

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

DELTA ETA CORP.	)	
	)	
Petitioner,	)	
	)	
v.	)	C.A. No. 03A-06-003 WCC
	)	
CITY COUNCIL OF CITY OF	)	
NEWARK, DELAWARE,	)	<b>CERTIORARI</b>
consisting of HAROLD F.	)	
GODWIN, JOHN H. FARRELL, IV,	)	
JERRY CLIFTON, KARL F.	)	
KALBACHER, DAVID J. ATHEY,	)	
FRANK J. OSBOURNE and	)	
CHRIS REWA	)	
	)	
Respondents.	)	

Submitted: January 4, 2005  
Decided: April 29, 2005

**MEMORANDUM OPINION**

**Upon Petitioner’s Appeal from the City Council  
of the City of Newark, Delaware. Granted.**

Richard H. Cross, Jr., 913 North Market Street, 10<sup>th</sup> Floor, Suite 1001, P.O. Box 1380, Wilmington, Delaware. Attorney for Petitioner.

Roger A. Akin, City Solicitor, 1220 North Market Street, P.O. Box 25047, Wilmington, Delaware. Attorney for Respondents.

**CARPENTER, J.**

On this 29<sup>th</sup> day of April, 2005, upon consideration of Petitioner's appeal, filed by *writ of certiorari*, the briefs filed by the parties and the record below, it appears to the Court that:

1. Petitioner seeks review by *writ of certiorari*, pursuant to Title 10, Section 562 of the Delaware Code, of a decision by the City Council of the City of Newark, Delaware, imposing a restriction on the approval of Petitioner's application for a major subdivision.

2. On or about January 31, 2002, Petitioner filed an application for approval of a major subdivision of property located at 163, 171, 175 and 179 South Chapel Street, in Newark, Delaware. Petitioner intended to rearrange and renovate the three existing houses and build a twelve-unit apartment building. Under Chapter 32 of the Zoning Code of the City of Newark, the lots subject to Petitioner's plan are zoned RM, meaning they are intended for garden apartments, boarding houses, rooming houses, lodging houses, private dormitories or fraternity houses.<sup>1</sup> On June 10, 2002, the Council denied Petitioner's application for the subdivision. In response, Petitioner filed a *writ of certiorari* and the Court rendered a decision on March 19,

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<sup>1</sup>See Newark, De., Municipal Code ch. 32, § 32-11. The Court also notes that the zoning designation has now been modified to remove the reference to fraternity houses but at the time the application was filed it was an approved use.

2003 in C.A. No. 02A-07-009 WCC, in which it reversed the Respondents' decision and remanded the case for further hearings consistent with its Order.<sup>2</sup>

On May 27, 2003, Respondents reconsidered Petitioner's application and approved Resolution No. 03-E (the "Resolution") with substantial conditions. The imposition of these conditions lead to a subsequent *writ of certiorari* to this Court, asserting that the restrictions are unreasonable and should be struck down by the Court. With the Court's strong encouragement, the parties, with the assistance of their able counsel, have resolved all of the disputed conditions, with the exception of the following restriction:

If the property is leased to or operated as a fraternity and/or sorority, that the sale, distribution, or consumption of alcoholic beverages shall not be permitted anywhere on the premises.<sup>3</sup>

It is the appropriateness of this condition that the Court is now asked to consider. The scope of review on a *writ of certiorari* is limited to correcting errors of law and determining whether substantial evidence exists to support the Council's findings of fact.<sup>4</sup>

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<sup>2</sup>*Delta Eta Corp. v. City Council of City of Newark, Delaware*, 2003 WL 1342476, at \*3 (Del. Super.).

<sup>3</sup>Form of Subdivision Agreement for development of properties located at 163, 171, 175, 179 South Chapel Street by Delta Eta Corp.

<sup>4</sup>*East Lake Partners v. City of Dover Planning Comm'n*, 655 A.2d 821, 825 (Del. Super. Ct. 1994).

3. Petitioner argues that the provision, restricting the lawful consumption of alcohol in the privacy of one's home, is unprecedented.<sup>5</sup> Petitioner admits it is cognizant of the historical alcohol abuse and noise problems which the City has encountered and agrees that it will utilize reasonable and legal means to assist the City in reducing these problems. Consistent with this point, the Petitioner has agreed to restrict by deed or other recordable instrument so as to reflect:

- 1) The owner agrees to insert in any lease of all or part of the property that 'the sale, distribution, or consumption of alcoholic beverages by tenants, guests, or others on the premises under the legal age shall not be permitted. Upon receiving actual knowledge of the possession or consumption of alcoholic beverages on the subdivision premises by any underage person, the owner, the on-site representative of the owner, and/or any officer of any fraternal organization housed therein shall promptly take appropriate steps to cause such possession or consumption to cease forthwith.'
- 2) The owner will agree to insert language in any lease of all or part of the property that 'the occupants and/or tenants shall abide by all statutes, applicable municipal ordinances and regulations concerning noise.'
- 3) An on-site live-in supervisor or supervisors (age 21 years or over) shall be designated at all times as a responsible person for the maintenance of the property and for the monitoring of all fraternity sponsored activities (if any) thereon. The name(s) of this individual(s) and, the means by which they may be contacted, shall be provided to the Newark Police Department at the beginning of each University of Delaware semester. Such supervisor(s), in addition, shall provide information so that they

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<sup>5</sup>Pet'rs Opening Br. at 13-14.

may be contacted by the Newark Police Department at reasonable times. If the supervisor(s) changes during a semester, the name(s) of a new supervisor shall be provided promptly to the Newark Police Department.

- 4) If the property is leased to or operated as a fraternity and/or sorority, that an owner or representative from any responsible property management company or fraternity/sorority alumni organization shall be present when the annual City fire prevention and property maintenance inspections are scheduled to take place.
- 5) Upon the second conviction of a resident for offenses such as violation of the City's noise ordinance, underage drinking, or any felony act or Class A misdemeanor the owner or other responsible party would commence process to evict the offending tenant or tenants pursuant to the provision of the State Landlord Tenant Code, to the extent that the law applies to such tenancies. The provisions of Newark Municipal Code § 17-4.404.8.2, as amended, shall apply to tenancies in the relevant premises.

While willing to abide by these limitations, the Petitioner admits there is a reasonable likelihood that it will have tenants over the age of 21, who may choose to consume alcohol within the confines of their own apartments and therefore contends that a term which restricts lawful consumption of alcohol, in the privacy of one's home, is unreasonable.<sup>6</sup>

Respondents claim that the prohibition on alcohol consumption in the privacy of one's home "bears a direct, reasonable and necessary relationship to mitigating

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<sup>6</sup>The Court notes that the minutes of Council's meeting of May 12, 2003, when the Resolution was passed, also reflected concern by counsel for the City of the appropriateness of including a prohibition against lawful consumption of alcohol and the treatment of this property in a manner inconsistent with other similarly situated properties in the City.

undesirable effects upon the quality of life in the City of Newark.”<sup>7</sup> While Respondents contend that the remaining restriction is reasonable, they provide no legal precedent to support their contention.<sup>8</sup> Instead, Respondents attempt to justify the restriction by referring to their inherent authority to regulate and restrict for the purpose of promoting health, safety and welfare and the evidence presented to Council indicating that fraternity and sorority organizations have for years exhibited behavior, fueled by excessive consumption of alcohol, unsuited for residential communities. It is within this emotional environment that this Court has been asked to resolve the remaining dispute.

4. The State has the power to impose certain implied limitations on the property rights of its citizens<sup>9</sup> and the General Assembly has delegated this power to subordinate governmental entities.<sup>10</sup> As a result, a municipality has the authority to impose zoning regulations or restrictions as long as they are consistent with the

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<sup>7</sup>Resp’ts Answering Br. at 13.

<sup>8</sup>The Court notes that the original conditions passed by Council required no alcohol on the premises if it was operated as a fraternity which the City knew was the intended purpose of the application; permitted no noise to be heard on adjacent properties; and provided the City sole discretion to determine if a violation of any condition had occurred.

<sup>9</sup>*Campbell v. State*, 1986 WL 8178, at \*3 (Del. Super.); *In re Auditorium, Inc.*, 84 A.2d 598, 603 (Del. Super. Ct. 1951).

<sup>10</sup>9 *Del. C.* §§ 2601, 4901 and 6902.

statutory authority passed by the General Assembly.<sup>11</sup> The delegation of that power is set forth in Title 9 of the Code, which provides cities and towns with the authority to impose conditions on development for “the purpose of promoting health, safety, morals or the general welfare of the community.”<sup>12</sup> However, that authority is specifically limited by statute:

For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated towns **may regulate and restrict the height, number of stories and size of buildings and other structures, percentage of lot that may be occupied, the size of the yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.**<sup>13</sup>

While this authority is broad and the Court will give deference to the City’s decisions,<sup>14</sup> the City has no inherent police power to zone property except as the Legislature may delegate to them.<sup>15</sup> The City’s conduct must be consistent with 22 *Del. C.* § 301, which refers to a plethora of lawful restrictions on the size, kind, location and use. However, despite the breadth of the authority set forth, there is no

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<sup>11</sup>*Langley v. Elsmere Associates*, 1994 WL 149256, at \*2 (Del. Super.); *Garden Court Apartments, Inc. v. Hartnett*, 65 A.2d 231 (Del. Super. Ct.1949).

<sup>12</sup>22 *Del. C.* § 301.

<sup>13</sup>22 *Del. C.* § 301 (emphasis added).

<sup>14</sup>*Newark Landlord Assoc., et al. v. City of Newark*, 2003 Del. Ch. LEXIS 66, at \*29.

<sup>15</sup>*Mayor and Council of Wilmington v. Smentkowski*, 198 A.2d 685, 686 (Del. 1964).

reference in the statute to restrictions on behavior analogous to that presently proposed by the City. As a result, the Court believes that the City has exceeded the authority, expressly granted to it by law, with the imposition of the restriction on the legal consumption of alcohol.<sup>16</sup>

While the Court again emphasizes that it is sympathetic to the concerns of excessive alcohol consumption in a city where the population for nine months of the year is mostly college students, it remains convinced that the City's restriction extends beyond the scope of its legitimate zoning authority in attempting to regulate this otherwise legal activity. Zoning is not a "panacea for all social, cultural and economic ills especially where they are unrelated to the use of land."<sup>17</sup> In addition, zoning ordinances have been held *ultra vires* where they restrict the use of land to deal with a community problem, which is "only tangentially related, if at all, to the use of land at a particular location."<sup>18</sup>

It is the role of the Legislature, not the Court, to delineate the zoning power it has delegated to the City. This Court's obligation is simply to insure that the City's

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<sup>16</sup>*State v. Penn Central Corp.*, 445 A.2d 939, 946 (Del. Super. Ct. 1982); *Boozer v. Johnson*, 98 A.2d 76, 77 (Del. Ch. 1953); *Mayor and Council of Wilmington*, 198 A.2d at 686.

<sup>17</sup>*Taxpayers Ass'n of Weymouth Tp., Inc. v. Weymouth Tp.*, 364 A.2d 1016, 1031 (N.J. Sup. Ct. 1976).

<sup>18</sup>EDWARD H. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1:12, at 1-39 (1<sup>st</sup> ed. 1997).



actions are consistent with that statutory authority or to rule upon the constitutionality of any class protected limitations. If the City desires greater latitude in its decision process it should petition the General Assembly to broaden the enabling statute to encompass such reasoning. However, for the moment, the qualifying language of § 301 is clear and under no reasonable interpretation can the Court find the condition, attempting to be imposed by the City, to be included within it.

5. For the reasons stated above, Petitioner's request for Judicial Review by *writ of certiorari* is GRANTED, and the remaining disputed restriction is declared null and void and may not be enforced by the City.

IT IS SO ORDERED.

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Judge William C. Carpenter, Jr.