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Re: *Sterling Property Holdings, Inc. v. New Castle County*
C.A. No. 20408-VCN
Date Submitted: May 8, 2014

Dear Counsel:

A settlement agreement has run amok. Sterling Property Holdings, Inc. ("Sterling") and New Castle County (the "County") settled their long-running land-use dispute with the commitment of the New Castle County Department of Land Use (the "Department") to support final approval of certain Sterling subdivision plans, assuming those plans are in compliance with County Code requirements.[1] The current disagreement involves the amount of final record plan review fees (the "Fees") owed and whether the current fee schedule was properly approved in accordance with 9 *Del. C.* § 3010. The difference in the total amount

[1] The Settlement Agreement (the "Settlement") appears at Pl.'s Opening Br. in Supp. of its Mot. to Enforce Settlement Agreement on 9 *Del. C.* § 3010 Issue ("POB"), App. ("App."), Ex. 2.

of Fees is approximately $228,000. Sterling, in its motion to enforce the Settlement, argues that the Fees must be calculated based on a 1997 ordinance, which was expressly approved by the County Council.[2] The County contends that the Fees should be based on the administratively approved rates from 2009.

The requirements for setting a uniform schedule of fees in this context are prescribed in 9 *Del. C.* § 3010, which states that the schedule of fees "shall . . . be proportioned to the cost of processing a subdivision submitted for review and approval of the [Department]."[3] Furthermore, "[n]o schedule established by the [Department] shall become effective unless and until approved by the County Council."[4]

* * *

Sterling first argues that the County Council never approved a uniform schedule of subdivision plan fees after the 1997 ordinance. Sterling contends that the "approv[al]" required by 9 *Del. C.* § 3010 requires a formal act of law and thus only an ordinance or resolution satisfies the statute. Sterling supports its argument

[2] The motion to enforce is evaluated under a summary judgment standard because there are no material facts in dispute and the motion may be resolved as a matter of law.
[3] 9 *Del. C.* § 3010.
[4] *Id.*

by pointing to general statutory provisions and the County Council Rules, which explain that the County may utilize an ordinance to act with the force of law or may act through a resolution, which will lack the force of law.[5] The County notes that the General Assembly knew how to insist upon approval by ordinance or resolution, as it more specifically requested such an action elsewhere in Title 9.[6]

These arguments, however, are not controlling because the County relies upon an act which has the requisite formality, even under Sterling's theory, to constitute approval for purposes of 9 *Del. C.* § 3010. The County cites a County Council ordinance in support of its argument that the fee schedule was approved, even though it was not approved directly. Rather, the County asserts that it was approved by implication. The County Council annually reviews and approves the

[5] POB at 13 (citing 9 *Del. C.* § 1151 and App., Ex. 33); Pl.'s Reply Br. in Supp. of its Mot. to Enforce Settlement Agreement on 9 *Del. C.* § 3010 Issue ("PRB") at 14 (citing 9 *Del. C.* § 1151, 9 *Del. C.* § 1103, and App., Ex. 33). The provisions cited are general provisions. For example 9 *Del. C.* § 1103 expressly provides that the powers of the County may be carried out as provided by Title 9 or other law of the State. Thus, the textual grant of any particular provision may provide for other means of authorization and these general provisions lack the necessary specificity to determine the meaning of "approv[al]" in 9 *Del. C.* § 3010.

[6] *See, e.g.*, 9 *Del. C.* § 1154(a) (requiring introduction of "ordinance" to adopt a map or amendment); 9 *Del. C.* § 1158(a) (requiring ordinance to approve annual operating budget); 9 *Del. C.* § 2662(2) (requiring "approv[al] by a resolution or ordinance, consistent with County procedures"); 9 *Del. C.* § 8109 (permitting exemptions "by resolution or ordinance duly passed and approved").

County's budget. The Department submits the proposed fees as a component of its projected revenues, which are used as a component of the revenue certification provided to the County Council. These revenues serve to balance the budget.[7] Thus, the County Council's approval of the budget incorporates and relies upon the Department's fee schedule and its budget approval therefore impliedly approves the fee schedule. Sterling does not support its contention that the Department must separately submit the fee schedule to the County Council in order to satisfy 9 *Del. C.* § 3010. Moreover, the Court sees no reason why such "approv[al]" may not be broadly provided by the County Council.[8] Thus, the County Council's budget approval process impliedly approved of the Department's fee schedule, through its reliance on the schedule as a source of revenue which produced a balanced budget.[9]

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[7] Milowicki Aff. ¶¶ 9-26.

[8] Sterling argues that this approval is merely a litigation construct. Whether the County was or was not aware of the requirements of 9 *Del. C.* § 3010 does not impact whether the County was in compliance with its requirements. Even if certain employees did not believe such approval was necessary, the County Council's reliance upon the fee schedules as part of the budgeting process satisfies 9 *Del. C.* § 3010's approval requirement.

[9] The County argues that the County Council later acted to ratify its earlier approvals of the Department's fee schedules. *See* Griffiths Aff., Ex. 16 § 4. Although Delaware law has recognized the effectiveness of curative acts, see *City of Wilmington v. Wolcott*, 122 A. 703, 707

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Sterling's second argument is that the Department's fee schedule did not comply with 9 *Del. C.* § 3010's requirement that the fee schedule "be proportioned to the cost of processing a subdivision submitted for review and approval of the [Department]." Sterling contends that the County never performed a "bottom up" or "top down" analysis of the cost of processing a subdivision application and thus compliance with 9 *Del. C.* § 3010 is impossible. The County argues that the fees it charges are proportional to, in its words, the "total cost of subdivision processing,"[10] by which it means the costs of operating the Planning Division within the Department.[11] Although the parties dispute the proper data source and analytical methodology for satisfying the term "proportion[al]," they agree that it

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(Del. 1921), and such acts typically apply retroactively, see *United States v. Heinszen*, 206 U.S. 370, 382 (1907), the plain terms of 9 *Del. C.* § 3010 state that "[n]o schedule established by the Commission shall become effective unless and *until* approved by the County Council." Thus, some question exists as to whether the General Assembly made clear its intent to allow the County Council's approval only to apply prospectively. Arguably, by imposing a temporal constraint on the County Council's authority, the statute may have limited its power to ratify retroactively its approval of the fee schedules. However, the issue need not be reached because of the County Council's implied approval of the Department's fee schedule.

[10] Def.'s Answering Br. Regarding the Applicability of 9 *Del. C.* § 1156 ("DAB") at 14.

[11] The County also makes reference to the cost of the Engineering arm of the Licensing Division, although its analysis appears to be focused on comparing the subdivision approval fees to the Planning Division's costs. *Id.* at 12-14.

means a rational relationship or comparative relation as respects magnitude, quantity or degree, size, number, and similar factors related to subdivision processing and the cost of providing those services.[12] Thus, the inquiry is into the breadth of the meaning of the phrase "the cost of processing a subdivision."

Neither party provides a crisp analysis of 9 *Del. C.* § 3010. Sterling's contention that a "bottom up" or "top down" analysis need be applied is offered without citation and appears to reflect its opinion of a common sense interpretation of the statute. Conversely, the County argues, based on a series of cases contemplating the imposition of licensing fees, that Sterling must demonstrate that the fee revenue is "grossly disproportionate" to the regulatory costs.[13] However, here the Court is reviewing a statutory mandate from the General Assembly, rather than an ordinance establishing a fee set by a municipality. The County's preferred standard is inapplicable.

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[12] POB at 16; DAB at 16 n.39. One concern is that the fees charged for subdivision approval should approximate the cost of those services and not become a source of funding for other County expenditures.

[13] DAB at 11 (citing *Harvey v. City of Newark*, 2010 WL 4240625 (Del. Ch. Oct. 20, 2010); *State v. Harbor House Seafood*, 1997 WL 1704528 (Del. Com. Pl. Apr. 2, 1997); 9 McQuillin Mun. Corp. § 26:44 (3d ed.)).

Nonetheless, direct and indirect expenses may be part of the overall cost when assessing the proportionality of certain fees.[14] Thus, the Court concludes that the legislature intended for 9 *Del. C.* § 3010 to grant the Department the power to recoup costs fairly. Moreover, Sterling never adequately explains the reasoning for the "bottom up" or "top down" approach it advocates. In the absence of such an explanation, the Court rejects Sterling's contention that a separate financial study or analysis must be performed to allow the Department to ascertain its costs and to allocate them with the level of precision for which Sterling advocates.

Although perhaps the County did not act with a motive of compliance with 9 *Del. C.* § 3010's proportionality requirement when creating the fee schedule, nonetheless, it acted in such a way as to as to be substantially guided by its principles. Proportionality and fairness are overlapping and consistent. Several witnesses testified that the County calculated the fees in conjunction with the revenues and expenses of the Planning Division.[15] Thus, whether intentional or

[14] *See, e.g.*, *Thompson v. City of Altoona Code Appeals Bd.*, 934 A.2d 130 (Pa. Commw. Ct. 2007); *Bainbridge, Inc. v. Bd. of Cty. Comm'rs of Cty. of Douglas*, 964 P.2d 575, 576 (Colo. Ct. App. 1998).
[15] App., Ex. 34 at 15-23; App., Ex. 35 at 27; App., Ex. 36 at 26.

not, the County was effective in achieving the objectives of 9 *Del. C.* § 3010's proportionality requirement.[16]

The County extracted data from its accounting software to demonstrate that the subdivision review fees are generally proportional to the overall costs of the Planning Division's operations. In fact, the Planning Division typically operates at a loss.[17] The numbers the County provided do not include charges for administration of the Department, certain personnel costs, building charges, and other cost centers which play a role in processing a subdivision; although certain other intergovernmental charges are included.[18]

According to the Department's Assistant General Manager, although not all personnel in the Planning Division perform subdivision processing functions, they could be called upon to do so.[19] Similarly, the scope of reviews and approvals

[16] That the Department was not focused on 9 *Del. C.* § 3010 does not demonstrate (or even tend to demonstrate) that it did not comply with the statutory mandate. Even if the Department had consciously sought to meet the legislative standard, its interpretation of the statute would be independently reviewed by the Court. *See, e.g.*, *J.N.K., LLC v. Kent Cty. Levy Court*, 974 A.2d 197, 203 (Del. Ch. 2009).
[17] Griffiths Aff., Ex. 17 at 22.
[18] Obusek Aff. ¶ 12 (describing cross charges for fleet vehicles, information technology services, GIS service and printing as among the intergovernmental charges).
[19] Griffiths Aff., Ex. 17 at 23-26.

which may be involved in a subdivision can be quite varied. The wide variety of review tasks which must be performed in combination with the reality that any member of the Planning Division might be called upon to assist in such a review (even if not all of them are processing applications all of the time), satisfies the Court that such costs are appropriately included in the "processing" called for by 9 *Del. C.* § 3010. Thus, the 2009 fee schedule which the Department published was proportional to the cost of processing a subdivision.

* * *

The Court therefore concludes that the Department's fee schedules published in 2009 were approved by the County Council and are proportional to the cost of conducting subdivision review. The Fees shall be assessed under the rates approved in 2009. With that conclusion, the parties shall renew their efforts to implement the Settlement.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K