

P. LLOYD SHEATS, DAVID E.  
SHEATS, SHAYN M. SHEATS, and  
CAROL K. SHEATS.

V.

*Civil Action No. 7053-VCG*

Respondents.

Date Submitted: February 1, 2013

Date Decided: April 17, 2013

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Dover, Delaware, Attorneys for the Petitioners.

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GLASSCOCK, Vice Chancellor

In Kent County, new residential construction under approved subdivision plans must commence within five years of the County’s approval, or the approval lapses. A county ordinance ameliorates this rule by allowing developers, in certain situations, to request that the County reapprove expiring subdivision plans and thereby obtain another five years to begin construction. The Petitioners here received approval for their development in October, 2006. Development of the property has not commenced. Unless the five-year period has been reset, the approval has lapsed. Because I find that, under Kent County Code Section 187-14(H) the approval and recording of an amended subdivision plan started the five-year commencement period anew, the County’s expungement of the amended plan was premature and invalid. Accordingly, the Petitioners are entitled to a declaratory judgment reinstating the amended plan, with a deadline of March 2, 2016—five years from the approval of the second development plan—to commence construction.

## **I. BACKGROUND<sup>1</sup>**

Petitioners Lloyd, David, Sharyn, and Carol Sheats own a parcel of land—approximately 272 acres—in Kent County, near Smyrna.<sup>2</sup> That property was divided into 213 residential dwelling lots and designated as the Willow Creek Subdivision (the “Subdivision”) by virtue of a subdivision plan (the “First

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<sup>1</sup> The pages in the stipulated record in this case have been stamped WC-1 through WC-377.

<sup>2</sup> WC-84.

Subdivision Plan”) recorded on October 20, 2006 in the Office of the Kent County Recorder of Deeds.<sup>3</sup> The First Subdivision Plan provided for the subdivision to have an on-site community septic system for wastewater treatment and disposal.<sup>4</sup>

Shortly after the First Subdivision Plan was officially recorded, the Sheats sought to redesign the plan, such that it would connect to the Kent County public sewer system, rather than using an on-site septic system.<sup>5</sup> On November 2, 2006, the Sheats requested that the Subdivision be annexed into the Kent County public sewer system.<sup>6</sup> By Jan. 30, 2007, various County administrative bodies (the Kent Conservation District, Kent County Department of Public Works, and the Levy Court) had completed the necessary public hearings, studies, agreements, and approvals, which culminated in the Levy Court’s approval of the application for public sewer service for the Sheats property.<sup>7</sup>

On March 27, 2007, after receiving approval for the Subdivision to connect to the County’s sewer system, the Sheats submitted a revised plan for the Subdivision (the “Second Subdivision Plan”) to the Kent County Department of Planning Services (the “Planning Department”).<sup>8</sup> The Second Subdivision Plan included the changes to the planned sewer system as well as other changes to the

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<sup>3</sup> WC-82, 84, 349-362.

<sup>4</sup> WC-46.

<sup>5</sup> WC-84.

<sup>6</sup> WC-83-95.

<sup>7</sup> The resolution approving the application was Resolution No. 2762. WC-116-119.

<sup>8</sup> WC-122-123.

size and location of the residential lots, public roads, open spaces, and other features of the plan. The Regional Planning Commission (“RPC”) approved the Second Subdivision Plan on April 12, 2007.<sup>9</sup> The Sheats represent that following that approval, they worked to obtain “letters of no objection” from various county agencies in order to officially record the Second Subdivision Plan.<sup>10</sup>

On October 21, 2010, the Sheats submitted what they thought were all of the required letters of no objection.<sup>11</sup> On November 9, 2010 the Planning Department notified the Sheats that the plan would not be recorded until several items were addressed. Specifically, the Planning Department requested that the Sheats obtain a letter of no objection from Kent County Geographic Information Systems (“GIS”), and that the Sheats include a note in the Second Subdivision Plan that that plan would supersede the First Subdivision Plan.<sup>12</sup>

On November 17, 2010—eight days after sending the Sheats notice of changes it required for approval of the Second Subdivision Plan—the Planning Department sent the Sheats a letter notifying them that the First Subdivision plan would be expunged from the public record unless construction began by November 17, 2011 (5 years from the date of the original recordation of the First Subdivision

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<sup>9</sup> WC-134.

<sup>10</sup> More than three years elapsed between RPC approval of the plan and the date when the Sheats obtained their first letter of no objection.

<sup>11</sup> The letters of no objection included letters from the Kent Conservation District (WC-148, 172), the Office of the State Fire Marshal (WC-171), the Delaware Department of Transportation (WC-167-168), and the Kent County Department of Public Works (WC-173).

<sup>12</sup> WC-178.

Plan).<sup>13</sup> The Sheats responded on December 14, 2010, setting forth their position that the recordation of the Second Subdivision Plan would supersede the First Subdivision Plan, and give them another 5 years to commence construction. On December 22, 2010, the Sheats received a reply from the Planning Department stating that the Second Subdivision Plan was still subject to expiration on October 20, 2011, because the Second Subdivision Plan was not in conformity with existing land-use policies and regulations.<sup>14</sup>

Despite their disagreement with the Planning Department over the true expiration date of the Second Subdivision Plan, the Sheats continued seeking to have the plan approved and recorded. The Sheats worked to comply with the Planning Department's suggested changes to the Second Subdivision Plan as set forth in Department's letter dated November 9. After obtaining the required letter of no objection from GIS, on February 14, 2011, the Sheats submitted copies of the Second Subdivision Plan to the Kent County Recorder of Deeds. On March 2,

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<sup>13</sup> This notice was sent pursuant to Section 187-14(B) of the Kent County Code, which requires that subdivision approval ceases unless construction commences within five years of the date the subdivision was recorded, and Section 187-14(D), which provides that the County must provide notice to landowners one year prior to the expiration of a development plan and again six months prior to the expiration. Kent Cty. C. § 187-14(B), (D).

<sup>14</sup> WC-186. It is unclear why the County indicated that the project would expire in October, rather than November. However, both parties subsequently agreed that the proper date of expiration was November 17, 2011, and it was after that date that the County expunged the Second Subdivision Plan.

2011, the Planning Director approved and signed the Second Subdivision Plan, and the Office of the Recorder of Deeds recorded the Plan.<sup>15</sup>

On May 17, 2011, the Sheats received another notice from the Planning Department that the Second Subdivision Plan would be expunged if the Sheats did not commence construction by November 17, 2011.<sup>16</sup> The Sheats continued to seek and obtain various construction permits during the summer of 2011. However, construction had not commenced as of November 2011. On November 16, 2011, the Planning Department reaffirmed its position that the Second Subdivision Plan was bound by the original expiration date.<sup>17</sup> On November 17, 2011, the Petitioners filed this action, seeking declaratory and injunctive relief against the County. On January 13, 2012, the Planning Director expunged the Second Subdivision Plan from the public land records.<sup>18</sup> The parties submitted cross-motions for summary judgment in September 2012.

## **II. ARGUMENT**

Section 187-14 of the Kent County Code governs the terms by which approved development plans expire.<sup>19</sup> Subsection (B) provides that “[c]onstruction of improvements shown on recorded subdivision plans shall commence within five

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<sup>15</sup> WC-334.

<sup>16</sup> WC-200-203.

<sup>17</sup> WC-215.

<sup>18</sup> WC-216-222.

<sup>19</sup> Kent Cty. C. § 187-14(A).

years of the original recordation date and continue progressing toward completion.”<sup>20</sup> Subsection (H) provides:

Should new plans be submitted, they must receive approval from the [Planning] Department, Regional Planning Commission, and/or Levy Court, as applicable. Once reapproved, subdivision plans may be recorded and shall have the effect of superseding the original record major subdivision plan. The owner/applicant shall then have five years from the date of approval to obtain building permits, commence construction, and progress toward completion.<sup>21</sup>

The sole question before me here is whether Section 187-14(H) applies to the Second Subdivision Plan and extends the expiring construction deadline. If it does, the deadline for the Sheats to commence construction is March 2, 2016, and the County’s premature expungement of the Second Subdivision Plan was invalid.

The Petitioners contend that on its face the Second Subdivision Plan was approved and recorded in accordance with subsection (H). The Sheats point to the fact that at the insistence of the County, the Second Subdivision Plan included an explicit notice that it would supersede the First Subdivision Plan. Furthermore, the Second Subdivision Plan was submitted to and approved by both the Regional Planning Commission and the Planning Department. The County responds by arguing that “new plans” referred to in subsection (H) are those plans submitted in accordance with the procedures outlined in Section 187-14(G)(2). For the reasons that follow, I reject the County’s argument, and I hold that the Second Subdivision

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<sup>20</sup> *Id.* § 187-14(B).

<sup>21</sup> *Id.* § 187-14(H).

plan was submitted, approved, and recorded in accordance with Section 187-14(H) of the Kent County Code, and that the Petitioners now have until March 2, 2016 to commence construction.

Our Supreme Court has recognized that “in the construction of a statute, this Court has established as its standard the search for legislative intent. Where the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls.”<sup>22</sup> Only if the statutory language is ambiguous should a court interpret a statute by looking beyond the text.<sup>23</sup> “A statute is ambiguous if it is reasonably susceptible to different interpretations, or if giving a literal interpretation to the words of the statute would lead to an unreasonable or absurd result that could not have been intended by the legislature.”<sup>24</sup>

Section 187-14, by its terms, is intended to regulate the “expiration of recorded and approved plans [for] major subdivisions.”<sup>25</sup> Each subsection of the ordinance provides specific regulations regarding the terms of the expiration of the County’s approval. As noted above, subsection (B) grants developers five years from the time the project was recorded to begin construction.<sup>26</sup> Subsection (D) requires the County to provide two written notices of expiration to landowners of

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<sup>22</sup> *State v. Cephas*, 637 A.2d 20, 23 (Del. 1994).

<sup>23</sup> *Dennis v. State*, 41 A.3d 391, 393 (Del. 2012).

<sup>24</sup> *Id.*

<sup>25</sup> Kent Cty. C. § 187-14(A).

<sup>26</sup> *Id.* § 187-14(B).

property that is part of an expiring development plan.<sup>27</sup> Subsection G of Section 187-14 provides that landowners who have received notice that their projects will expire can preserve those projects in two different ways:

- (G) 1. The applicant has the opportunity to provide evidence to the [Planning] Department establishing that construction has commenced;
- 2. The applicant may apply to the Department for reapproval of the project for an additional five-year period in accordance with the following procedures . . . .

Subsection (G)(2) then provides that any application for a five-year extension shall be reviewed by the Planning Department for consistency with all current land-use regulations.<sup>28</sup> After reviewing the application, the Planning Department has three options: (1) if the project is entirely consistent with current regulations, the Director of Planning Services can reapprove the project, thereby granting the applicant a new five years to commence construction; (2) if the project requires “minor revisions,” the Director shall provide notice to the landowner of the required revisions, and may approve the project once the revisions are complete, thereby granting the applicant another five years to commence construction on the project; or (3) if the project requires “considerable revision to an extent that would change the scope of the project,” then the applicant must start from scratch, submitting a “new application in accordance with Articles IV, V, and VI of this

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<sup>27</sup> *Id.* § 187-14(D).

<sup>28</sup> *Id.* § 187-14(G)(2)(a).

chapter.”<sup>29</sup> The parties agree that the Plaintiffs did not apply for reapproval under subsection (G) and that the Second Subdivision Plan does not comply with current zoning regulations.

The County’s argument that the phrase “new plans” in subsection (H) refers *only* to those plans submitted in accordance with subsection (G)(2) is at odds with the structure of Section 187-14 and the plain language of subsection (H). The structure of the ordinance is particularly illustrative. Subsection (G) sets forth the process by which a landowner can apply for a five-year extension of a soon-to-expire development plan and the various ways in which the Planning Department can respond to that application. Subsection (G)(3) clarifies subsection (G)(2) by providing that “all of the *above-referenced* reviews, determinations, and reapprovals must be completed prior to the expiration of the five year period.”<sup>30</sup> By its placement as a subpart of subsection (G) and by its explicit limitation to “above-referenced” reviews, the Levy Court in subsection (G)(3) clearly expressed its intent that the reapprovals outlined in subsection (G)(2) would be bound by the initial five-year deadline.

The lack of any similar limitation on subsection (H) indicates that it has a broader application than the County now contends. Subsection (H) stands as its own subsection, not as a part of subsection (G), which suggests that “new plans”

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<sup>29</sup> *Id.* § 187-14(G)(2)(c)-(e).

<sup>30</sup> *Id.* § 187-14(G)(3) (emphasis added).

may encompass more than just those plans submitted in response to an administrative review under subsection (G)(2). Indeed, the facts of this case illustrate that a developer in some instances may submit new plans on its own initiative, before, and independent of, receiving notice that its plans are set to expire within a year. In the Sheats' case, they submitted a new plan in order to connect their planned subdivision to the County's sewer system, rather than rely on a community septic system.<sup>31</sup> Because subsection (H) provides that "[o]nce reapproved . . . subdivision plans . . . have the effect of *superseding* the original . . . plan" and that "[t]he owner/applicant shall then have five years from the date of approval to . . . commence construction" I find that the Second Subdivision Plan does not expire until March 2, 2016, and that the County's expungement of the Second Subdivision was premature and invalid.

The County argues that the Levy Court could not have intended this result, and that Section 187-14(H) is therefore ambiguous and should be interpreted in light of other evidence beyond the text itself. The County believes that the procedures set forth in Section 187-14(G) are the *only* means by which an applicant can extend the expiration date of a development project. The County

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<sup>31</sup> The Sheats concede that subsection (G) does not govern the Second Subdivision Plan, because the Sheats had not "been notified that their project [was] subject to expiration" at the time they submitted the Second Subdivision Plan, and because they never submitted an application for reapproval in accordance with the procedures outlined in subsection (G)(2). *Id.* § 187-14(G). Notwithstanding the fact that the Sheats made no application for reapproval and an extension of their five-year deadline under subsection (G), they did submit and obtain approval of a new plan, the Second Subdivision Plan.

contends that the purpose of the regulations is to ensure that unbuilt subdivisions are compliant with current land-use regulations, including density and other zoning restrictions, before they are reapproved. Because the Levy Court could not have intended that Section 187-14(H) allow developers to do an end-run around the reapproval requirements of subsection (G), according to the County, I should look to extrinsic evidence, in particular the County's own interpretation of Section 187-14, in interpreting the ordinance.

Though I understand the County's concerns, I cannot conclude that the statute is ambiguous. It is true that I may consider a statute ambiguous where "giving a literal interpretation to words of the statute would lead to . . . unreasonable or absurd consequences."<sup>32</sup> However, a literal interpretation of Section 187-14, though perhaps undesirable from the County's perspective, is neither absurd nor unreasonable. Here, the Plaintiffs requested reapproval of a development approximately three years *before* receiving notice of expiration. The Plaintiffs undertook an extensive reapproval process, obtaining reapproval from the Regional Planning Commission, letters of no-action from various administrative agencies, and reapproval from the Planning Department in March 2011.

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<sup>32</sup> *Coastal Barge Corp. v. Coastal Zone Indus. Ctrl. Bd.*, 492 A.2d 1242, 1246 (Del. 1985).

The County, has failed to explain why it approved the Second Subdivision Plan (which was not filed under, nor in compliance with, subsection (G)), if in its view reapproval under subsection (H) required resubmission under subsection (G). The County argues in its briefing that the Director of the Planning Department may administratively approve minor revisions to final plans after the plans have been recorded, and that these administrative reapprovals do not trigger an extension of the plan's expiration date under subsection (H) of Section 187-14.<sup>33</sup> However, the only support the County cites for this argument is an affidavit from Sarah Keifer, the Director of the Planning Department.<sup>34</sup> The Keifer Affidavit simply describes the Department's position that the Sheats' Second Subdivision Plan was not a new plan under subsection H.<sup>35</sup> Neither the Keifer Affidavit nor the County's brief provide a legal basis for that position.

To the extent the County is concerned that developers will violate the spirit of Section 187-14 by manipulating the reapproval process under subsection (H), the County is free to amend the ordinance. What the County may not successfully do is approve a new subdivision plan—while requiring the developer to indicate that the new plan supersedes an old plan—and then ask me to interpret Section 187-14(H) in a manner inconsistent with its plain meaning.

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<sup>33</sup> Resp.'s Op. Br. Opp. Mot. Summ. J. 4.

<sup>34</sup> *Id.*, Ex. B.

<sup>35</sup> *Id.*, Ex. B ¶¶ 3-8.

### **III. CONCLUSION**

For the foregoing reasons, the Petitioner's Motion for Summary Judgment is GRANTED and the Respondent's Motion for Summary Judgment is DENIED.