



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S ANSWERING SUPPLEMENTAL MEMORANDUM

Gregory B. Williams (I.D. No. 4195)
Austen C. Endersby (I.D. No. 5161)
Wali W. Rushdan II (I.D. No. 5796)
FOX ROTHSCHILD LLP
Citizens Bank Center
919 N. Market Street, Suite 1300
Wilmington, DE 19801
(302) 622-4211

Attorneys for Appellee
New Castle County

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INTRODUCTION

Appellee New Castle County (“NCC”) hereby submits this Answering Supplemental Memorandum to address the Memorandum Opinion Regarding Remand For Further Consideration entered by the trial court on January 10, 2014 (“Remand Opinion” or “RO”) and the Opening Supplemental Memorandum (“Opening Memorandum” or “OSM”) submitted by Appellant Donald L. Pellicone (“Pellicone”).

The Remand Opinion and the Opening Supplemental Memorandum address the three questions framed by this Court in its November 14, 2013 Order (the “Remand Order”)—namely: (1) Does Chapter 12 of the County Code require specific procedural steps in order to authorize a County flood control project?; (2) If so, were those procedural requirements adhered to?; and (3) Can the Flood Control Project¹ legally constitute a County project?

For the reasons set forth in the Remand Opinion and as further explained below, the answer to each of the foregoing questions is “yes.”² Accordingly, the Order of Possession entered by the trial court on May 22, 2013 should be affirmed.

¹ With respect to the Court’s reference to the “Federal Flood Control Project,” NCC directs the Court’s attention to footnote 5 of the Remand Opinion.

² NCC adopts and incorporates as if fully set forth herein, the trial court’s factual findings and analysis set forth in the Remand Opinion.

ARGUMENT

I. Does Chapter 12 of the County Code require specific procedural steps in order to authorize a County flood control project? YES.

It continues to be NCC's position that 9 Del. C. §1525 must prevail over Articles 6 and 7 of Chapter 12 of the County Code, as Section 1525 specifically authorizes NCC to condemn property for purposes of widening, straightening, or altering the course of any part of Little Mill Creek whereas Articles 6 and 7 are general, non-condemnation provisions.³ See Appellee New Castle County's Answering Brief at p. 32. Even assuming that Article 7 of Chapter 12 of the County Code applies under the circumstances, the Flood Control Project squarely falls within the parameters of Section 12.07.001. Section 12.07.001 provides, in pertinent part, that "[i]mprovements to public and communal watercourses, drainage systems and stormwater management basins by New Castle County shall only be made...[t]o protect persons and property (specifically buildings) from serious harm and significant damage from flooding caused by storms of up to one hundred (100) year frequency."

It cannot be reasonably disputed that the type of flooding that has occurred at Little Mill Creek in the past and is meant to be addressed by the Flood Control

³ NCC provides the following discussion regarding Articles 6 and 7 without waiver of this position.

Project could cause significant personal injury or substantial property damage and, thus, falls within the parameters of Section 12.07.001. Indeed, during the hearing before the trial court on April 15, 2013, Pellicone, through his counsel, conceded, as he must, that flooding that would cause significant personal injury or substantial injury to property does fall within the County’s purview. A-618; A-685.

Pellicone’s contention that NCC has “not present[ed] any evidence that” it has satisfied Section 12.07.001C—which requires that “[i]mprovements made with bond revenues must have a useful life of at least ten (10) years”—lacks merit and is simply a red herring. (*See* OSM at 2.) The Flood Control Project is unquestionably intended to “have a useful life of” more than 10 years. Thus, the bond revenues that NCC expended as part of the Flood Control Project are covered under Section 12.07.001C.

In addition, as noted by the trial court in its Remand Opinion, Article 7 contains an enumerated list of procedural steps that must be met in order to authorize a County flood control project. Those requirements are set forth in Section 12.07.002 as follows:

- (1) A study will be made to establish and map the floodplain and delineate the wetlands along the watercourse.
- (2) A typical cross section of the improvements will be developed showing the approximate widths, depths and type of construction.
- (3) Order of magnitude costs for proposed improvements will be developed.

(4) A public hearing will be held with those property owners adjacent to the watercourse to obtain their comments regarding the drainage study and the proposed improvement(s).

(5) An informal meeting will be held with County Council to reach a consensus concerning proceeding with project development and a determination will be made to proceed or abandon the proposed improvement(s).

Section 12.07.002. As explained in the Remand Opinion and in the following section, NCC has complied with each of these requirements.

II. If so, were those procedural requirements adhered to? YES.

As the trial court correctly found in its Remand Opinion, NCC has satisfied each of the five procedural requirements of Section 12.07.002.

NCC satisfied the first three procedural requirements of Section 12.07.002 as follows: (1) the Army Corps of Engineers and NCC developed studies with respect to the Flood Control Project (A-432 to A-450; A-461 to A-471); (2) these studies establish and map the floodplain along Little Mill Creek (*Id.*); and (3) the projects clearly develop and set forth the order of magnitude cost for the proposed improvements and who will contribute those costs. (A-463). Pellicone's attempt to discredit NCC's compliance with these requirements based on Pellicone's contention that the U.S. Army Corps of Engineers "conducted most of the steps" (OSM at 2) should be rejected. As explained below, the Flood Control Project is a joint effort involving NCC, DNREC, New Castle Conservation District and the

U.S. Army Corps of Engineers, and the project legally constitutes a County project.

With respect to the fourth requirement, the record shows, and it is undisputed, that NCC held the requisite public hearings. Thus, NCC has satisfied the fourth enumerated requirement of Section 12.07.002. NCC sent notice to Pellicone of the project and the need to acquire the easements on his property on two occasions – December 13, 2011 and July 29, 2012. B-44; B-55. Further, NCC held at least two public hearings, on August 21, 2012 and January 15, 2013, about the project and the need to acquire the easements on Pellicone's property. A-519; B-34. NCC also gave notice of the public hearings by publication in a newspaper of general circulation in the County. B-60. Significantly, 38 out of 39 property owners agreed to the Flood Control Project by granting NCC the necessary property interests on their respective properties; Pellicone was the only property owner who refused to grant easements to NCC for the project. A-519. The relevant public is well aware of the project and is overwhelmingly in favor of it.

Further, NCC Council met, both formally and informally, concerning the improvements proposed in connection with the Flood Control Project; thus, NCC satisfied the fifth enumerated requirement of Section 12.07.002. A-517. Indeed, as detailed below, the record clearly shows that NCC Council, by Ordinance and

Resolution, specifically authorized the Flood Control Project and approved funds for it. Pellicone's contention to the contrary is simply incorrect.

Indeed, the Flood Control Project has been specifically authorized by County Council, and funds have been specifically designated for it in the County's Capital Budget Ordinance, beginning in 1995 and continuing through the 2013 Capital Budget. A-517. The **Capital Budget Ordinance of New Castle County** (which is the full title of the approved budget) is an **Ordinance** of County Council that is voted on after public hearings and approved by County Council. *See, e.g.*, B-37 to B-45. It is through the approval of the Capital Budget Ordinance that County Council approves capital projects in any given year and the Flood Control Project is clearly a capital project. *See* A-341.

Also, County Council passed a Resolution specifically authorizing NCC to proceed with the condemnation action to acquire from Pellicone the subject permanent easement and temporary construction easements. B-57 to B-58. In its Resolution, County Council specifically recognized its authority "pursuant to 9 *Del C.* § 1525 to exercise the right of eminent domain to widen, straighten or alter the course of any small run or creek in the County"; that "New Castle County requires easements across the properties described herein to proceed with the Little Mill Creek Flood Control Project"; and that "Little Mill Flood Control Project is a joint effort between the United States Army Corps of Engineers, the Delaware

Department of Natural Resources and Environmental Control, the New Castle Conservation District and the County to improve the stream bank and water channel along Little Mill Creek in order to abate a flooding problem.” B-57.

Further, the Court should reject Pellicone’s assertion that “the Remand Opinion’s reliance upon Affidavit statements and deposition testimony of County employee Anthony Schiavi is legally infirm.” (OSM at 5.) As NCC explained in its Answering Brief, Mr. Schiavi’s Affidavit is far from being a “sham” as characterized by Pellicone. (See NCC’s Answering Brief at 33-34.) Rather, Superior Court Civil Rule 71.1 expressly allows the court to consider affidavits during the order of possession hearing and Pellicone failed to overcome the presumption of regularity and prima facie case of necessity for a public use that NCC established during the order of possession hearing and otherwise failed to show good cause why the order of possession should not have been entered.

In sum, the record demonstrates that NCC satisfied Section 12.07.002 and the Order of Possession was properly entered by the trial court.

III. Can the Federal Flood Control Project legally constitute a County project? YES.

The Flood Control Project can and does legally constitute a County project. The project is a joint effort of NCC, DNREC, New Castle Conservation District and the U.S. Army Corps of Engineers. A-517; B-56 to B-58. Within this joint effort, NCC is far from a mere “cheerleader” as characterized by Pellicone.

Rather, the record shows that NCC has taken a very active role. At a minimum, NCC prepared and provided some designs to the U.S. Army Corps of Engineers for the project (A-518) and is contributing significant funds to the project. A-517; B-37 to B-45. As a result of NCC's involvement in the design process, contribution of funding and maintenance responsibilities upon completion of the infrastructure of the Flood Control Project, the Court should reject Pellicone's contention that the Flood Control Project is purely Federal in nature.

Similarly, Pellicone's assertion that Sections 12.06.001C and 12.06.001D of Article 6 bar NCC from acting when the U.S. Army Corps of Engineers or DNREC have jurisdiction over a stream is incorrect. As an initial matter, Pellicone presented no supporting record evidence whatsoever that Little Mill Creek is within the jurisdiction of the U.S. Army Corps of Engineers. Pellicone's assertion should therefore be rejected.

Further, the trial court correctly held that Chapter 12 does not bar the Flood Control Project from being a NCC project. (RO at 13.) Critically, as the trial court noted, Article 6 applies only to stormwater management facilities and watercourse management projects, and ***does not*** apply to drainage improvement projects such as the Flood Control Project. *Id.* at 14-15. Drainage improvement projects are addressed separately under Article 7; thus, Article 7—and *not* Article 6—would be

the operative provision here. And as explained above and in the Remand Opinion, NCC has fully complied with Article 7.

As further noted by the trial court, Article 7 contains no language which limits NCC's ability to proceed with the instant condemnation. There is nothing in Article 7 to suggest that watercourse improvement projects are subject to the limitations set forth in Article 6. *Id.* at 14. Nor does Article 7 preclude NCC from collaborating with other entities, such as the Army Corps of Engineers and DNREC, when making necessary improvements to watercourses. *Id.* at 16.

Moreover, even if the Court were to conclude that Article 6 applies, the Flood Control Project would still constitute a County project. The record evidence clearly establishes that, once the infrastructure of the project is completed, it will be NCC's continued responsibility (and not the responsibility of the U.S. Army Corps of Engineers) to maintain the infrastructure of the project, including the banks of the Creek, and to keep Little Mill Creek free-flowing. A-518. These activities fall squarely within the parameters of Article 6 if it were found to apply. *See* Section 12.06.001D ("The County will assume the responsibility for maintaining an open and free flowing condition in all nontidal streams, communal watercourses....").

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Remand Opinion, the three remand questions should be answered in the affirmative and the Order of Possession entered by the trial court should be affirmed.

Respectfully submitted,

FOX ROTHSCHILD LLP

By: /s/ Gregory B. Williams

Gregory B. Williams (I.D. No. 4195)

Austen C. Endersby (I.D. No. 5161)

Wali W. Rushdan II (I.D. No. 5796)

Citizens Bank Center

919 N. Market Street, Suite 1300

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