

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

JANEVE CO., INC., ADJILE, INC., )  
STANLEY WOJCIECHOWSKI, )  
HERSHEY WOJCIECHOWSKI, )  
READWAY, INC., TRUSTEE, )  
STANLEY C. LOWICKI, )  
WALTER LOWICKI, TRUSTEE OF )  
WALTER LOWICKI REVOCABLE )  
TRUST, )

Appellants, )

v. )

C.A. No. 08A-04-011 WCC

CITY OF WILMINGTON, a )  
municipal corporation under the )  
laws of the State of Delaware, )  
DEPARTMENT OF LICENSES )  
AND INSPECTION; )  
JEFFREY J. STARKEY, )  
Commissioner )  
BOARD OF LICENSE AND )  
INSPECTION REVIEW, )  
DONALD L. GOUGE, JR., )  
Chairman, )

Appellees. )

Submitted: January 14, 2009

Decided: May 7, 2009

**ORDER**

**On Appellee's Motion to Dismiss - GRANTED IN PART  
Writ of Certiorari - DENIED**

Stanley C. Lowicki, Esquire, 830 West Street, Wilmington, Delaware. Attorney for Appellants.

Brenda James-Roberts, Esquire, Senior First Assistant City Solicitor. Louis L. Redding City/County Building, 800 North French Street, 9<sup>th</sup> Floor, Wilmington, Delaware. Attorney for Appellees.

**CARPENTER, J.**

## **Introduction**

Before the Court is the City of Wilmington's (the "Appellee") Motion to Dismiss the writ of certiorari filed by Janeve Co., Inc., et al. (the "Appellants") to perfect their appeal of the Board of License and Inspection Review's (the "Board") denial of their petitions for waivers of vacancy assessments.

## **Facts**

The Appellants own five properties in Wilmington that the Department of Licenses and Inspections (the "Department") identified as vacant: (1) 1309 West Street, (2) 1309 N. Lincoln Street, (3) 709 W. 10<sup>th</sup> Street, (4) 2600 W. 18<sup>th</sup> Street, and (5) 2712 Tatnall Street. On November 1, 2007, the Department sent vacant property statements to the Appellants for each of these properties, totaling \$41,500.<sup>1</sup> The Appellants submitted petitions for waivers of these fees. Subsequently, the Department notified the Appellants that it was necessary to inspect the properties to determine their eligibility for waivers and that additional information was required prior to these inspections. The Appellants failed to provide the requested information, and thus the Department denied the waivers. The Appellants appealed the denials to the Board, which heard the appeal and ultimately affirmed the Department's denials.

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<sup>1</sup>The Wilmington City Code sets forth the schedule of fees for vacant properties. *See* Wilm. C. § 4-27, at 125.0(b)(3). The statements sent to the Appellants in November 2008 included unpaid assessments and fines from prior years.

The Appellants have appealed that decision to this Court via a writ of certiorari, arguing the following: (1) the Board lacked jurisdiction to review their appeal of the Department's denials because the Commissioner never issued a written decision setting forth the reasons for the denials, (2) Chairman Gouge wrongfully refused to recuse himself, (3) the standard the Board uses in determining whether a waiver is warranted is unlawful, (4) there is no Charter authority for the Board to issue vacancy statements, and (5) the Department has no authority to issue a vacancy statement when the owner has never filed a registration statement. In response, the Appellee has filed a Motion to Dismiss under Rule 12(b)(6), arguing that the doctrines of res judicata and collateral estoppel bar the appeal. Because the Appellee's Motion to Dismiss is potentially dispositive of the case, or at least of some of the issues, the Court will address it first.

### **Standard of Review**

The standard by which this Court reviews a motion to dismiss is well-established. The Court must accept as true all well-pleaded allegations;<sup>2</sup> however, only claims that are "clearly without merit" will be dismissed.<sup>3</sup> Further, a motion to

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<sup>2</sup>*Sterling Network Exchange, LLC v. Digital Phoenix Van Buren, LLC*, 2008 WL 2582920, at \*4 (Del. Super. Mar. 28, 2008) (citing *Lesh v. Appriva*, 2006 WL 2788183, at \*3 (Del. Super. June 15, 2006)).

<sup>3</sup>*Caldera Properties-Lewes/Rehoboth v. Ridings Dev., LLC*, 2008 WL 3323926, at \*11 (Del. Super. June 19, 2008) (quoting *Wilmington Trust Co. v. Politzer & Haney, Inc.*, 2003 WL 1989703, at \*2 (Del. Super. Apr. 25, 2003)).

dismiss shall be denied “unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.”<sup>4</sup>

This Court’s role in reviewing an appeal brought by a writ of certiorari is limited. The Court shall review the record to determine whether the Board “exceeded its jurisdiction, committed legal error, or proceeded irregularly.”<sup>5</sup> It is not the province of this Court to consider the merits of the case or to weigh the sufficiency of the evidence presented.<sup>6</sup>

### **Discussion**

#### **a. Motion to Dismiss**

The Appellee has moved to dismiss the appeal pursuant to Rule 12(b)(6). The Appellee bases its motion on the doctrines of res judicata and collateral estoppel. Both of these legal concepts prevent a party from re-litigating a matter previously

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<sup>4</sup>*E.I. Du Pont de Nemours & Co. v. Allstate Ins. Co.*, 2008 WL 555919, at \*1 (Del. Super. Feb. 29, 2008) (citing *Atamian v. Gorkin*, 1999 WL 743663, at \*5 (Del. Super. Aug. 13, 1999)).

<sup>5</sup>*Adjile, Inc. v. City of Wilmington*, 2008 WL 2623938, at \*1 (Del. Super. June 30, 2008) (citing *Adjile, Inc. v. City of Wilmington*, 875 A.2d 632 (Del. 2005)).

<sup>6</sup>*Id.* (citing *Shoemaker v. State*, 375 A.2d 431, 437 (Del. 1977)).

resolved by the same court.<sup>7</sup> Res judicata will bar a claim where the following elements are met:

(1) the original court had jurisdiction over the subject matter and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issues decided was the same as the case at bar; (4) the issues in the prior action must have been decided adversely to the appellants in the case at bar; (5) the decree in the prior action was a final decree.<sup>8</sup>

Similarly, collateral estoppel applies where:

(1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.<sup>9</sup>

Almost every year for the past five years, the Appellants have filed an appeal with this Court seeking review of the Board's denial of their petitions for waivers of vacancy assessments.<sup>10</sup> Issues relating to: (1) whether Chairman Gouge wrongfully

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<sup>7</sup>*LaPoint v. AmerisourceBergen Corp.*, 2009 WL 623288, at \*4 (Del. Mar. 12, 2009) (explaining that “[r]es judicata exists to provide a definite end to litigation, prevent vexatious litigation, and promote judicial economy.”) (footnotes omitted)).

<sup>8</sup>*Id.* at \*5 (quoting *Dover Historical Soc’y, Inc. v. City of Dover Planning Comm’n*, 902 A.2d 1084, 1092 (Del. 2006)).

<sup>9</sup>*Commonwealth Constr. Co. v. Endecon, Inc.*, 2009 WL 609426, at \*6 (Del. Super. Mar. 9, 2009) (quoting *Betts v. Townsends, Inc.*, 765 A.2d 531, 535 (Del. 2000)).

<sup>10</sup>*See Adjile, Inc. v. City of Wilmington*, 2008 WL 2623938 (Del. Super. June 30, 2008), *aff’d* 2009 WL 476538 (Del. Feb. 26, 2009); *Adjile, Inc. v. City of Wilmington*, 2007 WL 2028536 (Del. Super. June 29, 2007), *aff’d* 2008 WL 660139 (Del. Mar. 13, 2008); *Adjile, Inc. v. City of Wilmington*, 2004 WL 2827893 (Del. Super. Nov. 30, 2004), *aff’d* 2005 WL 1139577 (Del. May 12, 2005).

refused to recuse himself, (2) whether the standard the Board uses in determining whether a waiver is warranted is unlawful, and (3) whether there is no Charter authority for the Board to issue vacancy statements have all been previously addressed by this Court and those decisions have been affirmed on appeal to the Delaware Supreme Court.

The Court references its opinion of June 30, 2008<sup>11</sup> and emphasizes that this is now the fourth time the Plaintiffs have brought a similar petition before the Court. As a result, the Court will not address the above three issues and grants the Appellee's Motion to Dismiss as the elements of res judicata and collateral estoppel have been met. The Court will, however, consider: (1) whether the Board lacked jurisdiction to review the appeal, and (2) whether the Department had authority to issue vacancy fees as they appear to be "new versions" of issues perhaps not previously considered.

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<sup>11</sup>*See Adjile, Inc.*, 2008 WL 2623938, at \*1. Prior to addressing the Appellant's claims last year, the Court made the following statement:

The Court believes it is important to note that this is now the third certiorari petition filed by these Appellants, all with nearly identical issues, and the Court's prediction that this would become a request to annually review the actions taken by the Appellees has come true. Having issued two previous opinions the Court does not intend to again review the same alleged errors that are claimed to exist by the Appellants which have been previously denied by this Court and affirmed by the Delaware Supreme Court. Therefore some of the arguments made by Appellants will be only summarily addressed as having been previously decided and denied.

## **b. The Board's Jurisdiction**

The Appellants first argue that since the Commissioner of Licenses and Inspections did not issue a written decision pursuant to § 5-705<sup>12</sup> of the Wilmington City Charter on the Appellants' appeal of the vacancy assessments this would prevent the Board from being able to hear their appeal.<sup>13</sup> However, a closer review of this section of the Charter does not, in fact, require that the Commissioner issue a written opinion on a grievance, but merely states that such a decision shall be provided to the property owner "upon request."<sup>14</sup> The Court views this provision as simply a mechanism available to an aggrieved party to obtain written notice of any deficiencies.

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<sup>12</sup> See App. to Pls.' Opening Br. at A249. This section of the Wilmington City Charter is as follows:

The board of license and inspection review shall provide an appeal procedure whereby any person aggrieved by the issuance, transfer, renewal, refusal, suspension, revocation or cancellation of any city license or by any notice, order or other action as a result of any city inspection affecting him directly, shall upon request be furnished with a written statement of the reasons for the action taken and afforded a hearing thereon by the board of license and inspection review. Upon such hearing, the board shall hear any evidence which the aggrieved party or the city may desire to offer, shall make findings and render a decision in writing. The board may affirm, modify, reverse, vacate or revoke the action from which the appeal was taken to it.

<sup>13</sup>The Commissioner sent a letter to the Appellants dated January 29, 2008, directing them to provide certain information necessary to determine whether the properties were eligible for a waiver. The letter explained that failure to provide the information would result in a denial of the Appellants' requests for waivers.

<sup>14</sup>See Wilm. C. § 5-705.

While this is an important procedural process that the City should comply with, the Court does not view § 5-705 as establishing the written statement as a prerequisite to the Board conducting a hearing or to obtaining jurisdiction over an appeal filed by the property owner. In this case, the appeal documents filed by the Appellant to the Board reflect that they had full notice of the alleged deficiencies and have asked the Board to reverse the action taken by the Department of Licenses and Inspection. The filing of the appeal waives any procedural deficiencies that they now are claiming.

**c. The Department's Authority**

The Appellants also argue that the Department does not have the authority to collect vacancy assessments when the property owner has not filed a registration statement. In essence, it appears that the appellant is asserting that if the property owner fails to file the required registration statement, the only recourse available to the City is the penalty assessments set forth in Section 125.0(e). This provision states:

The failure or refusal for any reason of any owner, or agent of an owner acting on behalf of the owner, to register a vacant building or to pay any fees required to be paid pursuant to the provisions of this section, within 30 days after they become due, shall constitute a violation punishable upon conviction thereof by a fine in the amount of not less than \$100.00 nor more than \$500.00 for each failure or refusal to register, or for each failure or refusal to pay a required vacant building fee, as applicable. In such cases, whenever the minimum fine of \$100.00 is imposed, it shall not be subject to suspension or reduction for any reason.



If the Court was to accept the Appellant's argument, it would undermine the purpose of Section 125.0 as doing so would encourage non-compliance with the registration requirements of the code. The maximum penalty for the failure to register under subsection (e) is \$500 for each failure to register, whereas the registration fees found in Section 125.0(b)(3) range from no fee for a property that has been vacant for less than a year to over \$5000 for a property vacant for over 10 years. As such, the Appellants' argument would suggest that the owner of a property that has been vacant for, as an example, three years, could avoid the \$3000 fee found in Section 125.0(b)(3) by simply not registering the property and by the Appellant's assertion, could only be fined \$500. Obviously this is nonsensical as a property owner would obtain an economic windfall just by their non-compliance with the code.

The Court finds these two sections of the code must be considered together and the enforcement provision simply provides the City with a mechanism to penalize those who refuse to comply with the law. As such, the City may assess the registration fee regardless of whether the property owner has registered the property, and if the property owner continues to refuse to comply with the registration requirements or to pay the required registration fee, additional penalties under 125.0(e) for non-compliance may be imposed.

### **Conclusion**

For the foregoing reasons, the Appellee's Motion to Dismiss is granted as to: (1) whether Chairman Gouge wrongfully refused to recuse himself, (2) whether the standard the Board uses in determining whether a waiver is warranted is unlawful, and (3) whether there is no Charter authority for the Board to issue vacancy statements. The Appellants' writ of certiorari is denied as to the issues of whether the Board lacked jurisdiction to review the appeal, and whether the Department had authority to issue vacancy fees.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.  
Judge William C. Carpenter, Jr.