

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ADMIRAL HOLDING, a Trust domiciled :  
in New Castle County, Delaware, by and :  
through Bruce E. Hill, as General : C.A. No. 04A-03-002  
Manager of the Trust, :  
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 :  
Plaintiff, :  
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 :  
v. :  
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 :  
THE TOWN OF BOWERS, DELAWARE :  
TOWN COUNCIL, JANET L. FECGUE, :  
JEFF W. MORRIS, JACK C. HANN, and :  
VERNON GUITTANI, all individually :  
and in their official capacities as members :  
of The Town of Bowers, Delaware Town :  
Council, and WILLIAM POULIN, :  
individually and in his capacity as the :  
Mayor of the Town of Bowers, Delaware, :  
 :  
Defendants. :

Submitted: August 11, 2004  
Decided: October 18, 2004

**ORDER**

Upon Plaintiff' s Notice of Election to Transfer  
Pursuant to 10 *Del. C.* § 1902. Denied.

Paul D. Sunshine, Esquire of Whitehurst Curley & Sunshine, Dover, Delaware; attorneys  
for the Plaintiff.

Dominic J. Balascio, Esquire of Hudson Jones Jaywork & Fisher, Dover, Delaware,  
attorneys for the Defendants.

WITHAM, J.

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1. This Court is faced with the question as to whether Plaintiff, by filing a complaint in the wrong court, can toll Delaware's strict 60-day statute of repose for municipal zoning decisions (10 *Del. C.* §8126), and preserve its right to transfer its case under 10 *Del. C.* §1902 (governing removal of actions from court lacking jurisdictions). The Court concludes that Plaintiff's transfer should be denied because it failed to file in the proper court within the strict 60-day period prescribed by §8126 and additionally because Plaintiff failed to follow this Court's direct order mandating that it file the notice of election to transfer within 10 days of the motion hearing.

**FACTS**

2. On October 29, 2003, Plaintiff submitted a request asking the Defendants, Town Council of Bowers, to re-zone Plaintiff's property. The Town Council rejected the request to re-zone and Plaintiff's counsel was notified on February 16, 2004 of the sixty day period under 10 Del. C. §8126 in which it could file a challenge to the Council's decision. The Town Council published notification of its final decision on February 20, 2004, at which point the 60-day period for challenging the decision began to run under §8126. On March 15, 2004, Admiral Holding, filed its complaint in Superior Court. Defendants responded with a Motion to Dismiss for Lack of Subject Matter Jurisdiction on April 8, 2004. On June 4, 2004, the Superior Court granted the Defendants' Motion to Dismiss and made a verbal order requiring Plaintiff to "request or elect to transfer the matter within 10

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days.”<sup>1</sup> Almost sixty days later, on August 3, 2004, Plaintiff filed a Notice of Election to Transfer to the Court of Chancery pursuant to 10 Del. C. §1902. Defendants subsequently filed a Memorandum in Opposition to the Notice of Election to Transfer on August 11, 2004.

### CONTENTIONS OF THE PARTIES

3. Plaintiff, Admiral Holding, claims it met all the necessary time limitations and validly asserted its challenge to the Town Council’ s decision by timely filing its complaint in Superior Court on March 15, 2004 and by thereafter timely filing its Motion to Transfer within 60 days after the Superior Court’ s dismissal of the action for lack of subject matter jurisdiction. Defendants, Town Council, argue that the transfer should be barred by 10 Del. C. §8126 which permits challenges to municipal zoning decisions only within the 60-day period after publication of such a final decision. Defendants contend that because 10 Del. C. §8126 is a statute of repose and not a statute of limitations that §1902 (which refers directly to statutes of limitations but not repose) does not even apply to this case. They further argue that because Plaintiff failed to file its challenge to the Council’ s decision in the proper court within 60 days of the original publication of the Council’ s decision, the statute of repose had run and Plaintiff’ s right and remedy had both disappeared.

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<sup>1</sup> This verbal order was issued by President Judge Ridgely and is recorded in the case file. *Admiral Holding v. The Town of Bowers, Delaware Town Council*, Del. Super., C.A. No. 04A-03-002, Ridgely, J. (June 4, 2004) (ORDER).

### APPLICABLE LAW

4. The pertinent language of 10 Delaware Code §1902 states that actions removed from a court lacking jurisdiction “ may be transferred to an appropriate court for hearing and determination, provided that the party otherwise adversely affected, within 60 days after the order denying jurisdiction of the first court has become final, files in that court a written election of transfer.”<sup>2</sup> Section 8126 of 10 Delaware Code provides that “ [n]o action, suit or proceeding in any court” may be brought “ after the expiration of 60 days from the date of publication in a newspaper of general circulation” of notice of the final approval or denial of the proposed action.<sup>3</sup>

5. Another important factor to consider is that this Court issued a verbal order (recorded by a handwritten note in the file) at the end of this particular motion hearing on June 4, 2004, requiring that a transfer to a different court be filed, if the Plaintiff so elected, within 10 days of that hearing. Plaintiff waited almost 60 days, however, until August 3, 2004, to file its notice of election to transfer—in direct disregard of this order.

### DISCUSSION

6. It must first be noted that there is apparent confusion in the law as to the distinction between a statute of repose and a statute of limitations. Woolley’ s

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<sup>2</sup> 10 *Del. C.* §1902.

<sup>3</sup> 10 *Del. C.* §8126(a)-(b).

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Delaware Practice equates the two, noting, “ Statutes of limitations are founded in wisdom and sound policy. They have been termed statutes of repose and are regarded as highly beneficial.”<sup>4</sup> More recent definitions, however, draw a distinction between statutes of limitations and statutes of repose, observing that:

A statute of repose ... limits the time within which an action may be brought and is not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered. Unlike an ordinary statute of limitations which begins running upon accrual of the claim, the period contained in a statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted.<sup>5</sup>

Black’ s Law Dictionary similarly differentiates between statutes of repose and statutes of limitations:

A statute of limitations bars an action unless the plaintiff files the action within a specified period of time after the injury occurs. A statute of repose on the other hand terminates any right of action after a specified period of time has elapsed, regardless of whether an injury has yet occurred.<sup>6</sup>

In Delaware, in particular, some courts also tend to use the terms interchangeably. For example, although §8126 is most often termed a statute of repose, it is also

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<sup>4</sup> 1 Victor B. Woolley, Woolley’s Delaware Practice in Civil Actions §508 (1906).

<sup>5</sup> 54 C.J.S. *Limitations of Actions* §4, at 20-21 (1987).

<sup>6</sup> BLACK’S LAW DICTIONARY 1422-23 (7th ed. 1999).

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sometimes referred to as a statutes of limitations.<sup>7</sup>

7. The generous language of the transfer statute (§1902), seems to suggest that Plaintiff should not be barred from having its challenge heard merely because it filed in the wrong court. Section 1902 itself states that it shall be “liberally construed to permit and facilitate transfers of proceedings between the courts of this State in the interests of justice.”<sup>8</sup> Plaintiff cites *Wilmington Trust Company v. Schneider*, which states that §1902 is a “remedial statute designed to prevent a case from being totally ousted because it was brought in the wrong court.”<sup>9</sup> Despite the generous language of §1902, however, the policy behind §8126 indicates that Plaintiff should be barred from transferring its case. The purpose of this statute of repose for zoning decisions is to “promote predictability and stability in land use” and therefore must be applied strictly.<sup>10</sup> Cases also suggest that statutes of repose, in general, may not be tolled

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<sup>7</sup> See, e.g., *Lynch v. The City of Rehoboth*, 2004 WL 1238405, at \*1 (Del. Ch.); *Sterling Prop. Holdings, Inc. v. New Castle County*, 2004 WL 1087366, at \*3 (Del. Ch.); *Southern New Castle County Alliance, Inc., v. New Castle County Council*, 2001 WL 855434, at \*1 (Del. Ch.) which all refer to §8126 as a statute of repose. Cf. *Council of South Bethany v. Sandpiper Development Corp.*, 1986 WL 13707, at \*1 (Del. Ch.) (referring to §8126 as a statute of limitations); *Council of Civic Organizations of Brandywine Hundred, Inc., v. New Castle County*, 1991 WL 279374, at \*1 (Del. Ch.) (referring to §8126 as a “special statute of limitations”).

<sup>8</sup> 10 Del. C. §1902.

<sup>9</sup> *Wilmington Trust Co. v. Schneider*, 342 A.2d 240, 242 (Del. 1975). The language contained in §1902 was then contained in §1901.

<sup>10</sup> *Council of Civic Organizations of Brandywine Hundred, Inc., v. New Castle County*, 1991 WL 279374, at \*5 (Del. Ch.).

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because statutes of repose, unlike statutes of limitations, are jurisdictional and may not be waived.<sup>11</sup> In addition, the case law relating to §8126 notes that statutes of repose are strict, even “draconian”; suggesting that they are even less likely to be tolled under any circumstance.<sup>12</sup>

8. Although no cases directly addressing whether filing a timely complaint in the wrong court could toll the statute of repose were brought to this Court’s attention, almost all the cases available refused to allow tolling of §8126 for any reason. For example, the Chancery Court in *Southern New Castle County Alliance* held that §8126 precluded the joinder of an indispensable party after the strict 60-day time limit and the court therefore granted the opposing party’s motion to dismiss.<sup>13</sup> Another case, *Council of Civic Organizations of Brandywine Hundred, Inc., v. New Castle County* also refused to allow joinder of a party after the passing of the 60-day period under §8126.<sup>14</sup> Additionally, the Delaware Supreme Court has held that there are situations where transfers under §1902 should not be allowed, such as in the

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<sup>11</sup> See, e.g., *Sterling Prop. Holdings, Inc. v. New Castle County*, 2004 WL 1087366, at \*3 (Del. Ch.).

<sup>12</sup> *Lynch v. The City of Rehoboth*, 2004 WL 1238405, at \*4 (Del. Ch.). See also *Council of South Bethany v. Sandpiper Development Corp.*, 1986 WL 13707 (Del. Ch.).

<sup>13</sup> See *Southern New Castle County Alliance, Inc. v. New Castle County Council, et. al.*, 2001 WL 855434, at \*4 (Del. Ch.).

<sup>14</sup> *Council of Civic Organizations of Brandywine Hundred, Inc., v. New Castle County*, 1993 WL 390543, at \*5-6 (Del. Ch.). See also *Association of Citizens of North Dover, Inc. v. Regional Planning Commission of Kent County, et. al.*, 1990 WL 47344 (Del. Super.) (refusing to allow joinder of parties after passing of 60-day period under §8126).

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context of a mechanic's lien.<sup>15</sup> Defendants make reference to a persuasive case, *Moore v. Graybeal*,<sup>16</sup> in which the Chancery Court refused to toll the "special statute of limitations as to wills" under 12 *Del. C.* §1309 because to do so would defeat the public policy of prompt and final settlement of estates. Just as there is a great need for finality in settlement of estates, there is also a need for finality in zoning decisions. Section 8126, therefore, must be viewed strictly, as are the statutes in the context of estate settlement and mechanics' liens.

9. There are also arguments in support of tolling the statute of repose, most of which are based on equitable considerations. For instance, a related statute, 10 *Del. C.* §8127, (a statute of repose for builders who make improvements to real property), allows tolling of the statute if there has been fraud.<sup>17</sup> However, no fraud is alleged in this case so the principles allowing tolling in those situations do not apply here. In addition, a Delaware Chancery case, *Commissioners of the Town of Slaughter Beach v. The County Council of Sussex County*, allowed amendment of a complaint after the 60-day period under §8126 to more specifically plead an argument that the Council had failed to publish the notice properly under the statute

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<sup>15</sup> *Family Court of Delaware v. Giles*, 384 A.2d 623, 625 n.3 (Del. 1978). The Court noted that a transfer under §1902 after the filing deadline would be improper in the context of a mechanic's lien because the transfer would frustrate the purpose of giving notice to the proper parties under the strict mechanic's lien laws. *Id.*

<sup>16</sup> *Moore v. Graybeal*, 1989 WL 17430, at \*4-5 (Del. Ch.) (refusing to allow transfer of case to Chancery Court after running of "special statute of limitations" for wills).

<sup>17</sup> 10 *Del. C.* §8127.



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in question.<sup>18</sup> The present case is not an appeal, however, and notice was properly filed by the Town of Bowers so *Slaughter Beach* does not apply under the facts of this case.<sup>19</sup> Another Chancery case, *Carberry v. Redd*,<sup>20</sup> held that the provisions of §8126 could be waived.<sup>21</sup> When the court made that decision, however, the case had already proceeded for some time on the merits and the court held, based on equitable considerations, that it would be unconscionable to dismiss the case at that point.<sup>22</sup> The case at bar has not proceeded on the merits, though, and therefore the same inequities are not apparent.

10. The Court in the *Wilmington Trust* case, mentioned above, also held that it was reasonable for Plaintiff to wait until the Court entered its final order on the

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<sup>18</sup> *Commissioners of the Town of Slaughter Beach, et. al. v. The County Council of Sussex County, et. al.*, 1983 WL 142509 (Del. Ch.).

<sup>19</sup> In *Slaughter Beach*, the Chancery Court permitted an amendment to allege improper notice under a particular statute in the case because the original complaint “did charge improper and inadequate notice by the County officials.” *Id.* at \*6. The Court permitted the amendment to more particularly allege improper notice because it was “persuaded that the amendment to the complaint sought by plaintiffs, that is, one to add a failure of the County to comply with the notice requirements of §7002(m) as an additional grounds for voiding the rezoning of the . . . property, is not so much an attempt to add a new and separate cause of action—which might now be barred under 10 *Del. C.* §8126 since the 60-day period has long since expired—as it is an effort to allege a new theory of relief in support of their original charge that the rezoning of the . . . property was invalid due to defective notice on the part of the County. *Id.*

<sup>20</sup> *Carberry v. Redd*, 1976 WL 7959 (Del. Ch.).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at \*3.

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Motion to Dismiss before filing a Notice of Transfer, just as Admiral waited in this case to file its motion.<sup>23</sup> The *Wilmington Trust* case, however, does not directly apply in this instance because that was a class action against several banks for charging excessive interest rates and did not involve the same need for certainty and finality of decisions as in the field of zoning, to which §8126 applies. The statute involved in that case was not a statute of repose, so that case is not helpful.

11. In summary, §8126 is a statute of repose which must be very strictly construed. The policy behind §8126 indicates that it should not be tolled because of the need for certainty in land use decisions. Just as there is a strong public policy in favor of certainty in the settlement of estates, there also exists a strong policy in favor of certainty in municipal zoning decisions. This policy must be followed strictly and cannot bend, even to other statutes. The available case law also indicates that §8126 is strict and should not be tolled. Therefore, although there is no solid precedent as to whether filing a timely complaint in the wrong court should toll a statute of repose, by analogy from cases dealing with this statute, it seems that §8126 should not be tolled and the transfer of this case should not be allowed.

12. Plaintiff chose not to file its case in the Chancery Court and must now suffer the consequences of its actions. As the Court remarked in *Moore*, “[c]hoices were made and those choices have consequences . . . this fact is true in every instance a

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<sup>23</sup> *Wilmington Trust Co. v. Schneider*, 342 A.2d 240, 242 (Del. 1975).

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limitation is applied.”<sup>24</sup> Moreover, because this case has not proceeded on the merits and Plaintiff may eventually apply again for re-zoning of its property, the inequities against the plaintiff are not so severe as to permit this Court to disregard the strict statute of repose. Therefore, in light of the uncompromising nature of statutes of repose in general and the fact that Plaintiff failed to comply with this Court’ s order mandating the election of transfer within 10 days of the motion hearing, Plaintiff’ s Motion to Transfer is *denied*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution

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<sup>24</sup> *Moore v. Graybeal*, 1989 WL 17430, at \*7 (Del. Ch.).