter: it is not as if, for example, the Levy Court concluded that the Department of Planning Services was overworked and needed time to catch up.[15] The transparent and—as far as the Court can understand—actual purpose was to stop various land use development applications before they could ever be filed.[16]

* * *

The County maintains that there is a significant distinction between the power to regulate zoning and the power to suspend the regulation of zoning. It points to a case in which it was held that the power to zone does not necessarily include the power to suspend the zoning process.[17] From that, the County argues that the Ordinance cannot modify a zoning regulation because a moratorium is adopted through the exercise of the powers conferred under the County's enabling

[15] The Levy Court, for example, has also limited the number of certain applications that can be considered at a Planning Commission meeting. See Ordinance 07-02 which amended County Code § 187-13.

[16] The Court acknowledges the County's implicit argument that applications may be filed; they just will not be accepted. That argument, however, ignores the substantive effect that such an "administrative" policy would have in this setting.

[17] *Naylor v. Twp. of Hellam*, 773 A.2d 770 (Pa. 2001). The County does rely on any expressly granted authority to impose a zoning moratorium.

statute[18] (and not a statutory delegation of land use authority) and is, therefore, independent of the zoning regulation itself.

Curiously, the County relies upon a case which focused on this distinction in the course of determining that the municipality lacked the power to suspend the zoning process in the absence of an express grant of authority. To accept the County's logic in invoking this case would lead to the conclusion that the County, regardless of what procedural steps it may have taken, lacks the power to impose a moratorium. On the other hand, an alternative line of cases, also relied upon by the County, has held that the power to suspend a zoning ordinance in good faith, and for a proper purpose related to the public health and safety, arises from a general grant of police powers to a municipality.[19] The logic of these cases would support the County's invocation of its general police power authority, *see* 9 *Del. C.* § 4110, as support for the Ordinance.

The present debate is not over the source of the County's power to enact the Ordinance; the question, instead, turns on whether the Ordinance causes a change in a County zoning regulation. Regardless of whether the Ordinance is based upon

[18] *See* 9 *Del. C.* § 4110.
[19] *See, e.g., Arnold Bernhard & Co. v. Planning & Zoning Comm'n of Westport*, 479 A.2d 801 (Conn. 1984); *A. Copeland Enters., Inc. v. City of New Orleans*, 372 So.2d 764 (La. Ct. App. 1979).

the delegated zoning power or on the separately delegated general police powers, this Court still, as a matter of applying 9 *Del. C.* § 4911, must determine if the Ordinance caused a change to a zoning regulation. The debate about the source of authority, while interesting and perhaps important in a different context, is of no help in resolving the question precisely framed for the Court.

* * *

The Ordinance necessarily modifies or changes provisions of the County's zoning regulations which deal with timing and sequencing of the land use regulatory process.[20] For example, by § 187-12 of the County Code, the Planning Commission is assigned responsibility "[t]o review and render decisions on all applications for either preliminary or final approval of subdivision and/or land development plans." The Ordinance precludes the Planning Commission from carrying out this function specified in the County's zoning regulations. By § 187-13 of the County Code, the Levy Court assigned to the Director of the Department of Planning Services the responsibility "to determine whether or not any preliminary or final plan submissions are complete and acceptable to the County."

[20] The County does not dispute that County Code Chapters 187 (Subdivision and Land Use) and 205 (Zoning) are "zoning regulations" within the ambit of 9 *Del. C.* § 4911.

The Ordinance deprives that official of the authority to make the determination directed by § 187-13.

The County argues that nothing in the zoning regulations requires "acceptance" of any application. Any fair and comprehensive reading, however, of these ordinance provisions would recognize that acceptance of applications is part of the process established by the zoning regulations.[21] The Ordinance, by imposing a moratorium on the County's acceptance of certain applications, has substantively altered the rights—at least in a timing sense—of those persons seeking land use approvals. If nothing else, the Ordinance changes those provisions cited above by denying them any substance, meaning, or purpose for the duration. The Ordinance has changed them and they are indisputably zoning regulations.

* * *

[21] The Levy Court's direction that planning staff not accept certain land use applications is challenged here because the directive was accomplished by ordinance, and ordinances are required to accomplish the changes referenced in 9 *Del. C.* § 4911(a). If that which is being changed has the force of law (and a zoning regulation within the meaning of § 4911(a) would), then an ordinance is necessary to accomplish the change. If, however, acceptance were not required by the currently existing land use regulations, it would not have been necessary to have implemented the moratorium by ordinance; a resolution—if the act of acceptance of an application were a mere matter of whim as the County now seems to suggest—would have sufficed. A resolution, of course, cannot modify or change an ordinance, but a resolution would not have been dependent upon compliance with § 4911(a).

The County also argues that compliance with the requirement of Planning Commission review established by 9 *Del. C.* § 4911(a) should be excused because of the interim nature of the Ordinance. The controlling statute does not make any exception for interim ordinances.[22] The County contends that such ordinances do not require, as a constitutional matter, the same procedural safeguards as permanent regulations.[23] The County may be correct in this observation, but the question now before the Court is not of constitutional magnitude; it is, instead, a matter of statutory construction.

* * *

[22] The County concedes that there was no "emergency" which would have resulted in untoward and immediate consequences if the Ordinance had been referred to the Planning Commission. Thus, the question of an "emergency" exception to the referral requirement is not presented by this action. Less onerous procedural standards for the adoption of emergency regulations have been legislatively prescribed. *See, e.g.*, 9 *Del. C.* § 4110(j) (authorizing County to adopt emergency ordinances "[t]o meet a public emergency affecting life, health, property or the public peace"); 29 *Del. C.* § 10119 (establishing means for adoption of emergency regulations under Delaware's Administrative Procedures Act). *See also Deighton v. City Council of Colo. Springs*, 902 P.2d 426, 429 (Colo. Ct. App. 1994), *rev'd in part on other grounds*, 3 P.3d 488 (Colo. 2000) ("We agree that a 'stop gap' zoning moratorium of temporary and reasonable duration may be a useful procedure in local government land use planning. However, such a moratorium must be instituted under and in accordance with the applicable law.").

[23] The County invokes the notion of "interim development controls." *See Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg. Planning Agency*, 535 U.S. 302 (2002). The Ordinance may be an "interim development control" as that term has evolved in land use planning. The use of authoritative sounding terminology, however, cannot modify the terms of an unambiguous statute. *See Farmers for Fairness*, 2007 WL 1413247, at *3 ("The sole question before the Court is whether the County has complied with the requirements of the Legislature and its own regulations, not whether its actions would have been acceptable in another jurisdiction.").

In sum, the 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.[24] 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.[25]

Accordingly, Upfront's summary judgment motion is granted and the Defendants' summary judgment motion is denied. Upfront is entitled to a declaration that the Ordinance is not effective.[26] Counsel are requested to confer and to submit a form of order to implement this letter opinion.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[24] *See, e.g.*, *Fields v. Kent County*, 2006 WL 345014, at *3 (Del. Ch. Feb. 2, 2006). The County has advanced no policy grounds (perhaps because there are none) to exclude Planning Commission review of the Ordinance. The legislative policy choice is that the Levy Court will generally benefit from receiving input from the Planning Commission on land use matters. That policy is best served by allowing the Planning Commission to assess the appropriateness of any land use action as significant as the imposition of a moratorium.

[25] With this conclusion, it is not necessary to consider the other contentions advanced by Upfront.

[26] The intervenors are entitled to the same relief.