



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
SUPPLEMENTAL MEMORANDUM

ABBOTT LAW FIRM

/s/ Richard L. Abbott

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Appellant

Dated: February 20, 2014

I. THE COUNTY'S *IPSE DIXIT* IS ALL THAT SUPPORTS ITS CONTENTIONS

Appellee's Answering Supplemental Memorandum (the "County Memo" or "CM") contains numerous unsupported assertions that the Court is asked to take as true simply because the County says it is so. The paucity of record evidence to support these assertions, however, should cause the Court to reject such notions.

A. The Record Does Not Contain Evidence Showing § 12.07.001 Requisites Were Met; The County Was But A Beneficent Donor

The County Memo concedes that County Code § 12.07.001 establishes certain prerequisites for the conduct of a County watercourse improvement project, including, *inter alia*, proof that the project must protect persons and property from: 1) serious harm; 2) significant damage; and 3) flooding caused by storms of up to 100 year frequency. CM at 2. But the County fails to cite to any record evidence which supports its conclusory assertion that these 3 prerequisites were satisfied; it merely self-proclaims such facts to be true. If the County Council had enacted legislation which contained findings regarding the 3 prerequisites, then the Federal Flood Control Project could have conceivably been deemed to be partly a County project. But no such legislative findings were ever approved.

Next, the County unjustifiably asserts that it is self-evident that watercourse improvements will have a useful life of at least 10 years, as required by § 12.07.001C. CM at 3. Once again, the County cites to no record evidence in support of its posit. And no County Council legislation contains a finding in that regard. Whether the stream bank stabilization, widening, deepening, and other improvements to be made pursuant to the Federal Flood Control Project will have at least a 10 year lifespan is nowhere in the record. Indeed, silting, sedimentation, erosion, and stream flow damages which typically occur in a period of less than 10 years would logically degrade and undo at least part of the improvements.

Further, the County's self-proclamation of being a participant in the Federal Flood Control Project does not make it so. Instead, the County is a mere gratuitous donor of money for the Army Corps' undertaking. Indeed, \$320,000 of County funds were voluntarily gifted to the New Castle Conservation District ("Conservation District") via Resolution No. 04-082 "to administer and construct the Little Mill Creek I (Flood Control) Project in conjunction with the US Army Corps of Engineers." AR-1 (emphasis added). In addition, the County donated \$120,000 to the Conservation District in 1991 pursuant to Resolution No. 91-279 so that the Conservation District (not the County) could undertake "PLANNING, DESIGN, AND CONTRACT

CONSTRUCTION OF IMPROVEMENTS TO LITTLE MILL CREEK.” AR-4.¹ (emphasis added). The Conservation District is under the legal direction and control of DNREC, not the County. 7 Del. C. § 3905.

It is evident that the County only contributed funds to the Federal Flood Control Project. It gave gifts to the Army Corps and the Conservation District, but such donations do not magically transmute the Army Corps and DNREC project into one involving the County. The County frequently donates money to governmental and *quasi*-governmental agencies to defray the cost of such agencies’ projects. AR-7, AR-11, and AR-17 (Riverfront Development Corporation and New Castle Conservation District). But such monetary gifts do not convert the RDC and Conservation District projects into ones *qua* County.

B. The County Met None Of The 5 Requirements
Of § 12.07.002

The County’s next *ipse dixit*, regarding supposed County studies, is directly contradicted by the record. CM at 4. In fact, the County never performed any study that will be utilized to make any of the Federal Flood Control Project improvements. Instead, the County asserted that it worked with

¹ Interestingly, the County never produced a copy of the Resolutions in the limited discovery process at the Trial Court level. Nor did it produce the “Agreement LD 84-1246” document referenced in Resolution No. 04-082.

the Conservation District to prepare a plan to repair a nearby stormwater management basin. In addition, the studies that establish and map the floodplain along the Little Mill Creek were prepared by the Army Corps, not the County.

The record is also devoid of any evidence that the County prepared typical cross-sections of improvements to be developed showing approximate widths, depths, and type of construction, as required by § 12.07.002(2). The Army Corps prepared such plans.

Nor did the County develop any magnitude of costs for proposed improvements, as required by § 12.07.002(3). Once again, the Army Corps did.

The County also failed to timely conduct the required public hearing with property owners adjacent to Little Mill Creek prior to the Federal Flood Control Project becoming a *fait accompli*. Section 12.07.002(4), read in context, clearly requires that the public hearing be conducted before any determination is made to proceed or abandon the proposed improvements. In this instance, the County conducted a public hearing at the very end of the process, not at the beginning as required.

Finally, § 12.07.002(5) was not satisfied; an informal meeting with County Council reaching a consensus regarding proceeding with project development never occurred. The County Council meeting relied upon by the

County was at the very end of the process, after the project had been fully developed, designed, funded, bid, and was ready to build. As a result, the five (5) § 12.07.002 prerequisites were not met, eliminating the possibility that a County project legally exists.

**II. THE COUNTY'S RELIANCE UPON
AFFIDAVITS IS MISPLACED; DISPUTED
MATERIAL FACTS AND A SHAM AFFIDAVIT
CANNOT SUPPORT A VALID DECISION**

The County contends that this Court should rely upon the Affidavit of its Engineer to support a finding of compliance with County Code prerequisites. CM at 7. But the Affidavit cited by the County was directly rebutted by deposition testimony of the Affiant and by Pellicone's rebuttal Affidavit. So although Superior Court Civil Rule 71.1 permits the Court to consider affidavits, the Court must engage in an evidentiary hearing in order to resolve disputed material facts contained in competing affidavits.

More importantly, the Affidavit relied upon by the County is directly rebutted by the deposition testimony of the Affiant. Under the Sham Affidavit Doctrine, such affidavit statements must be ignored by the Court in favor of the more reliable deposition testimony. Regardless, the County's *ipse dixit* cannot carry the day over mounds of evidence to the contrary.

III. THE COUNTY WILL NOT AND CANNOT MAINTAIN LITTLE MILL CREEK IN THE FUTURE AS A MATTER OF FACT AND LAW

The County's mere *ipse dixit* that it will maintain Little Mill Creek after the Federal Flood Control Project is over should be rejected by the Court. *First*, there is no record evidence supporting the proposition other than the County's bald assertion. *Second*, the County cannot maintain the improvements made by the Army Corps; the County will maintain the stream (not the Army Corps' improvements) and it may only do so to the extent necessary to keep the stream "open and free flowing." County Code § 12.006.001C. and D. *Third*, the County is prohibited from conducting any maintenance activities in streams: 1) that are within the jurisdiction of the Army Corps or DNREC; or 2) which are tidal in nature. *Id.*

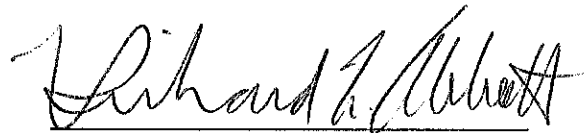
Little Mill Creek is within the jurisdiction of the Army Corps and DNREC and it is a tidal stream (a tributary of the tidal Christina River). Pellicone submitted citations to applicable legal authority which established that the Army Corps has jurisdiction over Little Mill Creek under Section 404 of the Federal Clean Water Act and associated federal regulations since it is a tributary of navigable waterway (the Christina River). In addition, evidence was presented that Little Mill Creek is tidal in nature, thereby establishing DNREC's jurisdiction under 7 *Del. C. Ch. 66* (delegating authority over tidal

“wetlands”: any bank or low land subject to tidal action along the Delaware River or any estuary or tributary waterway thereof, including areas connected to tidal waters).

IV. CONCLUSION

Based on the foregoing, the County cannot legally be a participant in the Federal Flood Control Project since: 1) the prerequisites of the County Code were not followed; 2) the County was only a gratuitous donor of funds to the Conservation District/DNREC and the Army Corps; and 3) the County’s *ipse dixit*, disputed material facts and a sham affidavit are not valid grounds to support a decision. It is understandable that the County wishes to take some political credit for its donation of funds to the Federal Flood Control Project, but its voluntary monetary contribution does not *ipso facto* cause the County to have a formal legal role in the Army Corps/DNREC undertaking. Accordingly, reversal and dismissal with prejudice are warranted.

ABBOTT LAW FIRM

A handwritten signature in black ink, appearing to read "Richard L. Abbott", is written over a horizontal line.

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