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Case No. 3347-VCG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BRUCE E. OSBORNE; GRUBB PROPERTY, LLC; FIENI ENTERPRISES, LLC; HARVIN PARTNERS, LLC; E-TEGOS LLC; CARRIAGE HOUSE ASSOCIATES, LLC; WILLIAM D. SHELLADY, INC.; PHYLLIS AND LEONOARD C. PLOENER TRUST; LEE TIBBET and SHIRLEY TIBBET,	)	C.A. No. 3347-VCG
Plaintiffs,	)	
v.	)	
THE CITY OF WILMINGTON, a municipal corporation,	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: August 22, 2011
Decided: October 31, 2011

Richard L. Abbott, of ABBOTT LAW FIRM, Hockessin, Delaware, Attorney for Plaintiffs.

Andrea J.F. Rhen, Richard L. Emge, of CITY OF WILMINGTON LAW DEPARTMENT, Wilmington, Delaware, Attorneys for Defendant.

GLASSCOCK, Vice Chancellor.

This case involves the adoption and implementation of a redevelopment plan in South Wilmington known as the South Walnut Street Urban Renewal Plan (the "SWURP"). Among other things, the SWURP outlines broad redevelopment objectives—along with more specific building guidelines that property owners must abide by—designed to promote development on the South Wilmington riverfront. The Plaintiffs, property owners in the SWURP area, seek a permanent injunction and declaratory judgment finding that the SWURP and ordinances adopting the 2007 and 2009 amendments to the SWURP (the "SWURP Ordinances") are legally invalid, and prohibiting their application. The Plaintiffs allege that the SWURP imposes additional use restrictions on the land and buildings located in the SWURP area above and beyond what is required by the underlying zoning categories applicable to the owners' properties—predominantly W-4 (Waterfront Residential and Commercial Mixed Use) and M-1 (Light Manufacturing). Since the SWURP occupies only a portion of the Wilmington W-4 and M-1 districts, the Plaintiffs argue that subjecting this area to the SWURP amounts to imposition of an unlawful zoning overlay and must be declared legally invalid under the uniformity requirement of 22 *Del. C.* §302, which prohibits zoning restrictions from varying within districts.

The Defendant, the City of Wilmington, argues as a preliminary matter that

there is no justiciable controversy here because (1) the Plaintiffs do not have standing, as they have not suffered any injury in fact, (2) the Plaintiffs' claims are not ripe, and (3) the Plaintiffs have not exhausted their judicial and administrative remedies, as they have never applied for a building permit or variance under the SWURP. Moreover, even if there were a justiciable controversy, according to the City, the SWURP as amended in 2009 does not impose unlawful overlay zoning. There are no material facts in dispute, and the parties have cross-moved for summary judgment.

This case is the rarest of birds: both sides clarified their positions at oral argument in a way that all but mooted the controversy before me. For the reasons that follow, I conclude that—assuming that a justiciable controversy exists—the SWURP does not impose unlawful overlay zoning. Summary judgment is therefore granted in favor of the Defendant, and the Plaintiffs' claims are dismissed without prejudice.

I. FACTUAL BACKGROUND

The SWURP and the various ordinances adopting its amendments over the years have a long and involved history, much of which does not affect the outcome of this case. Thus, although the parties spill much ink detailing the history of the SWURP and its amendments, for purposes of this Opinion, I think it is sufficient to

state that the original complaint focused heavily on the validity of the eminent domain provisions of the SWURP, which have since been removed. Therefore, I will only briefly address the SWURP's history in the context of the procedural history of this litigation before turning to the relevant (and current) provisions of the SWURP that are material to my decision here—that is, the SWURP as amended in 2009.

A. Procedural History

An urban redevelopment plan was first adopted for the SWURP area in 1969, and after several earlier amendments (e.g., 1971, 1990, 2003), the City of Wilmington amended the SWURP in 2007.[1] In response to these amendments, the Plaintiffs filed their initial complaint in November 2007, alleging that the revised SWURP was invalid on several grounds, mostly relating to the threat of a government taking.[2] In January 2009, the Delaware legislature passed Senate Bill 7, which Governor Markell signed into law in April 2009. Senate Bill 7, codified at

[1] Again, the specifics of the amendments are essentially inconsequential to the outcome of this Opinion, as most of the offending provisions were removed later on. For the sake of completeness, though, the Plaintiffs' main issue with the 2007 amendments was with the addition of certain parcels of land—including the Plaintiffs' properties—onto a land acquisition list. A public notice was sent out to all affected property owners warning them that the City may be able to use its condemnation powers as redevelopment authority, so long as the acquisition of the properties was in conformity with the goals of the SWURP.

[2] The Plaintiffs' grounds for attacking the SWURP were (1) that there was no evidence or finding of blight; (2) the SWURP was in conflict with the City's comprehensive development plans, (3) the SWURP was unconstitutional on its face under the Takings Clause for lack of "need," and (4) the SWURP constituted illegal overlay zoning.

29 *Del C.* § 9501A(c), limited the use of eminent domain to specifically defined public uses and changed the standard for acquiring property by eminent domain. It also mooted all but one of the Plaintiffs' initial grounds in the complaint: their claim that the SWURP constituted an illegal zoning overlay. In August 2009, the City adopted amendments to the SWURP in light of Senate Bill 7. The parties stipulated to dismiss the mooted claims without prejudice, and the Plaintiffs amended their complaint. The amended complaint challenges the SWURP on an additional ground: the City's lack of authority to adopt certain of its provisions. All that remains before me now is whether the SWURP constitutes unlawful overlay zoning and the related claim as to whether the City of Wilmington lacked authority to adopt the SWURP restrictions, which the Plaintiffs characterize as zoning restrictions, under the Slum Clearance and Redevelopment Authority ("SCAR"), which, according to the plaintiffs, does not authorize zoning changes.[3] Thus, the substantive issue is whether the challenged provisions of the SWURP are, in fact, zoning provisions.

B. The SWURP

The SCAR grants the City authority to adopt voluntary or compulsory programs for the "repair and rehabilitation of buildings and improvements"[4] or to

[3] *See* 31 *Del. C.* § 4501–4543.
[4] 31 *Del. C.* § 4516(12).

adopt "prospective requirements for rehabilitation and improvement of property"[5] in a redevelopment area. The City adopted the SWURP under authority of the SCAR.

The SWURP's objectives comply with the SCAR. Section I.B. outlines the SWURP's broad objectives—"promoting environmentally, economically and socially sustainable practices in the ongoing development of South Wilmington."[6] Those are the SWURP's "overall objectives."[7] Beyond that broad mandate, § I.B. contains several sub-sections listing more specific objectives of the SWURP. These include:

> (A) To provide substantial employment opportunities to South Wilmington and the City of Wilmington through the development of office, residential and commercial mixed use neighborhoods and an environmentally sustainable business park along Garashces Lane.
>
> (B) To provide a relocation resource for commercial and business operations required to move from predominately residential urban renewal areas because of their incompatibility with residential use.
>
> (C) To prevent blighting effects from the emission of sound, vibration, heat, glare, smoke, fumes, odor, dust or other discharge.
>
> (D) To eliminate conditions of blight and to encourage waterfront commercial and residential mixed uses with limited light manufacturing uses that are in compliance with those uses defined in the proposed Land Use Plan of the South Wilmington Comprehensive Development Plan.

[5] 31 *Del. C.* § 4520(b).
[6] SWURP § I.B.
[7] Summ. J. Arg. Tr. 12, Aug. 22, 2011 (Rhen).

(E) To provide for the reuse of unimproved, un-maintained vacant land and its return to productive use.

(F) To encourage new commercial development and the upgrading of existing uses within commercially zoned districts in the urban renewal project area.

(G) [To e]ncourage retail and service commercial development to support quality residential and commercial mixed use developments along the Christina River, particularly along 'A' Street, Market Street, and Walnut Street as well as in adjacent communities.

(H) To develop a street network and public easement design that supports dense, mixed use neighborhoods by creating access, pedestrian-friendly environments, sustainable stormwater management and optimal parcel configurations.

(I) To provide an open space network that encourages management of stormwater at a neighborhood level rather than at the parcel level, in order to provide public benefits including: reduced inputs to combined sewer systems, protection and enhancement of existing wetlands and flood protection and enhanced function and connectivity of the overall recreation and hydrologic network, including provision of a parks and trail network along the Christina riverfront, wetland areas and connecting corridors.

(J) To encourage environmentally low impact, safe, energy and resource-efficient design and construction techniques.

(K) [T]o achiev[e] equitable development in South Wilmington, in order to address the issues of gentrification, displacement and social and economic inequities.

(L) To fully address the drainage and stormwater management issues in South Wilmington in a timely manner in order to permit South Wilmington to realize its full redevelopment potential through the implementation of the South Walnut Street Urban Renewal Plan.

Section III of the SWURP, entitled "Zoning," describes current zoning, land use provisions, and building requirements, outlines criteria for review of a development proposal, and lays out specific design guidelines. Section III.C. sets forth a list of specific building guidelines, including things such as orientation of doorways and architectural details.

The Plaintiffs made clear at oral argument that they concede that the design guidelines in § III.C. do not constitute zoning restrictions, since they do not limit the use of the property.[8] Plaintiffs' objections, as clarified, involve § III.A.2)b., which provides that "[a]ll plans for new construction, exterior rehabilitation, demolition, or change in use of any building on any property in the [SWURP] Area shall be submitted to the Department of Licenses and Inspections, for referral to and review by the Department of Planning and Development," and that if that Department finds that the proposed plans are "consistent with the objectives stated in § I.B. and the design guidelines found in § III.C., the Commissioner of Licenses and Inspection" shall direct that a permit be issued. However, if the Department finds that the proposed plans are inconsistent with the SWURP, "the Commissioner . . . shall deny the issuance of a permit" for the desired action. Plaintiffs then point to Figure 4 attached to § II.B of the SWURP, which illustrates

[8] *See* Summ. J. Arg. Tr. 36-37 (Abbott) ("[W]e're not objecting to Section III.C., the design guidelines. They're not at issue in terms of our challenge.").

that the Plaintiffs' properties are within an area designated for "mixed use." While mixed use is not defined in the SWURP, § I.B.(G) explains that a plan objective of the SWURP is to "[e]ncourage retail and service commercial development to support quality residential and commercial mixed use developments." From this less-than-pellucid language, the Plaintiffs draw the conclusion that mixed use includes only residential and retail use—that is, not the commercial use to which the Plaintiffs currently put their land. The Plaintiffs' syllogism runs thusly: Any new construction, rehabilitation, or change in use of a property in the SWURP requires a finding from the Department of Planning and Development that the proposed action is consistent with the SWURP, without which finding the Commissioner of Licenses and Inspections is mandated to deny the permit; the Plaintiffs' properties are not "mixed use," so not consistent with the SWURP; therefore even a request for permission to put a new roof on one of Plaintiffs' commercial buildings must be denied. In effect, the Plaintiffs argue that the SWURP limits their properties to mixed use and that this limitation on use amounts to a rezoning. Thus, the Plaintiffs conclude, because the restriction of property to "mixed use" does not occur in the underlying zoning applicable to at least some of the Plaintiffs' properties, the new "mixed use" zoning is an impermissible overlay on these underlying zoning districts, and in any event this purported exercise in

zoning in the SWURP is not authorized under the SCAR.

II. CONTENTIONS OF THE PARTIES

As described above, the Plaintiffs contend that § III.A.2)b. of the SWURP *mandates* that the L&I Commissioner deny any permit for uses inconsistent with the SWURP's "*supra*-zoning" restrictions.[9] According to the Plaintiffs, such a use restriction is both an illegal zoning overlay and beyond the authority of the City as conferred by the SCAR.

The City, on the other hand, argues that the Plaintiffs cannot demonstrate the existence of any justiciable controversy for three separate but related reasons: standing, ripeness, and failure to exhaust administrative remedies. First, the City argues that the Plaintiffs lack standing because they have not suffered an injury in fact as a result of the alleged overlay zoning. Specifically, the City argues that the 2007 and 2009 amendments to the SWURP did not change the zoning classification applicable to the Plaintiffs' properties, and the Plaintiffs have not challenged the underlying requirements of the City's zoning code. In addition, the Plaintiffs' current uses of their parcels are allowed under the code,[10] and the City has not denied the Plaintiffs' right to continue the non-conforming uses of their

[9] Pls.' Answering Br. at 13.

[10] They are either allowed as a matter of right or grandfathered in as nonconforming uses under the zoning code. *See* Def.'s Opening Br. at 18 (citing Am. Compl. ¶¶ 1-10, 47, A-160-162, 170; *Wilmington City Code* §§ 48-36(b), 48-38(b), 48-72, A-511, 513, 518-519).

properties. Accordingly, the SWURP would only be triggered with respect to the Plaintiffs' parcels if one of the Plaintiffs submitted an application for a permit for "new construction, exterior rehabilitation, demolition, or change in use of any building" on their property.[11] None of the Plaintiffs has applied for such a permit, and according to the City, the Plaintiffs are incorrect that the SWURP mandates denial of a permit otherwise obtainable pursuant to the underlying zoning. Thus, says the City, the Plaintiffs have suffered no injury in fact, and therefore they lack standing.

Second, the City argues that the Plaintiffs' claims are not ripe for adjudication because none of the Plaintiffs have applied for a permit or zoning variance to alter the existing uses of their property. Third, and relatedly, because the Plaintiffs have not applied for a permit, and it is "entirely possible" that the City would grant the Plaintiffs' permit, the City argues that the Plaintiffs have not exhausted their administrative remedies.[12] Specifically, the City contends, if the Plaintiffs apply for a permit or variance and are denied, they could then seek judicial review of that decision in the Delaware Superior Court or file a new complaint in this Court. Finally, the City argues that even if the Plaintiffs can demonstrate a justiciable controversy, the SWURP neither imposes additional use

[11] *Id.* (quoting SWURP § III.A.2)b.).
[12] Def.'s Opening Br. at 23.

restrictions nor mandates denial of a permit, and that it therefore does not constitute unlawful overlay zoning and does not exceed the authority extended to the City under the SCAR.

The Plaintiffs argue that they have suffered an immediate injury: because their businesses are not of the type permitted by the SWURP (mixed use), their zoning has been changed illegally to their detriment, and they have suffered an immediate diminution of their property rights. The Plaintiffs thus argue that the issue is ripe for adjudication. In other words, if the Plaintiffs are correct that the SWURP imposes an illegal zoning overlay mandating a loss of their rights to use their property as allowed by the underlying zoning districts, then the Plaintiffs have cleared their procedural hurdles, and they are entitled to a decision on the merits. If the City is correct that no additional zoning restrictions have been imposed—that is, if the City is right on the merits—the procedural defects it alleges in this case are inconsequential. Therefore, for purposes of this Opinion only, I will assume justiciability, and turn directly to the merits of the case.

III. ANALYSIS

A. Legal Standard

Under Court of Chancery Rule 56(h), where, as here, "the parties have filed cross motions for summary judgment and have not presented argument to the

Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[13] I shall address the cross-motions accordingly, taking into account the parties' submissions and oral arguments in support of the motions.

B. The SWURP Does Not Constitute an Illegal Overlay Zoning

The outcome of this decision turns in large part on whether the SWURP does, in fact, impose *use* restrictions over and above the restrictions imposed by the underlying zoning categories on the properties located in the SWURP area.[14] Both parties are in agreement that if the Plaintiffs are correct that the SWURP imposes restrictions that prohibit uses permitted by the underlying zoning, the SWURP would constitute unlawful overlay zoning.

The Plaintiffs are not objecting to § III.C. of the SWURP, the design guidelines. The Plaintiffs concede that, "based on the sections that the City relies

[13] Ct. Ch. R. 56(h).

[14] That is, restrictions on the actual uses of land allowed on the property as opposed to additional restrictions on building code or design-type guidelines, which would not, as the Plaintiffs concede, amount to illegal overlay zoning. *See In re Kent County Adequate Pub. Facilities Ordinances Litig.*, 2009 WL 445611, at *12 (Del. Ch. Feb. 11, 2009) (concluding that because the statutes at issue "[did] not result in an actual or effective change in the use to which an owner may put his property . . . [they] did not constitute a 'zoning change'"); *Upfront Enterprises, LLC v. Kent County Levy Court*, 2007 WL 1862709, at *4 (Del. Ch. June 20, 2007) (holding that the imposition of a moratorium on the acceptance of certain land use approvals constituted a zoning regulation); *Farmers for Fairness v. Kent County*, 2007 WL 1651931, at *6 (Del. Ch. May 25, 2007) (finding that Kent County implemented zoning changes when it provided for different use restrictions between identically zoned areas).

on and that we've cited in our briefs, [ ] you can adopt design guidelines. That doesn't change the use of the land. It . . . changes the condition. All of the . . . sections that the City has cited from the SCAR [ ] permit it to regulate the condition of land and buildings, not the use."[15] Rather, what the Plaintiffs focus their claims on is that "there is nothing in the SCAR that permits restrictions to be imposed on use."[16] The SWURP provides, at § III.A.1), that "[a]ll codes . . . of the City . . . shall be applicable to the renewal of the [SWURP], except in instances where the Current Zoning, Land Use Provisions and Building Requirements of this Urban Renewal Plan are more restrictive, in which case they shall govern." The Plaintiffs' argument (citing § III.A.2)b.) is that any request for development of their property, and even renovation, must be consistent with the objectives of the SWURP, or be denied. Those objectives include, as provided by § I.B.(G), "[e]ncourag[ing] retail and commercial development to support quality residential and commercial mixed use development." Since, according to the Plaintiffs, this is a use restriction more stringent than provided by the underlying zoning, it amounts to an illegal zoning overlay under the uniformity requirement of 22 *Del. C.* § 302.[17]

The Plaintiffs argue that the SWURP has clearly imposed use restrictions

[15] Summ. J. Arg. Tr. 37 (Abbott).
[16] *Id.*
[17] "All . . . regulations shall be uniform for each class or kind of buildings throughout each district but the regulations in [one] district may differ from those in other districts." 22 *Del. C.* § 302.

because "we know with absolute certainty, given the mandatory language contained in the SWURP, what it will lead to. . . . Permit denied."[18] But the language of §§ I.B.(G) and III.A.2)b. is hardly so clear. The language that the Plaintiffs point to—"encouraging" commercial and residential mixed use[19]—does not say that, should the Plaintiffs apply for building permits or variances, those permits would necessarily be denied. The language does not say that uses other than commercial and residential mixed uses are not permitted. Rather, the SWURP merely *encourages* mixed use development, as part of the broader goal of "promoting environmentally, economically and socially sustainable practices in the ongoing development of South Wilmington."[20] The language cited is so vague that it may not be legally sufficient (even if otherwise enforceable) as a ground to deny a use permit.

More importantly, the City itself has conceded that it will not use the language of § I.B.(G) to impose use restrictions beyond those imposed by the underlying zoning. At oral argument, counsel for the City explained:

> Our position . . . is that if [the use is] allowed under the zoning code . . . then the use will be allowed . . . under the SWURP analysis[,] and [we] will only review it for compliance with the objectives and the

[18] Summ. J. Arg. Tr. 35 (Abbott). *See also id.* at 42 ("[W]e know with certainty that there will be fewer uses permitted. Regardless of how [the SWURP] language is applied, it will be less broad than the underlying zoning. So under those circumstances, game over.").
[19] *See* SWURP § I.B.(G).
[20] SWURP § I.B.

> design guidelines. So . . . [if a use] was allowed under the zoning code, we couldn't then rely on subsection (G) . . . to deny the expansion . . . in isolation. We could not. We would have to be bound by . . . the determination under the zoning code.[21]

Moreover, if the Zoning Board of Adjustment allows the expansion of a nonconforming use, "then the planning department couldn't subsequently bar the expansion under the SWURP solely on the basis of the use."[22] That, to me, makes it clear that the City does *not* interpret the SWURP's provisions as imposing use restrictions on the Plaintiffs' properties, in which case (as the Plaintiffs agreed at oral argument)[23] the restrictions do not constitute illegal overlay zoning. The City is bound by its representations before this Court, which I find consistent with a fair reading of the SWURP.[24] Since the City has conceded that the underlying zoning will control permitting decisions based on the *use* of the Plaintiffs' properties, the

[21] Summ. J. Arg. Tr. 82 (Rhen).
[22] *Id.*
[23] *See* Summ. J. Arg. Tr. 91 (Abbott) ("If the Court in the end determines no, there's no way that I.B.(G) and the related provisions can be relied upon to impose use restrictions, that's acceptable, too.").
[24] Judicial estoppel would preclude the City from arguing in a later proceeding that the SWURP imposes use restrictions. "Judicial estoppel acts to preclude a party from asserting a position inconsistent with a position previously taken in the same or earlier legal proceeding." *See Motorola Inc. v. Amkor Technology, Inc.*, 958 A.2d 852, 859 (Del. 2008). Although commonly used to prevent a party from "establish[ing] an inconsistent or different cause of action arising out of the same occurrence, . . . judicial estoppel also prevents a litigant from advancing an argument that contradicts a position previously taken that the court was persuaded to accept as the basis for its ruling." *I.d.* at 860. I have dismissed this matter without prejudice to allow for a situation, which I in no way anticipate, where the City's enforcement does not comport with its representations in briefing and at oral argument.

SWURP cannot constitute an illegal zoning overlay.[25]

D. The City Had Authority to Adopt the SWURP Regulations

Finally, the Plaintiffs argue that although the SCAR permits the city to regulate the condition of land and buildings, it does not permit the city to adopt *use* restrictions supplementing the zoning restrictions applicable to the Plaintiffs' properties. Because I have already determined, based upon a fair reading of the language of the SWURP and upon the City's representations both in its motion papers and at oral argument,[26] that the SWURP is not intended to be a use restriction on the Plaintiffs' properties, the Plaintiffs' argument that the City lacked authority to adopt the SWURP restrictions under the SCAR is without merit.

IV. CONCLUSION

For the foregoing reasons, summary judgment is granted in favor of the Defendant, and the Plaintiffs' claims are dismissed without prejudice.

An order has been entered consistent with this opinion.

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[25] As noted above, judicial estoppel will prevent the City from asserting in a later proceeding that the SWURP gives it authority independent from the underlying zoning regulations to issue permitting decisions that restrict land use. As the Plaintiffs conceded at oral argument, however, the City has the authority to make permitting decisions based on the objectives and design guidelines of the SWURP so long as those decisions do not change a property's permitted use. Summ. J. Arg. Tr. 37 (Abbott). *See supra* note 14.

[26] For example, counsel for the City stated at oral argument that the City's "position has been in the briefing . . . that the zoning code controls the permitted uses. And we're not trying to, through Section I.B.(G), to restrict the permitted uses inconsistently with what's set forth in the zoning code." Summ. J. Arg. Tr. 89 (Rhen).