

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONALD L. PELLICONE,	:	No. 329,2013
	:	
Defendant-Below,	:	
Appellant,	:	
	:	
v.	:	Lower Court: Superior Court
	:	In And For New Castle County
NEW CASTLE COUNTY, upon the	:	C.A. No. N13C-03-073 EMD
relation of the County Executive,	:	
	:	
Plaintiff-Below,	:	
Appellee.	:	

APPELLANT'S REPLY BRIEF

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COUNTER-STATEMENT OF FACTS

In Appellee New Castle County's Answering Brief ("County Brief"), a patchwork quilt of half-truths and unsupported assertions is set forth in an attempt to create the faux appearance that New Castle County ("County") was actually part of the Federal Flood Control Project being performed by the United States Army Corps of Engineers ("Army Corps"). No matter how many times the County unilaterally asserts that it is part of the project, however, all objective evidence shows that it is being undertaken solely by the Army Corps, with some local assistance from the Delaware Department of Natural Resources and Environmental Control ("DNREC"). The County's involvement is limited to lending its purported eminent domain power contained at 9 *Del. C.* § 1525 as a "Trojan Horse" for the Army Corps to take easements needed solely for the Federal Flood Control Project.

A. The County Does Not Need And Will Not Ever Use The Easements Being Taken; The Army Corps Will

The Corps-DNREC Agreement conclusively proves that the Army Corps will prosecute the Federal Flood Control Project, with limited assistance from DNREC. A-91 to 92. And DNREC, not the County, is contractually obligated to acquire easements needed by the Army Corps. A-96. Therefore, the County's involvement is merely as a gratuitous donor of its time and money, not as a formal participant in the Federal Flood Control Project.

Federal funds were used to complete all plans and specifications for construction of the Federal Flood Control Project. A-121. And the Army Corps is the one that prepared the bid package, solicited bids, and issued the final plans necessary to construct the Federal Flood Control Project. A-122, A-128 *et seq.*, and A-115 *et seq.* The Army Corps was also the one that prepared the erosion and sediment control plans and obtained permits from DNREC. A-432 *et seq.* and A-165 *et seq.* The County is nowhere mentioned, or in any way involved, in any of the activities undertaken to carry out the Federal Flood Control Project.

Only the County's bald, unsupported assertion that it is part of the project was presented to the Trial Court in support of the theory that the County would be using the easements to be taken from Pellicone. The assertion is fallacious. And Pellicone submitted an Affidavit which directly rebutted the County's unsupported Affidavit. AR-1. So the County's taking on behalf of the Army Corps was formally contested.

B. The County Presents Misleading, Unfounded Allegations Which Are Rebutted By The Undisputed Record Evidence

The County submits that in 2013 it prepared some designs that will be given to the Army Corps to be incorporated into the Federal Flood Control Project. County Brief at 9. No documentary evidence presented in the Trial Court, however, supported this allegation. In fact, the Affiant's assertion in this

regard is patently false, as the uncontraverted evidence established that all plans to construct the Federal Flood Control Project were complete prior to the Army Corps' solicitation of bids in September of 2011. A-122, A-128 *et seq.*, and A-115 *et seq.*

The County's Affiant testified at deposition that a "stormwater management basin redesign for 34 Germay Drive" was being prepared by the New Castle Conservation District to provide to the Army Corps. A-271. But the Federal Flood Control Project involves a deepening and widening of the stream channel of Little Mill Creek, not an industrial park stormwater management basin. The County misled the Trial Court and attempts to do the same on appeal. Such disingenuousness should be rejected.

C. The State & Local Government Advisory Committee Has No Direct Say On, Or Relationship To, The Federal Flood Control Project

In its next sleight-of-hand, the County asserts that its role as a voting member of the Little Mill Creek Flood Abatement Committee ("Advisory Committee") establishes that it is a part of the Federal Flood Control Project. County Brief at 9-10. This is but a diversionary distraction argument. The real question is who is carrying out the project at issue – *i.e.* what entity or entities have formal legal responsibility for design, easement acquisition, funding, and construction?

The record evidence establishes that since at least 2009 the Federal Flood Control Project has been an undertaking of the Army Corps. A-88 *et seq.* One hundred percent (100%) of funding, designing, planning, contracting, and construction of the Federal Flood Control Project has been or will be the responsibility of the Army Corps.

The Advisory Committee merely provides recommendations. It has no binding legal authority to direct or operate the Federal Flood Control Project.

The Army Corps is not a member of the Advisory Committee. A-522 to 523. But the Army Corps has and will perform all substantive tasks which make up the Federal Flood Control Project, from start to finish. Thus, the Advisory Committee has no legal role in carrying out the Federal Flood Control Project, and concomitantly the County's membership in the Advisory committee is irrelevant.

D. The County Is An Obliging Volunteer, Not An Official Participant In The Federal Flood Control Project

The County's Affiant admitted at deposition that the County had no formal written agreement establishing it as a participant in the Federal Flood Control Project. A-271-272. And even the County's surprise, last-minute Affidavit conceded that "[t]he Army Corps is responsible for the design and construction of the Project." (emphasis added). A-518 at para. 8.

The County erroneously asserts that the Federal Flood Control Project “requires” it to obtain all easements needed to carry out construction. County Brief at 10. Not so. The County’s only support for this supposition is the unfounded and evidentially contradicted assertion by an Affiant that it is so. *Id.* Instead, the Corps-DNREC Agreement clearly and unequivocally establishes that the easements must be acquired by DNREC, not the County. A-96. Thus, the County has agreed to donate time and money to acquire easements for the Army Corps, but it has no legal obligation to do so.

The fact that the County has voluntarily donated services and funding, however, does not transform the Federal Flood Control Project into a County project. The County’s non-mandatory intergovernmental cooperation does not catapult it into the formal legal role of project participant. The uncontradicted Trial Court record establishes that the County was not an official participant in the Federal Flood Control Project.

E. The County Asserts It Will Maintain Little Mill Creek Post-Project, But The Assertion Is Irrelevant & Speculative

Finally, the County’s unsupported assertion that it will maintain the Federal Flood Control Project after it is constructed should be disregarded. County Brief at 11. At most, the assertion constitutes a legal truism: New

Castle County Code §§ 12.06.001C. and D. and 12.06.002¹ provide that the County is generally responsible to insure that watercourses remain “open and free flowing.” But County Code § 12.06.001C. excuses the County from doing so regarding watercourses that the Army Corps or DNREC have jurisdiction over. Because both agencies have jurisdiction over Little Mill Creek, the County has no legal role in maintaining Little Mill Creek in the future.

The fact that the Army Corps had to obtain a wetlands and subaqueous lands permit from DNREC establishes that DNREC has jurisdiction over the section of the Little Mill Creek adjacent to Pellicone’s land, as it is a tidal stream. *See 7 Del. C. Ch. 66 and Ch. 72.* And the Army Corps has jurisdiction over the Little Mill Creek since it constitutes a tributary of the Christina River. *See A-126 (Little Mill Creek is a tributary of Christian River), 33 C.F.R. § 328.3(a)(5)(Tributaries of the Waters of the United States are within Army Corps jurisdiction), and 33 U.S.C. § 1344 (§ 404 of the Federal Clean Water Act).* Thus, no ongoing County maintenance responsibility exists as a matter of law.

Regardless, the unrefuted record evidence establishes that the sole entity which will possess, occupy, and utilize the easement for purposes of constructing the Federal Flood Control Project will be the Army Corps. The

¹ Pertinent portions of the County Drainage Code are contained at AR-4.

Temporary Easements only last for the duration of the Army Corps' work. A-642. And the Permanent Easement is taken solely for the Army Corps to modify its grade and elevation (*i.e.* deepen). A-636. Therefore, the County will not ever occupy, possess, or utilize the easements it is taking from Pellicone.

ARGUMENT

I. THE TRIAL COURT CONCLUSORILY AND ERRONEOUSLY HELD THAT § 1525 PERMITS CREEK BED DEEPENING

The County tacitly admits that the Trial Court failed to conduct the necessary statutory construction analysis to determine whether the term “alter the course” contained in 9 *Del. C.* § 1525 was broad enough to encompass the “deepening” component of the Federal Flood Control Project. While contending that the Trial Court did not “largely disregard” Pellicone’s statutory construction arguments, the County concedes that the “Opinion does not explicitly address those arguments *per se*...” County Brief at 13 (emphasis added). By admitting that the Trial Judge failed to articulate any rationale for concluding that the phrase “alter the course” in the context of § 1525 includes a creek “deepening,” the County has conceded that the Trial Court erred. The paucity of reasoning is grounds for reversal.

A. The Lack Of Any Judicial Rationale In The Trial Court Opinion Constitutes Reversible Error *Per Se*

It is well settled that a Delaware Judge must state the reasons for his decision. *B.E.T., Inc. v. Bd. of Adjustment of Sussex County*, 499 A.2d 811 (Del. 1985). In that action, the Court held that the incorporation by reference of

a party's brief as the Court's opinion is an unacceptable judicial "shortcut." *Id.* at 812.

Similarly, the Trial Court used an equally impermissible shortcut by skipping directly to a conclusory and legally obvious statement that the County had the "power under 9 *Del. C.* § 1525 to condemn property for the purposes of widening, straightening, or otherwise altering the course...Little [Mill] Creek." Opinion at 9, n.36. Such a mere restatement of the law, however, does not constitute legal reasoning. Without providing even the briefest explanation of the Court's legal analysis which led it to conclude that "alter the course" included a creek bed deepening, the Trial Court committed reversible error.

B. If The Term "Course" Is Not Ambiguous, Then
§ 1525 Does Not Apply To Creek Bed
Deepening Projects Like The One At Issue

Next, the County submits that § 1525 is clear and unambiguous on its face based upon the dictionary definition of the term "course." County Brief at 15-16. Specifically, the County contends that because the dictionary definition of the term "course" is "path," this fact automatically leads to an interpretation of § 1525 that permits the deepening of the creek bed. Not true. On its face, the term "path" does not impart the concept of deepening. Instead, the word "path" facially refers to directional meanderings in the context of a creek. Consequently, the County's argument is without merit.

Pellicone concedes that the term “alter” means to “change” or “modify.” But the term “path,” which the County contends is the sole meaning of the word “course,” is defined as “the way or course traversed by something: route.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY at 1654 (emphasis added). The way or route a stream travels imparts only a horizontal directional meaning. Therefore, a creek’s “course” would not include its vertical dimension (*i.e.* deepening).

In contrast, “deepen” means “to increase the depth of.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY at 590. And “depth” is defined as “the perpendicular measurement downward from the surface.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY at 607. The route that a stream traverses, however, is a one dimensional, directional issue – *i.e.* north, south, east, west, or straight, curvilinear, dog-leg, etc. “Deepening” is a vertical concept which is therefore outside the bounds of the common and ordinary meaning of the term “course.” As a result, the Federal Flood Control Project exceeds the scope of § 1525.

C. The County’s New Argument On § 1525 Is
 Barred By Rule, And It Fails Regardless

Further, the County attempts to raise for the first time on appeal a new argument: the phrase “any part of” a creek in § 1525 means that the “creek bed”

may be deepened. County Brief at 16-17. *First*, the Court should decline to consider this argument since it was not presented to the Trial Court and is therefore violative of Supreme Court Rule 8. *Second*, the argument fails on the grounds that the phrase “any part of” merely modifies the term “course,” which in turn has only a one dimensional, directional meaning.

Section 1525 permits condemnation of lands for County projects “to widen, straighten, or alter the course of any part of any small run or creek in the County.” Given the clear and unambiguous meaning of the term “course,” the term “any part” means any section or segment along the linear path of a small creek, not a vertical cross-section of the creek and its bed. As a result, the County’s new argument wilts under legal scrutiny.

D. The Anti-Absurdity Doctrine Applies In Case
Of An Unreasonable Result, But None Will
Arise If The Plain Meaning Of “Course”
Prevails

The County’s next argument is that Pellicone’s reading of § 1525 would lead to an unreasonable and absurd result: the inability of the County to take easements from Pellicone for the Federal Flood Control Project. County Brief at 17. But the statutory construction principle that eschews interpretations that would lead to absurd or unreasonable results does not apply simply because the County loses the case (as it effectively suggests). Instead, the Anti-Absurdity

Doctrine focuses on the outcome of an application of the plain meaning of statutory language. In this instance, however, the plain meaning makes estimable sense given the history and background of § 1525.

Initially adopted in 1931 to permit the County to carry out its role to construct Roads and Bridges, the limited scope of condemnation power granted by § 1525 is perfectly sensible. Small creeks and runs needed to be relocated or piped to accommodate paved roads. Dredging or deepening was only needed for large rivers and creeks which were navigable waterways that hosted ship traffic. And small creeks did not need to be deepened to build a bridge over them or place a pipe in them.

Additionally, the language of § 1525 itself provides a context that makes Pellicone's argument all the more reasonable. The statute does not contain broad language that permits the County to conduct any type of project in any type of watercourse. Instead, § 1525 only covers projects: 1) in "small creeks or runs"; and 2) which "widen, straighten, or alter the course" thereof. If the General Assembly intended to give the County a blank check to do any type of project in any size watercourse it would have so provided. But it did not. Instead, the language is narrow. As a consequence, it is evident that a constricted scope of authority was established pursuant to § 1525, not unbridled authority to conduct a large scale project like the Federal Flood Control Project.

Further evidence of the narrowness of the General Assembly's delegation of eminent domain power in § 1525 may be gleaned from contrasting it with the broad grant of eminent domain power delegated to the Delaware Department of Transportation ("DelDOT"). DelDOT is empowered to: 1) "[a]cquire by condemnation or otherwise any land, easement, franchise material, or property, which in the judgment of the Department shall be necessary therefor" (17 Del. C. § 132(c)(4)); and 2) acquire by eminent domain any property rights needed for highways and roads, which are defined to include "any sewer, drain or drainage system connected therewith, and any bridge, culvert, viaduct, or other construction or artificial way used in connection therewith and anything which is accessory to any of the same or to the use thereof." 17 Del. C. §§ 137(a)(1) and 101(a)(8) (emphasis added). In addition, DelDOT has the power to do "whatever is incidental and germane to the scope of the duties and powers conferred on it by law." 17 Del. C. § 132(d). No such broad language is contained in § 1525. Accordingly, § 1525 was intended to delegate a narrow scope of condemnation authority.

E. Past Precedent Does Place The Burden On The
County To Establish It Will Be The End User,
Which It Is Not

Lastly, the County's attempt to distinguish *Wilmington Parking Authority v. Land With Improvements, Etc.*, 521 A.2d 227 (Del. 1986) is unavailing. *See*

County Brief at 17-18. In that case, this Court broadly set forth the analytical parameters which apply to the case *sub judice*:

In the context of determining whether a State agency acted within the scope of a limited delegation of the power of eminent domain, inquiry into the underlying purpose of a proposed taking is perhaps even more appropriate. In addition to the constitutional values at stake, the exercise of a statutorily delegated power raises problems concerning the proper role of the agency as defined by the legislature. Generally, the burden is on the condemnor to show that it is acting within the scope of its statutory power. [citation omitted]. Even when the power of eminent domain is expressly granted, the extent thereof will be construed strictly against the grantee. [citations omitted]. (emphasis added).

The Opinion did not limit its holding to circumstances where it is alleged that a private party is the predominant beneficiary of the taking by eminent domain. Thus, the County's argument is without merit.

The holding in *Wilmington Parking Authority* applies to the circumstances in the case at bar, where the State of Delaware's Sovereign Power of Eminent Domain was exercised for a federal use: the Army Corps' Federal Flood Control Project. The County abysmally failed to meet its burden to establish that § 1525 was broad enough to encompass the extensive Federal Flood Control Project. As a consequence, this Court should reverse and enter an Order dismissing the condemnation action with prejudice.

ARGUMENT

II. THE FEDERAL FLOOD CONTROL PROJECT DOES NOT CONSTITUTE A “PUBLIC USE” UNDER § 9501A SINCE THE ARMY CORPS, NOT THE COUNTY, WILL BE USING THE EASEMENTS

A. Neither County Voluntary Expenditures Nor Easement Ownership Proves A “Public Use” Under § 9501A; The County Will Not Possess, Occupy, Or Utilize, The Army Corps Will

The County argues that the Trial Court properly held that the “public use” requirement of 29 *Del. C.* § 9501A was satisfied based on: 1) the County’s expenditure of funds; and 2) the titling of easements in the name of the County. County Brief at 26-27. But the County’s gratuitous donation of money and the vesting of bare legal title in the name of the County fail to satisfy the requirements necessary to prove a “public use” under § 9501A. The statute looks to who is actually going to undertake “possession, occupation, or utilization” of easements on Pellicone’s land. A federal agency, the Army Corps, will be the end user of the easements. Consequently, the County’s argument misses the mark.

It is conceded that the County constitutes an “agency” for purposes of potentially establishing “public use” under 29 *Del. C.* § 9501A. It is also admitted that the easements taken from Pellicone will be titled in the County’s name. But that begs the question: who will ultimately be undertaking the

“possession, occupation, or utilization” of the land. It must be the County, or else no “public use,” as defined by § 9501A, exists.

It is undisputed that the Army Corps is the entity that will be occupying, possessing, and utilizing the easements on Pellicone’s land. The Army Corps will be prosecuting the Federal Flood Control Project. At no time will the County be occupying, possessing, or utilizing the easements. Thus, it is patently obvious that the County is merely attempting to loan its eminent domain power in a fashion that contravenes the General Assembly’s intent under § 9501A. Accordingly, the Trial Court’s entry of an Order of Possession should be reversed and the condemnation action dismissed with prejudice.

The County’s voluntary expenditure of funds does not magically cloak the Federal Flood Control Project with the attributes of “public use.” Again, the seminal question in determining if the Federal Flood Control Project qualifies as a “public use” under § 9501A is whether the County will be partaking of “possession, occupation, or utilization” of the easements on Pellicone’s land. The answer is unequivocally no, as the Army Corps is the sole entity that will be constructing the Federal Flood Control Project. *A fortiori*, the necessary presence of a “public use” is lacking, and the condemnation action should be dismissed with prejudice.

B. The County's Speculation That It May Go Into
Little Mill Creek To Clear It In The Future
Does Not Equate To Present Possession,
Occupation, Or Utilization

The County's possible future entry into the Little Mill Creek in order to remove debris so as to insure that the watercourse remains clear and free flowing is irrelevant to the "public use" calculus. *See* County Brief at 32. The purpose of the County's taking of easements from Pellicone by eminent domain is for the Federal Flood Control Project. And the Army Corps alone will be possessing, occupying, and utilizing Pellicone's land.

No evidence exists in the record to support the notion that the County is taking easements from Pellicone to remove beaver dams, fallen trees, or collapsed stream banks, which are small scale maintenance projects generally within the purview of the County's jurisdiction under Chapter 12 of the County Code. Accordingly, the taking cannot constitute one for a "public use" under § 9501A.

C. The Army Corps Does Not Concede That The
County Is Involved In The Federal Flood
Control Project

Noticeably missing from the record below is any affidavit or other evidence emanating from the Army Corps which would indicate that it is using any County funding and/or assistance to prosecute the design, contracting, or construction of the Federal Flood Control Project. That fact is telling. It shows

that the Army Corps has no evidence to support the theory that a project which is now purely of its own doing somehow includes the County. Instead, the only record evidence to support the County's theory that it is involved in the Federal Flood Control Project is the County's own *ipse dixit*.

All of the documentary evidence in the record points to the inexorable conclusion that the County has no formal legal role in the Federal Flood Control Project. And the Army Corps does not constitute a Delaware State or local government agency under 29 *Del. C.* Ch. 95. The Army Corps' singular role as prosecutor of the Federal Flood Control Project establishes beyond *peradventure* that no "public use" as defined by § 9501A exists in order to support a taking pursuant to the State of Delaware's Sovereign Power of Eminent Domain.

D. No County Project Exists Since The Legal
Procedures Necessary To Adopt One Have Not
Occurred

Finally, the fact that the requisites of Chapter 12 of the County Code were not followed in order to legally authorize the conduct of a County flood control project reveals that the County is not actually part of the Federal Flood Control Project. Article 7, Chapter 12 of the County Code requires certain criteria to be met and specific procedures to be followed in order for the County to undertake "stream and watercourse improvements." No County Council

Ordinance or Resolution establishing satisfaction of the criteria necessary to authorize such a County project exists. Indeed, the fact that jurisdiction over the Little Mill Creek is vested in both DNREC and the Army Corps legally bars the County from pursuing such a project. *See* County Code § 12.06.001C.

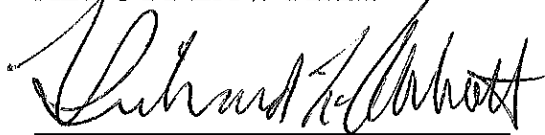
The County Drainage Code clearly establishes when and how a County flood relief project may be undertaken. No County Council legislation established satisfaction of the Code criteria, or a waiver thereof. Instead, the record reflects that the County is a mere donor and volunteer, doing a favor for the Army Corps. And so the inevitable conclusion is that the Federal Flood Control Project is an Army Corps undertaking, not a County project.

Given the lack of any record evidence supporting the theory that the County is officially part of the Federal Flood Control Project, its arguments to the contrary should be rejected by the Court. As a result, no “public use” under § 9501A exists, and dismissal is therefore warranted.

CONCLUSION

Based upon the foregoing, Appellant Donald L. Pellicone respectfully requests that this Court reverse the Superior Court, vacate the Order of Possession, and direct that the condemnation action be dismissed with prejudice. *First*, 9 Del. C. § 1525 does not cover the deepening component of the Federal Flood Control Project; “alter the course” only means “modify the direction” of a creek. *Second*, the Federal Flood Control Project is not a County project, so as to meet the definition of “public use” contained in 29 Del. C. § 9501A. Accordingly, reversal and dismissal are warranted.

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