SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

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RE: ***Dolores Willis v. City of Rehoboth Beach, et al.***
C.A. No. 03C-11-016-RFS

Date Submitted: March 17, 2005
Date Decided: June 24, 2005

Dear Counsel:

This is my decision regarding the City of Rehoboth Beach's Motion to Dismiss and for Summary Judgment. For the reasons set forth herein, the City's Motion is granted.

STATEMENT OF THE CASE

This action stems from a dispute over a building permit issued in November 2001 by the City of Rehoboth Beach ("the City") to Dolores Willis ("Willis") and her now deceased husband, Cecil Willis, (collectively, "the Willises"). The Willises had applied for a building permit to make improvements to their property, a condominium unit that was classified under the Rehoboth Beach Zoning Code ("the Zoning Code") as a garage apartment. The Zoning Code did not permit the expansion of garage apartments in their zone, however. The City, upon discovering that the permit had been issued illegally, in violation of the Code by the building

inspector, ordered the Willises to stop the construction in May of 2002.[1] The Willises applied to the Rehoboth Beach Board of Adjustment ("the Board") for a variance. It was denied, but they were able to acquire a special use exception allowing them to complete some of the improvements. They did not appeal the Board's decision to this Court.

Instead, Willis, for herself and as successor to her deceased husband, brought an action for compensatory and punitive damages against the City of Rehoboth. She claims the City is liable for 1) negligent hiring and supervision of the building inspector; 2) intentional misrepresentation and consumer fraud under the Consumer Fraud Act, 6 *Del. C.* §§ 2511-2527, and at common law; and, 3) deceptive trade practices, prohibited by the Deceptive Trade Practices Act, 25 *Del. C.* §§ 2531-2536.[2] The City has filed a Motion to Dismiss and for Summary Judgment. It argues that it has municipal immunity under the County and Municipal Tort Claims Act, 10 *Del. C.* §§ 4010-4013, to both the negligence and the fraud claims. In addition, the City claims this suit should be barred because Willis failed to exhaust all of her administrative remedies when she did not directly appeal the Board's decision to the Superior Court. It also argues that Willis has no claim under either the Consumer Fraud Act or the Deceptive Trade Practices Act.

DISCUSSION

The City's Motion is for Dismissal as well as for Summary Judgment. Both parties base their arguments on the pleadings and documents incorporated into those pleadings, such as the application for the permit and the Board's decision to grant a special use exception. Since they have not submitted additional documents outside the pleadings, such as affidavits and depositions, the Court will treat this motion as one for dismissal pursuant to Superior Court Civil

Rule 12(b)(6). *Cf. Shultz v. Delaware Trust Co.*, 360 A.2d 576 (Del. Super. Ct. 1976) (finding motion to dismiss must be considered as motion for summary judgment when the moving Defendant offered depositions and affidavits in addition to the pleadings).

When the Court considers a motion to dismiss for failure to state a claim, the Court accepts all well-pleaded allegations in the complaint as true. *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978). If the plaintiff can recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint, then it will not be dismissed. *Id*.

The Court first addresses the City's argument that The County and Municipal Tort Claims Act bars Willis' claims of negligence and the intentional tort of common law fraud. It will then consider whether Willis has causes of action under the Consumer Fraud Act and the Deceptive Trade Practices Act. Since the case can be resolved with the consideration of those issues alone, the Court need not address the other arguments raised by the parties.

I. Municipal Immunity

10 *Del. C.* § 4011(a) provides, "except as otherwise expressly provided by statute, all governmental entities and their employees shall be immune from suit on any and all tort claims seeking recovery of damages." "Governmental entity" is defined in 10 *Del. C.* § 4010 to include any municipality, town, or county.

A. Negligent Hiring and Supervision

Under the County and Municipal Tort Claims Act ("the CMTCA"), a municipality is generally immune from liability for its tortious acts or omissions. However, 10 *Del. C.* § 4012 provides three exceptions to governmental immunity, stating:

> A governmental entity shall be exposed to liability for its negligent acts or omissions causing property damage, bodily injury or death in the following instances:
>
> > (1) In its ownership, maintenance or use of any motor vehicle, special mobile equipment, trailer, aircraft or other machinery or equipment, whether mobile or stationary.
> >
> > (2) In the construction, operation or maintenance of any public building or the appurtenances thereto, except as to historic sites or buildings, structures, facilities or equipment designed for use primarily by the public in connection with public outdoor recreation.
> >
> > (3) In the sudden and accidental discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalines and toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.

"The activities listed in Section 4012 are an exclusive list and 'are the only activities as to which municipal immunity is waived.'" *Sussex County v. Morris*, 610 A.2d 1354, 1357 (Del. 1992) (citations omitted).

The analysis regarding Willis' negligence claims against the City of Rehoboth is simple. The City has immunity for its negligent acts. The claims of negligent hiring and supervision of the building inspector do not fit into any of the three exceptions to immunity under § 4012. Willis is seeking damages for the City's alleged negligence. Therefore, according to the plain language of the CMTCA, the City has immunity from Willis' negligence claims against it.

Willis states in her complaint that the City waived its immunity by the terms of its charter. As pointed out by the City, however, the legislature's grant of immunity cannot be extinguished by such a waiver. The Delaware Supreme Court concluded in *Fiat Motors of North America, Inc. v. Mayor of Wilmington*, 498 A.2d 1062, 1067 (Del. 1985), that a municipality may

not waive immunity. Only a legislature, by statute, may waive a municipality's immunity. *Id.*[3] Nowhere has the legislature waived the immunity for a municipality against claims of negligent hiring or supervision of an employee. The only conclusion to be reached is that the City has immunity against Willis' negligence claims for damages.

B. Intentional Misrepresentation and Common Law Fraud

In addition to her claims of a material misrepresentation under the Consumer Fraud Act, Willis alleges common law fraud. The claim is that the City allowed its Building Inspector to issue an illegal permit. To the extent that Willis rests her case on this basis, the City has countered that the CMTCA bars intentional tort claims against it.

Again the analysis of this issue is straightforward. Section 4011 clearly states that "all governmental entities . . . shall be immune from suit on *any and all tort claims seeking recovery of damages*." (Emphasis added). Fraud is an intentional tort.[4] Willis is seeking to recover damages for the fraud. Unless there is an exception to, or waiver of municipal immunity, the City cannot be sued for common law fraud. In this regard, § 4012 provides the only exceptions to immunity. That section states, however, that "[a] governmental entity shall be exposed to liability for its *negligent* acts or omissions" in the enumerated instances. (emphasis added). There is no exception for intentional torts.

This reasoning is supported by the Superior Court's decision in *Schueler v. Martin*, 674 A.2d 882, 886-87 (Del. Super. Ct. 1996). In *Schueler*, the Court determined the plaintiff could not seek punitive damages for his injury because the threshold for recovery is reckless or willful or wanton conduct, and the CMTCA does not create an exception to its grant of immunity for anything other than negligent conduct. The Court stated:

> Section 4012 of the Act creates several limited exceptions to local government immunity. The predicate to those exceptions, however, is that the local government employee committed a *negligent* act or omission. Obviously, negligent conduct under § 4012 cannot act as a sufficient predicate to entitle a plaintiff to recover punitive damages from a local government entity.

Id.

Unlike the State Tort Claims Act, 10 *Del. C.* §§ 4001-4005, which excepts acts done with gross or wanton negligence from the blanket immunity from tort claims against the State, the CMTCA makes no distinction of tort claims for damages based upon the state of mind of the tortfeasor. *Compare* 10 *Del. C.* § 4001(3) *with* 10 *Del. C.* §§ 4011(a) and 4012. *See also Burns v. United Servs. Auto. Ass'n Props. Fund, Inc.*, 1991 WL 53399 (Del. Super. Ct.)(finding the City of Newark immune from claims of gross or wanton negligence in the inspection of a residence and the issuance of a certificate of occupancy, and noting the differences between the State Tort Claims Act and the CMTCA). Section 4011(a) provides for immunity for municipalities against "any and all tort claims seeking recovery of damages." Consequently, the City has immunity, and Willis cannot bring a common law fraud claim against it.

Furthermore, even if Willis' claims for negligence and common law fraud were to fall into one of the three exceptions listed in § 4012, the City would still be immune because the claims center around the issuance and revocation of a building permit. Section 4011(b) lists six examples[5] of when a governmental entity shall not be liable for damage claims, notwithstanding § 4012. Section 4011(b) provides exceptions to § 4012, which in turn provides exceptions to § 4011(a). *Middleton v. Wilmington Housing Authority*, 637 A.2d 828 (Table), 1994 WL 35382, at *2 (Del.). The Section provides that, *inter alia*, "a governmental entity shall not be liable for any damage claim which results from . . . (2) [t]he undertaking or failure to undertake any

judicial or quasi-judicial act, including . . granting . . . or revocation of any license, permit, order or other administrative approval or denial." Since this case unequivocally centers around the issuance and revocation of a building permit, which, under the CMTCA is a quasi-judicial act, the City would be immune from liability for any tort claim for damages arising from the issuance and revocation of the permit under § 4011(b)(2).

In sum, Willis is barred by the CMTCA from bringing suit for damages against the City of Rehoboth Beach for common law fraud and for negligent hiring or supervision.

II. Causes of Action under the Consumer Fraud Act and the Deceptive Trade Practices Act

A. The Deceptive Trade Practices Act

Willis claims that the City engaged in a deceptive trade practice prohibited by the Deceptive Trade Practices Act ("the DTPA") because the building permit "represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another." 6 *Del. C.* § 2532(a)(7). She also argues that by allowing an illegal permit to be issued, the City "engag[ed] in . . . other conduct which similarly creates a likelihood of confusion or of misunderstanding." *Id.* § 2532(a)(12).

The City contends that Willis has no cause of action under the DTPA because, pursuant to § 2432, the Act does not apply to "[c]onduct in compliance with the orders or rules of, or, a statute administered by, a federal, state, or local government agency." In the alternative, it argues that even if the DTPA is applicable, the Act does not protect "consumers" who are not able to seek an injunction and who do not have a competing business or trade interest with the City. *See Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 70 (Del. 1993).[6]

In her answer to the City's Motion for Summary Judgment, Willis admits that her DTPA claim is precluded by § 2534 and the fact that she does not allege that she has any competing business interest with the City. As a result of Willis' admissions, this claim shall be dismissed, and the Court need not consider this issue further.

B. The Consumer Fraud Act

Willis' claim under the Consumer Fraud Act ("CFA") alleges that the building permit constituted a material misrepresentation because its issuance certified that the building, as described in the application, complied with all provisions of the Zoning Code. Willis argues that the City engaged in an unlawful practice, under 6 *Del. C.* § 2513, which states:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled deceived or damaged thereby, is an unlawful practice.

In its Motion for Summary Judgment and in subsequent filings, the City argues that Willis has no claim under the CFA because the issuance of the permit was not a business transaction involving the "sale" of "merchandise." The Court agrees.

The purpose of the Consumer Fraud Act is to "protect consumers and legitimate business enterprises from unfair or deceptive merchandising practices in the conduct of any trade or commerce in part or wholly within this State." 6 *Del. C.* § 2512. Section 2513 covers unlawful acts or omissions employed in connection with a sale, lease or advertisement of merchandise.

A "sale" is defined in the CFA as "any sale, offer for sale or attempt to sell any merchandise for any consideration." A "lease" is "any lease, offer to lease or attempt to lease any

merchandise for consideration." *Id.* § 2511(7). An "advertisement is defined as "the attempt by publication, dissemination, solicitation or circulation to induce, directly, any person to enter into any obligation or acquire any title or interest in, any merchandise." *Id.* § 2511(1). Whether or not the issuance of a building permit is a sale or a lease turns upon whether it could be considered a contract. Whether the City's and the building inspector's actions were advertisements of merchandise depends upon whether a building permit can be considered merchandise.

Black's Law Dictionary defines a "sale" as "[t]he transfer of property or title for a price." Black's Law Dict. 1337 (7th ed. 1999). It lists four elements necessary to make a sale: "(1) parties competent to contract, (2) mutual assent, (3) a thing capable of being transferred, and (4) a price in money paid or promised." *Id.* A "lease" is "[a] contract by which a rightful possessor of real property conveys the right to use and occupy that property in exchange for consideration." *Id*. at 898.

The issuance of a permit by a Board of Adjustment is not a sale nor a lease, first and foremost, because there is no consideration in such a transaction. As the Texas Court of Appeals stated in *Trevino & Gonzalez Co. v. R.F. Muller Co.*, 949 S.W.2d 39, 42 (Tx. Ct. App. 1997): "In the case of a building permit, the issuing municipality must issue a permit where the requesting party meets all of the requirements determined by ordinance to be necessary to its issuance. The discharge of a duty one is already bound to perform is not consideration."

When issuing and revoking permits, the City (and as its agent, the Building Inspector) is exercising the police power delegated to it by the legislature.

> [Z]oning laws and regulations are now uniformly recognized as proper subjects of legislative action. Their propriety stems from the right of the State, in the exercise of the police power, to protect the public health, safety and welfare. And, when the local authority acts in accordance with the powers conferred it does so in its legislative capacity.

Dukes v. Shell Oil Co., 177 A.2d 785, 790 (Del. Ch. 1962). *See also* Del. Const. art. II, § 25.[7] Municipalities are given the authority to regulate and restrict construction of structures in order to promote the health, safety, morals and the general welfare of the community. *See* 22 *Del. C.* § 301. Within this power, they can issue permits and revoke them.

A permit issued and revoked in the exercise of the City's police power creates no contractual rights in the parties. *Cf. Vari-Build, Inc. v. City of Reno*, 596 F.Supp. 673, 679 (D. Nev. 1984) ("Defendants correctly contend that a license issued in the exercise of the City's police power confers no contractual rights upon the licensee."). *See also* 9 McQuillin Mun. Corp. § 26.81 (3d ed. 1995) ("there is no contract or vested right or property in a license or permit as against the power of the state or a municipality to revoke it for cause or in the exercise of the police power to protect the public health, safety, morals or welfare.").[8] It is neither a contract generally, nor a sale nor a lease.

To interpret the issuance of a permit as a "sale" or a "lease" under these circumstances would have harmful consequences. If the City were faced with the binding obligation of a sale every time it issued a permit, its ability to promote and protect the health, safety, morals and general welfare of the community would be severely hindered. *Cf. Patzer v. City of Loveland*, 80 P.3d 908, 911 (Colo. Ct. App. 2003) (finding that the issuance of a building permit does not create a binding contractual obligation to issue a certificate of occupancy, and noting that if it

that were the case, "the City's ability to protect the health, safety, and welfare of the public would be seriously hampered.").

Moreover, a building permit is not "merchandise." A building permit is a license, which is revocable and authorizes the licensee to construct or alter a structure under the zoning laws of the municipality. *See* Black's Law Dict. 1160, 931 (7th ed. 1999)[9]; *Trevino*, 949 S.W.2d at 42 ("A building permit is simply a revocable and alterable license authorizing construction."). According to the CFA, merchandise includes "any objects, wares, goods, commodities, intangibles, real estate or services." 6 *Del. C.* § 2511(4). Black's defines merchandise as "goods that are bought and sold in business; commercial wares." Black's Law Dict. 1000 (7th ed. 1999).

In the abstract, a building permit might be an "object;" yet, given the purpose of the statute and the meaning of the other words in the definition, it would be illogical to find it is merchandise. "[G]eneral terms in a statute take their meaning from the setting in which they are employed and must be understood as used with reference to the subject matter in the mind of the legislature, and strictly limited to it." 82 C.J.S. *Statutes* § 329 (1999). The purpose of the CFA is to protect consumers from deceptive practices *in the conduct of any trade or commerce.* 6 *Del. C.* § 2512. Goods, wares, commodities, services and real estate are all items generally traded in a commercial market.[10] In this context, an "object" must be an item which is traded commercially. A permit, however, while it may itself be a tangible piece of paper, simply enables a government to efficiently regulate and enforce its laws. It does not create a right that can be bought and sold. It is revocable and allows a person or business to do something they were not otherwise permitted under the law to do. A building permit cannot legally be traded commercially and, thus, cannot be considered merchandise.

The CFA protects consumers and business enterprises, not citizens from the acts of a government carried out pursuant to its police power. It is focused on fraud in the conduct of trade or commerce, not on fraud in the conduct of a City's power to make and enforce zoning laws. A building permit is not merchandise, and neither can its issuance be considered a sale, lease or an advertisement. The Court finds that a person has no claim against a municipality or its agents for the issuance and/or revocation of a permit under the Consumer Fraud Act.[11]

Finally, the Plaintiff argues that by not allowing her a cause of action for the alleged misrepresentations of the City, justice will not be carried out. She states, "the interests of justice would not be served by endorsing misrepresentations by the City thereby fostering the false sense of security that an applicant has when a building permit is issued." Pl. Letter Mem., D.I. 34, at 5. The legislature has provided a means, however for aggrieved parties to challenge the arbitrary and unreasonable, and allegedly unlawful actions of a City when granting and revoking building permits. *See* 22 *Del. C.* §§ 324, 327 and 328 (providing for appeals to the Board and to the Superior Court). The Plaintiff in this case did not seek to appeal the Board's decision to the Superior Court, an option she was clearly allowed to pursue.[12]

In addition to this appeals process, the Plaintiff could have sought an injunction in the Chancery Court. *See, e.g., Geyer v. City of Rehoboth Beach*, Del. Ch., C.A. No. 22088-S, Chandler, C. (October 14, 2004) (Bench Op.) (enjoining City's stop work order when plaintiffs had detrimentally relied on the City's building permit; noting that the Court had jurisdiction because it could entertain an equitable remedy not available to the Board of Adjustment). A plaintiff whose constitutional rights have been violated may also bring a claim under 42 U.S.C. § 1983. *See, e.g., Heaney v. New Castle County*, 672 A.2d 11, 15-16 (Del. 1995) (finding

Plaintiffs failed to state a § 1983 claim against New Castle County because they were unable to show the deprivation of any constitutional rights resulting from the action of the County). As for this Court, however, the Plaintiff has presented no claims for which relief can be granted.

CONCLUSION

Considering the Foregoing, the City of Rehoboth Beach's Motion to Dismiss is granted.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary

ENDNOTES

1. The stop work order was issued by letter dated May 30, 2002.

2. Willis also claimed breach of contract against United National Insurance Company, the City's liability insurer, arguing that she and her husband were third party beneficiaries to the insurance policy. United National's policy covered the City for any damages it might be legally obliged to pay due to the wrongful acts of its public officials. This Court, in a previous decision, *Willis v. City of Rehoboth Beach*, Del. Super., C.A. No. 03C-11-016, Stokes, J. (October 1, 2004) (Letter Op.), determined that the Willises were not third party beneficiaries to the insurance policy and dismissed United National as a party from this case.

3. The complete passage is as follows:

> [O]ur analysis must begin with the basic proposition that only the legislature can provide for the waiver of municipal immunity. . . . We read nothing in the Act itself which indicates an intention by the legislature to allow a municipality to waive its immunity. To the contrary, § 4011(a) states that municipalities shall be immune from all tort claims "[e]xcept as otherwise expressly provided by statute . . . ." We also note that the preamble to the Act indicates the legislative intent to re-establish the principle of municipal immunity in light of the number of frivolous claims and escalating insurance costs.

(citations omitted).

4. A tort is a term of art, which has a peculiar and definite meaning in the law. It has been defined as "any act done, or omitted to be done, contrary to the obligation of the law . . . ; and the damages suffered thereby may be recovered in an action on the case." *Garber v. Whittaker*, 174 A. 34, 36 (Del. Super. Ct.1934). Terms of art or technical terms are to be construed and understood according to their peculiar and appropriate meaning. 1 *Del. C.* § 303. *See also* 73

Am. Jur. 2d *Statutes* § 152 (2001) ("Technical words and phrases which have acquired a peculiar and appropriate meaning in the law cannot be presumed to have been used by the legislature in a loose popular sense."). In this regard, a tort consists of all civil wrongs, including intentional torts like fraud, trespass, conversion and assault and battery. *See, e.g., Wise v. Western Union Telegraph Co.*, 172 A. 757, 760 (Del. Super. Ct. 1934) (discussing generally duties, and specifically how the transfer of a fraudulent telegram might constitute a wilful injury). Along those same lines, acts that breach a contractual duty are not torts. *See Heronemus v. Ulrick*, 1997 WL 524127, at *3 n. 30 (Del. Super. Ct.) (noting the plaintiffs had actions at contract, not in tort because the duties claimed arose under a contract and not by operation of law); *Ulmer v. Whitfield*, 1985 WL 189262, at *2 (Del. Super. Ct.) (noting that tort liability must based on an act contrary to an obligation at law and on a duty other than that created by contract.). *See also* note 11, *infra* (discussing the fact that the CMTCA does not bar contract actions).

5. The full text of § 4011(b) is as follows:

> (b) Notwithstanding § 4012 of this title, a governmental entity shall not be liable for any damage claim which results from:
>
> (1) The undertaking or failure to undertake any legislative act, including, but not limited to, the adoption or failure to adopt any statute, charter, ordinance, order, regulation, resolution or resolve.
>
> (2) The undertaking or failure to undertake any judicial or quasi-judicial act, including, but not limited to, granting, granting with conditions, refusal to grant or revocation of any license, permit, order or other administrative approval or denial.
>
> (3) The performance or failure to exercise or perform a discretionary function or duty, whether or not the discretion be abused and whether or not the statute, charter, ordinance, order, resolution, regulation or resolve under which the discretionary function or duty is performed is valid or invalid.

(4) The decision not to provide communications, heat, light, water, electricity or solid or liquid waste collection, disposal or treatment services.

(5) The discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalines, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, except as provided in subdivision (3) of § 4012 of this title.

(6) Any defect, lack of repair or lack of sufficient railing in any highway, townway, sidewalk, parking area, causeway, bridge, airport runway or taxiway, including appurtenances necessary for the control of such ways including but not limited to street signs, traffic lights and controls, parking meters and guardrails.

Paragraphs (1) to (6) of this subsection to which immunity applies are cited as examples and shall not be interpreted to limit the general immunity provided by this section.

6. In *Grand Ventures, Inc*., the Supreme Court clarified a consumer's right of action under the DTPA, stating:

> In short, the most logical interpretation of the Consumer Fraud Act in conjunction with the DTPA is that the Consumer Fraud Act provides remedies for violations of the "vertical" relationship between a buyer (the consumer) and a producer or seller. Damages are the traditional remedy. Conversely, the DTPA addresses unreasonable or unfair interference with the "horizontal" relationships between various business interests. Grand Ventures had only a retail consumer relationship with the defendants. There was no horizontal business or trade interest at stake, as the enumerated deceptive trade practices in § 2532 demonstrate. That significant distinction deprives Grand Ventures, as an insurance purchaser, of standing to seek an injunction under the DTPA. Without such standing one cannot state a cause of action under the DTPA.

7. The General Assembly may enact laws under which municipalities and the County of Sussex and the County of Kent and the County of New Castle may adopt zoning ordinances, laws or rules limiting and restricting to specified districts and regulating therein buildings and structures according to their construction and the nature and extent of their use, as well as the use to be made of land in such districts for other than agricultural purposes; and the exercise of such authority shall be deemed to be within the police power of the State.

8. The author qualifies this statement with two limitations listed in subsequent sections. First, a

municipal authority cannot revoke a permit arbitrarily or without cause or without authority of law. *Id.* § 26.81.10. Second, substantial work done or expenditures made under the permit may protect a permittee against revocation, unless there is public necessity. *Id.* § 26.82. However, if a permit is void, i.e., issued illegally, then it confers no vested right to the permittee. *Id*. Neither party disputes in this case the fact that the permit was issued illegally.

While no Delaware case could be found that deals directly with whether the issuance of a permit can constitute a sale under the CFA, in *Miller v. Board of Adjustment of Dewey Beach*, 521 A.2d 642, 647 (Del. Super. Ct. 1986), the Court stated, "[t]he general rule . . . is that a permit issued illegally, or in violation of the law, or under mistake of fact does not confer a vested right upon the person to whom it is issued, even though that person has made substantial expenditures in reliance thereon." In addition, in *Fliptop, Ltd. v. New Castle County*, 1983 WL 473056, at * 1 (Del. Super. Ct.), the Court found that the issuance of a building permit would not create a contract between the parties.

If the Court were to find that the issuance of a permit does constitute a sale for the purposes of the CFA it would create the untenable result that every time a City revoked an illegal permit it would risk being subject to liability for breach of contract for having done what was necessary to uphold its Code and to protect the public welfare. Not only would such an interpretation frustrate a City's ability to promote the public welfare, but it would also contradict the established legal principle that an administrative body cannot contract away the power granted to it by the legislature. As early as 1895, the United States Supreme Court stated, "[t]he responsibility of the legal authority, municipal or state, cannot be stipulated or bartered away." *Gray v. Connecticut*, 159 U.S. 74, 77 (1895). *See also Hartman v. Buckson*, 467 A.2d 694, (Del.

Ch. 1983) ("[The City of Camden] may not, under the guise of compromise, impair a public duty owed by it. By entering into the contract in question, Camden bargained away part of its zoning power to a private citizen. It simply does not possess the authority to normally contract such authority. . . "). The City must be able revoke a permit in order to protect the public welfare. This Court cannot limit that duty through strained interpretations that impose contractual obligations upon the City for exercising its police power.

9. Black's Law Dictionary defines a permit as "[a] certificate evidencing permission; a license." It defines a license as "[a] revocable permission to commit some act that would otherwise be unlawful."

10. Black's defines "goods" as a "[t]angible or movable personal property other than money; esp., articles of trade or items of merchandise" or as "[t]hings that have value, whether tangible or not." Black's, *supra*, at 701. The UCC states that "goods" must be "both existing and identified before any interest in them can pass," unless they are future goods. 6 *Del. C*. § 2-105(2). They are defined as "all things . . . which are movable at the time of identification to the contract for sale . . . ." According to Black's, the term "commodity" means "[a]n article of trade or commerce," which embraces only tangible goods such as products or merchandise, as distinguished from services." Black's, *supra*, at 267. Webster's Third New International Dictionary 2576 (1993) states that "wares" are "manufactured articles, products of art or craft or farm produce offered for sale; articles of merchandise; goods, commodities." The common theme running through all of these definitions is that each of the items is used in the conduct of

trade or commerce.

11. If Willis had entered into a legitimate contract with the City, she would have a cause of action under the CFA, if it were of a type covered by the Act. In addition, the CMTCA does not bar contract actions against a municipality. In *Middleton v. Wilmington Housing Auth.*, 637 A.2d 828 (Table), 1994 WL 35382 (Del.), *rev'g*, 1993 WL 258817 (Del. Super. Ct.), the Supreme Court reversed a decision of the Superior Court, finding that the CMTCA does not bar contract actions against a municipality. There, Laura Middleton was injured just outside of an apartment she was leasing from the Wilmington Housing Authority. *Middleton*, 1993 WL 258817, at *1. The Court stated, "we continue to hold to the view expressed in our prior decisions that, as a matter of policy, it would be unjust to permit governmental entities to make contracts with private citizens and then breach them with impunity." 1994 WL 35382, at * 2.

12. The City also raises the argument that Willis did not exhaust her administrative remedies when she chose not to appeal the Board's decision and instead brought this collateral attack. Because the Court finds Willis has no cause of action it is unnecessary to address this issue; however, it does note that the application of the doctrine of exhaustion of administrative remedies in Delaware is a matter of judicial discretion. *Levinson v. Delaware Compensation Rating Bureau*, Inc., 616 A.2d 1182, 1189 (Del. 1992).