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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

THE TOWN OF SOUTH BETHANY, a municipal corporation of the State of Delaware,	)	
Petitioner,	)	
v.	)	Civil Action No. 781-S
ROBERT D. NAGY and DEBRA NAGY,	)	
Respondents.	)	

MEMORANDUM OPINION

Submitted: January 26, 2006
Decided: May 12, 2006

John Terence Jaywork, Esquire, Thomas I. Barrows, Esquire, HUDSON, JONES, JAYWORK & FISHER, LLC, Dover, Delaware, *Attorneys for Petitioner*

Richard E. Berl, Jr., Esquire, SMITH O'DONNELL FEINBERG & BERL, LLP, Georgetown, Delaware, *Attorney for Respondents*

PARSONS, Vice Chancellor.

On or about October 28, 2004, Petitioner, the Town of South Bethany (the "Town"), filed a petition for declaratory judgment and a permanent injunction to remove a floating dock owned by Respondents, Robert and Debra Nagy (the "Nagys"). The parties have filed cross motions for summary judgment and have not presented argument that there is an issue of fact material to the disposition of either motion. Accordingly, the motions are deemed the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.

For the reasons stated below, the Court grants the Town's motion for summary judgment and denies the Nagys' motion for summary judgment.

I. BACKGROUND

The Nagys own the real property located at 311 West 4th Street, South Bethany, Delaware. To the rear of the Nagys property is one of many man-made canals which lead to the deeper waters of Sussex County's inland bays. The Nagys property is bulkheaded in order to create a permanent boundary and prevent erosion.

The Nagys purchased and installed a drive-on dry docking system (the "Dock") in May or June 2002. The Dock is a floating platform, approximately ten by thirteen feet, onto which a personal water craft can be driven and stored. The floating platform connects to an existing dock by a "Tide Manager System" which allows the floating platform to rise and fall with the changing tidal flow. The platform is removed at the end of the boating season (although some of the related apparatus remains attached to the Dock), and then replaced the following spring.

Floating docks are subject to regulation by various governmental bodies, including state and municipal governments. In the case of the Dock, at least the Town and the State of Delaware Department of Natural Resources and Environmental Control ("DNREC") have potentially applicable laws and regulations.

On June 26, 2002, Wayne Stacey, the Town Manager, sent a letter to Robert Nagy notifying him that the Town had no building permit for the Dock in its files and that the Dock was in violation of a Town ordinance and a state regulation.[1] In particular, the letter stated:

> A number of complaints have been received about why the Town is not enforcing the laws and ordinances that are on its books. South Bethany ordinance states, "*under no circumstances shall a dock extend more than four (4) feet into the waterways*" (South Bethany Code, 50-7, Dock Specifications). In addition, Delaware Regulations Governing the Use of Subaqueous Lands (Regulation) states, "*the dock must be placed no closer than ten (10) feet from the side property line*." Your floating dock is in violation of both facets of the ordinances.
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> * * * *
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> For the reasons stated above, you must remove the floating dock immediately. There can be fines assessed with Town regulations and ordinances.[2]

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[1] App. to Resp'ts' Opening Br. in Supp. of their Mot. for Summ. J. ("ROB App.") Ex. G. Citations in this letter opinion to the Respondents or Nagys' opening, answering and reply briefs on the respective motions for summary judgment are in the form ROB, RAB, and RRB; similarly the Petitioner or Town's summary judgment briefs are cited as POB, PAB and PRB.

[2] The June 26 letter also indicated that DNREC recently had adopted regulations "requiring all installations of Jet Dock floating piers to have prior DNREC approval before being installed" that would apply to installations made after June 15, 2002. The Town Manager acknowledged that the Nagys apparently installed

The Nagys did not respond to this letter.

On July 11, 2002, the Town Council and Mayor adopted Resolution 3-02, prohibiting all floating jet-ski or personal water craft docks and ramps.[3] Consistent with that resolution the Town amended Chapter 50 of the South Bethany Code (the "Code") to ban floating docks on October 11, 2002.[4]

Following the change in the law the Town sent Mr. Nagy at least two more letters on January 8 and July 6, 2004, informing him that the Dock violated the Code.[5] The January 8, 2004 letter recited the substance of the June 26, 2002 notice of violation and noted that the Town later adopted a new Ordinance, Code § 50-8.1, which prohibited floating jet-ski docks. It also urged the Nagys again to remove their Dock immediately and not to re-install it in the future. In a further letter on July 6, 2004, the Town provided formal notice that the Dock violated Code § 50-8.1(D) prohibiting floating docks and § 50-10 requiring building permits. The Nagys did not respond to either of those letters.

The Town filed this action on October 28, 2004. Its petition seeks a declaration of the parties' rights and "an Order permanently enjoining Respondent from maintaining, re-installing and using a floating jet-ski dock."

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their Jet Dock before June 15, 2002. Thus, the lack of prior DNREC approval is not an issue in this case.

3 POB App. Ex. D.

4 POB App. Exs. E-1 & E-2.

5 POB App. Exs. F and G.

II. THE PARTIES' CONTENTIONS

Under Court of Chancery Rule 56(h), the parties' cross motions for summary judgment are deemed the equivalent of a stipulation for decision on the merits based on the record submitted with the motions. Thus, the usual standard of drawing inferences in favor of the nonmoving party does not apply.[6]

The Nagys contend that Ordinance 108-02 does not apply to them because the Dock complied with the law in effect when they installed it. Thus, they assert that the Dock meets the requirements for a "legal nonconforming use." The Town denies that the Dock complied with all applicable laws when the Nagys installed it. In particular, they contend that the Nagys failed to obtain a building permit as required by Section 50-10 and that the Dock does not comply with the size and placement criteria of Chapter 50. Finally, the Town asserts that even if the Dock complied with the law when installed, it is still subject to Ordinance 108-02 because the Town adopted that law pursuant to its police powers.

In the alternative, the Nagys assert that even if the Dock did not comply with the law when they installed it, Ordinance 108-02 cannot apply to them because it is not a reasonable exercise of the Town's police power. The Town responds by making two threshold arguments based on the Nagys' failure to appeal the Town's decision and a claim of untimeliness under 10 *Del. C.* § 8126(a). The Town also contends that Ordinance 108-02 is a valid exercise of its police powers.

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[6] *Am. Legacy Found. v. Lorillard Tobacco Co.*, 886 A.2d 1, 18 (Del. Ch. 2005).

III. ANALYSIS

Whether and to what extent Ordinance 108-02 applies to the Dock depends first on whether the Dock constitutes a legal nonconforming use. The answer to that question turns on whether the Dock was lawful at the time it was installed. Even if the Dock is a legal nonconforming use, however, it still would be subject to the prohibition against floating docks in Ordinance 108-02, if that Ordinance represents a valid exercise of the Town's police powers. A discussion of those issues follows.

A. Was the Jet Dock a Legal Nonconforming Use?

The parties dispute whether the Dock satisfies the requirements of a legal nonconforming use. In particular, the Town asserts that the Dock does not satisfy the requirements of a legal nonconforming use because it violated several ordinances when the Nagys installed it. The Nagys respond that the Dock complied with the Code at the time of installation.

A nonconforming structure or use is:

> [A] structure the size, dimension or location of which was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reasons of such adoption, revision or amendment. A use which does not comply with present zoning provisions but which existed lawfully and was created in good faith prior to the enactment of the zoning provision.[7]

The parties dispute whether the Dock existed lawfully before July 2002. The Town alleges that the Dock violated at least two types of legal requirements: (1) the

[7] *Vivari v. Francis*, 1991 WL 79472, at *3 (Del. Ch. May 6, 1991) (internal citations omitted).

requirement of a building permit for the installation; and (2) the physical requirements for the construction and location of a dock. I address those allegations in turn.

1. Did the Nagys violate the Town Code by not obtaining a building permit when they installed the Dock?

The Town asserts that the Nagys violated the Code by not applying for and receiving a permit to construct the Dock. Specifically, the Town asserts that the Dock is a structure under Chapter 42 of the Code and therefore the Nagys had to obtain a building permit before installing the Dock. The Nagys respond that the Dock is not a structure under Section 145-3, because the Dock does not directly attach to the ground. Rather, they assert that the Dock attaches to the existing dock indirectly by way of the Tide Management System.

Section 42-5 of the South Bethany Code provides:

> It shall be unlawful to begin the excavation or filling for construction of any lot for any construction of any building or structure, to begin construction of any building or structure or to begin the moving, demolition or alteration of any building or structure until a building permit for such work has been issued. "Structure" includes paved driveways and paved sidewalks.[8]

The Code defines a structure in Section 145-3 as follows:

> Anything constructed, erected upon or attached to, on or below the ground, including but not limited to the following: dams, docks, fences, walls, principal buildings, accessory buildings, dish antennas, manufactured homes, footings, basements, framing, pilings and foundations.[9]

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[8] POB App. Ex. A.

[9] POB App. Ex. H.

The Code recognizes several things as structures that indirectly connect to the ground through an existing structure. For example, if someone added a second floor to their home, that structure would not connect directly to the ground. Nevertheless, the second floor would be a structure under the Code, as Section 145-3 includes "framing" among its examples of structures. Similarly, the definition of structure includes a "dish antenna," although dish antenna normally do not attach directly to the ground. Moreover, although Section 145-3 does not explicitly include "floating docks" in its definition of a structure, it does include "docks."

Thus, even though the Dock only indirectly touches the ground through the Tide Management System and existing dock, I conclude that it constitutes a structure under the Code. Section 42-5 requires issuance of a building permit before the beginning of construction or installation of a structure in the Town. Likewise, Section 50-10 in the chapter entitled "Bulkheads" provides in pertinent part: "It shall be unlawful to proceed under the terms of the chapter until a building permit for such work has been issued." Section 50-7 of this chapter provides "Dock specifications." The Nagys admit that they never applied for nor received a building permit for the Dock.[10]

The Nagys also emphasize that the preamble to Resolution 3-02 adopted in July 2002 states that the issue of floating jet ski or personal water craft docks and ramps "is

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[10] Both the Town and DNREC have separate building permit requirements. Thus, someone wishing to install a dock would have to obtain a building permit from *both* the Town and DNREC. *See* § 50-10, as amended by Ordinance 108-02 on October 11, 2002 to add: "Prior to issuance of a town permit, the petitioner shall present copies of valid DNREC and Sussex County building permits for the work." The Town does not contend, however, that the Nagys needed a building permit from DNREC at the time they installed the Dock.

not addressed in Chapter 50 of the Town Code." Although Chapter 50 does not explicitly address floating docks or prescribe any specific requirements for such docks, the Court does not view that as exempting floating docks from the requirement of a building permit. In fact, the Town notified the Nagys that they had failed to file for a building permit for the Dock in their June 22, 2002 and January 8 and July 6, 2004 letters.[11] In my opinion, the record demonstrates that the Nagys' failure to obtain a building permit from the Town violated the Code. I need not rely on that conclusion, however, because certain other alleged violations are even clearer.

2. Did the Dock violate Chapter 50 of the Town Code at the time of installation?

The Town asserts that the Dock fits the definition of a dock under Chapter 50 of the Code and therefore must satisfy the requirements of that Chapter, which it does not. The Nagys respond that the Dock does not have to satisfy Chapter 50 because floating docks such as the one they own did not exist when the Town adopted Chapter 50. In particular, they rely on the same statement in Resolution 3-02 discussed previously to the effect that issues relating to floating docks were not addressed in Chapter 50.

Section 50-7 as it existed before the amendments in late 2002 places the following restrictions on the size and placement of docks:

> A. Materials/size for fixed and floating docks: approved salt-treated wood; maximum dock size four by twenty-two (4 X 22) feet.

[11] POB App. Exs. F and G.

* * * *

> B. Workmanship. Construction of docks shall be authorized only in areas of existing bulkheads or approved riprap. Under no circumstances shall a dock extend more than four (4) feet into the waterways. The dock must be placed no closer than six (6) feet from the side property line.[12]

The application of Chapter 50 is not restricted to any particular type of dock. Rather, Section 50-7 states that it applies to "all docks." Consequently, I do not believe that the Town intended to exclude from the application of Section 50-7 any new type of dock that might be developed after its adoption. Therefore, the Dock must comply with the requirements of Section 50-7.

The Nagys concede that the Dock does not comply with all the requirements of Section 50-7. Specifically, they concede that the Dock: (1) extends more than four feet into the waterway;[13] (2) is placed less than six feet from the side property line;[14] (3) was not constructed of approved salt treated wood; and (4) is larger than four by twenty two feet.[15] Furthermore, the Town notified the Nagys that the Dock did not comply with the

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12 POB App. Ex. B.

13 The Dock extends thirteen feet into the waterway. Resp'ts'Answer to Pet'r's Interrog. No. 1.

14 The Dock is between one to six feet from the side property line. Resp'ts' Am. Answer to ¶ 7 of Pet'r's Req. for Admis. This also appears to be in violation of the DNREC Regulation which states, "the dock must be placed no closer than ten (10) feet from the side property line." *See* POB App. Exs. C and F.

15 The Dock is ten by thirteen feet. Resp'ts' Answer to Pet'r's Interrog. Nos. 3 and 4.

Code in its letter of June 26, 2002.[16] Hence, the Dock violated Section 50-7 of the Code at the time of installation and continues to do so.

For these reasons, I conclude that the Dock would not qualify as a legal nonconforming use.

3. Was Ordinance 108-02 adopted pursuant to the Town's police power?

The Town contends that Ordinance 108-02 regulates private property under the Town's police powers, and that the Nagys therefore cannot assert the defense of a legal nonconforming use in any event. The Nagys dispute this arguing that Ordinance 108-02 is little more than a common zoning ordinance and furthermore does not represent a valid exercise of police powers.

Both conforming and nonconforming uses are subject to ordinances and regulations based upon a local government's police power.[17] Thus, if a town adopts an ordinance based on its police power that ordinance applies whether or not a pre-existing structure or use complied with the law before it was amended.[18] Therefore, absent a "grandfather" provision, ordinances adopted under a town's police powers cannot be avoided by invoking the defense of a legal nonconforming use.

Article II, § 25 of the Delaware Constitution provides:

> 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

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16 POB App. Ex. C.

17 *Town of Bethel v. West*, 1997 WL 525879, at *3 (Del. Ch. Aug. 18, 1997).

18 *Id.*

> 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.

Based on this provision the Delaware Superior Court recently held:

> Zoning 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.[19]

In *Town of Bethel* the court held that the town adopted the ordinance in question not as part of the zoning code, but rather under their police powers as a separate piece of legislation.[20] Thus, while preexisting nonconforming uses may continue to be operated in spite of a later *zoning* ordinance that prohibits the establishment of new uses of the same kind or new structures of the same bulk or location, such uses generally are not granted immunity from police power regulations governing the manner or operation of use.[21]

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[19] *Willis v. City of Rehoboth Beach*, 2005 WL 1953028, at *5 (Del. Super. June 24, 2005); *Warwick Park Owners Ass'n, Inc. v. Sahutsky*, 2005 WL 2335485, at *4 (Del. Ch. Sept. 20, 2005) ("Zoning regulations constitute a governmental exercise of police power and must bear a substantial relation to the public health, safety, or general welfare.").

[20] 1997 WL 525879, at *3. "Ordinance banning the keeping of horses was not enacted as part of the Zoning Code. Rather, it was a separate piece of legislation enacted under the Town's general police power. Therefore, the 'grandfather' clause [applicable to legal nonconforming uses under the Zoning Code] does not apply, and the Court must look to other doctrines to determine whether the Ordinance may validly be applied to Ms. West." *Id.*

[21] *Id.* at *4.

Similarly, in this case Ordinance 108-02 was not enacted under the portion of the Code dealing with zoning, namely, Chapter 145.[22] Rather Ordinance 108-02 amends Chapter 50 of the Code entitled "Bulkheads." Moreover, Chapter 145 contains a provision that explicitly allows for nonconforming uses.[23] In contrast, Chapter 50 contains no parallel provision. Thus, I hold that, as in *Town of Bethel,* the Town adopted Ordinance 108-02 pursuant to its police power. Therefore, even if the Nagys had a legal nonconforming use defense, they could not assert it to avoid Ordinance 108-02, provided it represents a valid use of the Town's police power.

B. Is Ordinance 108-02 a Valid Exercise of the Police Power?

The Nagys contend that Ordinance 108-02 is not a valid and reasonable use of the Town's police power. The Town makes two threshold arguments in opposition to the Nagys challenge to the validity of 108-02. First, they assert that the Nagys cannot challenge Ordinance 108-02 because they failed to exhaust their administrative remedies. Second, they contend that the statute of limitations for zoning ordinances, 10 *Del. C.* § 8126(a), bars the Nagys' defense. In addition, the Town asserts that Ordinance 108-02 satisfies the rational basis test for an exercise of police powers, and is therefore valid.

1. The Town's threshold defenses

a. Failure to appeal

The Town asserts that because the Nagys did not appeal the Town's decision ordering the removal of the Dock under Section 50-9.1, they failed to exhaust their

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[22] Chapter 145 is entitled "Zoning."

[23] *See* Code Ch. 145, Art. V.

administrative remedies and thereby waived their right to challenge that decision. The Nagys deny that they had any obligation to appeal the Town's decision because an appeal would have been futile.

Under the doctrine of exhaustion of administrative remedies, where a remedy exists before an administrative agency a claimant must exhaust that independent remedy before filing in court.[24] This doctrine stems from recognition of the specialized expertise of administrative boards.[25] It is not controlling, however, where the administrative scheme cannot provide relief that is substantially equivalent to the relief available in court.[26]

Delaware law strongly favors the exhaustion of administrative remedies before resorting to judicial intervention.[27] Nevertheless, the decision to require exhaustion of administrative remedies lies within the discretion of the court.[28] Further, there are several exceptions to the presumption in favor of requiring exhaustion. They include: where the administrative review would be futile; where it is in the public interest to have a prompt decision; where there is a question of law involved that does not involve administrative

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24 *Buckson v. Town of Camden*, 2001 WL 1671443, at *5 (Del. Ch. Dec. 4, 2001).

25 *Id.*

26 *Id.*

27 *Christiana Town Ctr. v. New Castle County*, 2003 WL 21314499, at *4 (Del. Ch. June 6, 2003).

28 *Buckson*, 2001 WL 1671443, at *6.

expertise or discretion; and where irreparable harm will otherwise result from a denial of immediate judicial relief.[29]

The *Buckson* case provides an example where a court did not require exhaustion of administrative remedies. In *Buckson* the plaintiff challenged the constitutionality of a zoning ordinance.[30] The court excused the plaintiff's failure to appeal the zoning violation before filing suit because the administrative agency was not qualified to adjudicate the merits of a constitutional attack on the zoning ordinance.[31]

Sections 50-9 and 50-9.1 of the Code allow a party to appeal a notice of violation of the provisions of the Code relating to bulkheads and docks. In particular, the person alleged to have violated the Code must file a written notice of appeal with the Town Hearing Board within thirty days of the date they are notified that they violated the Code. In this case the Town sent the Nagys a notice on July 6, 2004, that their Dock violated Section 50-8.1 of the Code, prohibiting floating docks, and that they had a right to appeal the notice of violation. The Nagys admit, however, that they did not file an appeal.

In this action, the Nagys contest the violation of Ordinance 108-02 primarily on a constitutional ground: that Ordinance 108-02 was not a proper exercise of the Town's police powers. The court in *Buckson* held that a party does not have to exhaust administrative remedies before filing a suit which raises a constitutional argument. Thus,

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29 *Id.* at *5, citing *Cheswold Aggregates, L.L.C. v. Town of Cheswold*, 1999 WL 743339 (Del. Super. July 2, 1999).

30 *Id.* at *6.

31 *Id.*

the Nagys failure to appeal does not preclude them from challenging the ordinance on constitutional grounds as an improper exercise of the Town's police power.

b. 10 *Del. C.* § 8126(a)

According to the Town, 10 *Del. C.* § 8126(a) bars this suit because the Nagys failed to challenge Ordinance 108-02 within 60 days after publication of notice of its adoption. The Nagys respond that they could not sue within the 60 day time period because the case was not ripe until they received notice of a violation of the ordinance.

Section 8126(a) is Delaware's zoning and planning statute of limitations. It reads as follows:

> No action, suit or proceeding in any court, whether in law or equity or otherwise, in which the legality of any ordinance, code, regulation or map, relating to zoning, or any amendment thereto, or any regulation or ordinance relating to subdivision and land development, or any amendment thereto, enacted by the governing body of a county or municipality, is challenged, whether by direct or collateral attack or otherwise, shall be brought after the expiration of 60 days from the date of publication in a newspaper of general circulation in the county or municipality in which such adoption occurred, of notice of the adoption of such ordinance, code, regulation, map or amendment.

Section 8126 does not apply, however, to constitutional challenges to zoning ordinances.[32]

In the circumstances of this case, Section 8126(a) does not apply to Ordinance 108-02 for at least two reasons. First, I already have concluded that Ordinance 108-02 is not a zoning ordinance, so it appears to be outside the scope of Section 8126(a). And

[32] *Acierno v. New Castle County*, 2000 WL 718346, at *8 n.8 (D. Del. May 23, 2000).

second, even if the ordinance "relat[ed] to zoning" within the meaning of the statute, the Nagys have challenged the constitutionality of Ordinance 108-02. Specifically, they contend that Ordinance 108-02 is not a valid exercise of the Town's police powers. Police powers are limited only by the constitutional standard of reasonableness.[33] Because the Nagys challenge the constitutionality of Ordinance 108-02, Section 8126(a) does not apply to this case.[34] Therefore, the Court need not decide when the limitation period under the statute b would have begun to run.

2. Is Ordinance 108-02 a valid and reasonable use of the Town's police power?

The Nagys contend that the Town adopted Ordinance 108-02 to indirectly eliminate the use of jet skis within the Town's canal system. They further contend that the ordinance is not a valid exercise of the Town's police power because it has no relationship to public health, safety, morality, or welfare. In response, the Town argues that it did not enact Ordinance 108-02 to prohibit jet skis and that the ordinance specifically allows their use. Moreover, the Town contends that Ordinance 108-02 was enacted to protect its waterways and therefore is a valid exercise of the Town's police power.

A municipality may regulate private property under its police powers.[35] The constitutionality of zoning ordinances promulgated to implement those powers is presumed; therefore, anyone who challenges the constitutionality of a zoning ordinance

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33 *Town of Bethel*, 1997 WL 525879, at *4.

34 *Acierno v. New Castle County*, 2000 WL 718346, at *8 n.8.

35 *Green v. County Council of Sussex County*, 508 A.2d 882, 884 (Del. Ch. 1986).

bears the burden of proof.[36] While "it would be difficult if not impossible, to define the precise scope of [the State's police] powers, . . . an ordinance based thereon must have some rational and necessary connection with the peace, good order, health, safety, morals or general welfare of the community."[37]

"The test for determining the constitutionality of such an ordinance is whether its terms are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[38] "In considering what is a reasonable exercise of the police powers of the State a court must bear in mind that *if the validity of the legislation for zoning purposes is fairly debatable, the legislative judgment must be allowed to control*. Thus, . . . in any facial attack on an ordinance, the challenger must establish the absence of any state of facts that would furnish a basis to support the ordinance."[39]

In this case the Town has several rational reasons for banning floating docks. Ordinance 108-02 states the following purpose:

> It was declared that substantial erosion of the banks of the waterways within the corporate limits of the Town of South

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36 *Buckson v. Town of Camden*, 2002 Del. Ch. LEXIS 126, at *3 (Del. Ch. Oct. 31, 2002).

37 *Papaioanu v. Comm'rs of Rehoboth*, 20 A.2d 447 (Del. Ch. 1941).

38 *Mayor & Council of New Castle v. Rollins Outdoor Adver., Inc.*, 475 A.2d 355, 360 (Del. 1984); *accord Town of Bethel v. West*, 1997 WL 525879, at *5 (Del. Ch. Aug. 18, 1997) (denying town's motion for summary judgment because it "proffered no specific reason why banning the keeping of horses promotes public health, welfare, and safety, or prevents a nuisance.").

39 *Buckson*, 2002 Del. Ch. LEXIS 126, at *7 (internal quotations omitted) (emphasis added).

> Bethany has resulted in significant shoaling [i.e., becoming shallower] and unless the erosion was abated, public and private property, as well as the waterways, would have sustained considerable damage; that the inevitable and continual shoaling of the waterways would have prevented proper tidal flushing and contributed to the pollution of the waterways and impeded navigation of boats to the adjoining inland waterways and bays. Therefore, it is declared to be the public policy of the town to protect and preserve the waterways and public and private property abutting the waterways and within the town with bulkheads and/or alternative material and maintaining all property abutting the canals.

Wakes generated by a boat can produce shoaling of the shoreline. Although the Dock itself does not produce a wake, I find it rational to prohibit its use to minimize the production of wakes. In particular, when someone uses a floating dock, they thrust the engines of a jet ski or personal watercraft in order to climb onto the dock. This produces a wake. Consequently, by prohibiting the use of floating docks the Town would further their goals of eliminating wakes in the Town's waterways and reducing shoaling. Moreover, all waterways of the Town are "no wake" zones.[40] Thus, by enacting Ordinance 108-02 the Town has helped ensure that people abide by its existing laws.

The Nagys suggest that the Town could eliminate wakes by crafting an ordinance to address the problem more directly than Ordinance 108-02. In *Buckson*, however, the court held that "[w]hether the ordinance, as drafted, is 'good' land use planning, of course, is not the issue."[41] The rational basis test does not require that a zoning ordinance

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[40] Section 37-2(B) of the Code of the Town of South Bethany.

[41] *Buckson*, 2002 Del. Ch. LEXIS 126, at *9.

use the least restrictive means of achieving its goal. Therefore, I find unpersuasive the Nagys' argument that the Town had better ways of regulating wakes.

The Nagys further assert that the Town has attempted to ban jet skis through Ordinance 108-02. I disagree. The portion of Ordinance 108-02 that became § 50-8.1(A) states that "Davits (of a type to lift canoes, kayaks, or *jet skis*) are permitted."[42] Therefore, I do not find that the Town had a hidden purpose of prohibiting jet skis. Rather, the Town intended to prevent shoaling by reducing the chances that a personal watercraft or jet ski would produce a wake in the Town's waterways. Thus, the Nagys have failed to demonstrate the absence of any facts that would furnish a basis to support the ordinance. Accordingly, I find that Ordinance 108-02 is a valid exercise of the Town's police powers that applies to the Dock whether or not it is a legal nonconforming use.

C. Is a Permanent Injunction Against the Nagys Necessary?

"The standard for granting a permanent injunction requires [the plaintiff] to demonstrate that: (1) it has proven actual success on the merits of the claims; (2) irreparable harm will be suffered if injunctive relief is not granted; and (3) the harm that will result if an injunction is not entered outweighs the harm that would befall the [defendant] if an injunction is granted."[43]

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[42] Emphasis added.

[43] *Examen, Inc. v. VantagePoint Venture Partners 1996*, 2005 WL 1653959, at *2 (Del. Ch. July 7, 2005) (internal quotations omitted).

The Town has proven actual success on the merits through their summary judgment motion. Specifically, the Town has succeeded in demonstrating that the Nagys could not establish that the Dock qualifies as a legal nonconforming use, and even if they could that defense would fail, because the Town properly enacted Ordinance 108-02 pursuant to its police powers. Further, the Town will be irreparably harmed through a continuing violation of its ordinances if the Court does not require the Nagys to remove the Dock. Finally, the importance of the Town's ability to enact and enforce laws under their police powers outweighs the harm to the Nagys from the loss of the use of the Dock. Thus, I will enter an injunction requiring the Nagys to remove the Dock permanently.

IV. CONCLUSION

For the reasons stated I grant the Town's motion for summary judgment and deny the Nagys' motion for summary judgment. The Nagys are hereby directed to remove the Dock and as much of the related Tidal Management System as reasonably practicable and to refrain from reinstalling that or any other floating dock in the future.

IT IS SO ORDERED.