



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 OPENING
SUPPLEMENTAL MEMORANDUM**

ABBOTT LAW FIRM

/s/ Richard L. Abbott

Richard L. Abbott, Esquire (#2712)
724 Yorklyn Road, Suite 240
Hockessin, DE 19707
(302) 489-2529

Attorneys for Defendant-Below/
Appellant

Dated: January 23, 2014

Discussion Regarding Remand Questions

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

This Court's November 14, 2013 Order ("Remand Order") summarized the position of Appellant Donald L. Pellicone ("Pellicone") regarding the failure of Appellee New Castle County ("County") to have approved an Ordinance or Resolution establishing satisfaction of the criteria necessary to authorize a County project under New Castle County Code ("Code") Article 7, Chapter 12. The Trial Court's "Memorandum Opinion Regarding Remand For Further Consideration" (the "Remand Opinion" or "RO") answered the question of whether the Code establishes procedural requirements in the affirmative. Pellicone agrees.

- b) If so, were those procedural requirements adhered to? **NO**

The Remand Opinion incorrectly asserts that the County followed the approval procedure required by Article 7. And the Trial Court skipped the question of whether all "qualification criteria" under § 12.07.001 were satisfied, instead conclusorily stating that they were. *Id.* Because the County failed to establish that the provisions of §§ 12.07.001 and 12.07.002 were followed, the Court should reverse.

i. The County Did Not Meet 4 Code
Criteria To Advance A Project To The
Final Step In The Approval Procedure

For starters, § 12.07.001C. requires that “[i]mprovements made with bond revenues must have a useful life of at least ten (10) years.” The County contends that it expended bond revenues as a part of its purported project. *See* A-366 and A-420 to 422. But the County did not present any evidence that the 12.07.001C. criteria was met.

Next, § 12.07.002 requires County Council approval of an “improvement” project: “every effort should be made with a minimal expenditure, to determine if County Council will approve the project, before any further study or expenditure.” The procedural steps that § 12.07.002A. requires prior to final County Council approval are: 1) a watercourse study and map of the floodplain and wetlands; 2) preparation of preliminary construction plans depicting the improvements; 3) development of estimated improvement costs; 4) a public hearing with adjacent property owners to solicit comments on the study and improvements; and 5) an informal meeting with County Council to reach consensus on proceeding with further project development and determining whether to proceed or abandon the proposed improvements.

In the case at bar, the Army Corps, not the County, conducted most of the steps. The Army Corps: 1) performed the study regarding Little Mill Creek;

2) prepared the construction plans for the Federal Flood Control Project; and
3) developed the cost estimate for the Federal Flood Control Project. A-14 *et seq.*, A-115 *et seq.*, and A-128 *et seq.* No evidence exists that these documents were presented to or approved by County Council. Since the procedural requisites of § 12.07.002 were not followed, the Federal Flood Control Project cannot constitute a County project as a matter of law.

ii. The Final Procedural Step, Council
Approval, Was Not Completed

More importantly, County Council did not ever approve a Resolution or Ordinance expressly authorizing a County flood control project. Pursuant to 9 *Del. C.* § 1151, “[a]ll actions of the County Council which shall have the force of law shall be by ordinance.” And County Council Rule No. 2 provides that the only other means by which Council may express its intent is via Resolution. *See* Exhibit A attached. No County Council legislative enactment provides that the procedural steps required by Code § 12.07.002 were satisfied or that formal approval of a County project was granted. Thus, no County project legally exists.

iii. The Trial Court Wrongly Attributes
Federal Actions To The County, And
Relies Upon County Fiat And Disputed
Facts

The Remand Opinion asserts that the County developed a study with respect to the Federal Flood Control Project. RO at 11. Not so. Instead, only the Army Corps studied the Little Mill Creek. A-14 *et seq.* And in New Castle County, the floodplain is established by maps prepared and/or approved by the Federal Emergency Management Agency (FEMA), not the County. Code § 40.10.310 (attached as Exhibit B). Thus, the County did not satisfy the procedural steps required by Code § 12.07.002A.1.

Additionally, the Remand Opinion attempts to bootstrap the County into the Federal Flood Control Project via the red herring Little Mill Creek Flood Abatement Committee. RO at 11-12. The Army Corps is not part of the Committee, which is only an advisory group with no legal impact on the Federal Flood Control Project. A-350, A-451, and A-321 to 323. And the Trial Court's reliance upon a County powerpoint presentation merely regurgitates the County's *ipse dixit*. RO at 11, n.10 and 12, n.15, and A-461 to 471. No objective evidence exists in the record to prove that the County performed a flood study or prepared construction cost estimates. Thus, the Trial Court is off base in all of these respects.

Lastly, the Remand Opinion's reliance upon Affidavit statements and deposition testimony of County employee Anthony Schiavi is legally infirm. They were disputed by Pellicone. AR-1 *et seq.*, A-198 *et seq.*, and A-203 *et seq.* And Schiavi's statements were rebutted by the documents which established the Army Corps prepared all of the studies, plans, etc. A-14, A-88 *et seq.*, A-115 *et seq.*, A-122 *et seq.*, A-128 *et seq.*, A-165, and A-432. Since the Trial Court declined to conduct an evidentiary hearing, it could not judge the credibility of the witnesses and act as a fact-finder. Schiavi's contested assertions are not a valid basis for decision.

- c) Can the Federal Flood Control Project legally constitute a County project? NO

Rather than directly responding to the remand question posed by this Court, the Remand Opinion goes off on a tangent into a further discussion of the alleged dichotomy between Article 6 and 7 of Code Chapter 12. at 13-17. Pellicone believes the Court intended a broader-based question of how the County could be legally deemed to be part of the Federal Flood Control Project. Regardless, the Remand Opinion misses the mark.

- i. Articles 6 & 7 Should Be Read Together,
Not In Isolation

Articles 6 and 7 must be read in *pari materia*, such that Article 7 on watercourse "improvements" is subject to the limitations contained in Article 6

on watercourse “maintenance.” *See Richardson v. Bd. of Cosmetology etc.*, 69 A.3d 353, 357 (Del. 2013)(en Banc)(The well settled rule of statutory construction known as the doctrine of *in pari materia* requires that “related statutes must be read together rather than in isolation... .”) Indeed, § 12.06.002 sets the maintenance objective of keeping watercourses “open and free flowing to prevent, to the extent possible, flooding that will cause serious personal harm or significant property and/or structural damage.” (emphasis added). Similarly, improvements to watercourses are intended “[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.” Code § 12.07.001A.1. (emphasis added). Therefore, the Article 6 limitations on watercourses that the County may maintain apply with equal force to Article 7 watercourse improvement projects.

Code §§ 12.06.001C. and D. expressly bar the County from involvement with watercourses under the jurisdiction of the Army Corps, the State of Delaware, or another public agency. It would belie logic and common sense for the County to prohibit “maintenance” of a watercourse like Little Mill Creek that is within the jurisdiction of the Army Corps and DNREC, but permit “improvements” to be made to the same watercourse. Such an absurd result should be avoided by concluding that Article 7 incorporates the related Article

6 limitations. *See Chase Alex, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1152 (Del. 2010)(“Statutes must be construed as a whole, in a way that gives effect to all of their provisions and avoids absurd results.”).

ii. The Project Circa 2013 Is Army Corps
Through And Through, And No Council
Approval Cinches It

The uncontraverted record evidence establishes that the Army Corps: 1) conducted the only flood study; 2) prepared the only construction cost estimates; 3) generated all construction plans; 4) obtained all necessary permits; 5) advertised and awarded bids for construction; 6) agreed to pay all construction costs; and 7) committed to oversee all construction activities. A-14, A-115, A-122, A-128, A-165, A-302, and A-432. The County’s role has been limited to that of a cheerleader and easement acquisition volunteer. Given the exclusive Army Corps legal role in the Federal Flood Control Project, it is impossible as a matter of law for the County to be part of it.

The Remand Opinion also fails to address the lack of any formal County Council approval of a supposed County project as required by Article 7. While the County has voluntarily donated some easement acquisition funding and declared itself to be a local project sponsor, a unilateral act and a self-proclamation does not a County project make. Indeed, the paucity of record evidence regarding a formal County Ordinance or Resolution approving a

County flood control project is dispositive of the remand question. Without valid County Council approval as required by Code § 12.07.002, 9 *Del. C.* § 1151, and County Council Rule No. 2, the Federal Flood Control Project cannot legally constitute a County project in part or whole.

iii. The Project Shifted From State/County
To Army Corps Over Its 23 Year
Gestation

Finally, the Remand Opinion fails to address the historical evolution of the Little Mill Creek project from one initially involving DNREC and the County into a purely Army Corps endeavor. When the General Assembly established the Little Mill Creek Flood Abatement Committee and charged DNREC with the responsibility to obtain local funding to perform a flood control project after the 1989 Elsmere area flood, it was contemplated that the project construction would be funded with State and local monies. A-348 to 350. Thereafter, DNREC entered into an agreement with the Army Corps to conduct the Federal Flood Control study, which was ultimately completed in 1995. A-85 and A-14 *et seq.* That same year, the County proceeded to appropriate capital funds for the Little Mill Creek project contemplated to someday be carried out pursuant to that study. A-351 *et seq.*

By 2009, the project was solely an Army Corps undertaking which had local assistance from DNREC, not the County. A-88. More recently, the Army

Corps was able to secure funding to cover 100% of the cost of construction. A-332. *See also* A-131 (Contract Administration, Payment and Billing: all Army Corps responsibilities). Thus, the County did not have to perform any studies, prepare any cost estimates, or obtain final County Council approval of a County project. It was no longer going to be a County project that necessitated compliance with § 12.07.002. Accordingly, the Federal Flood Control Project *ipso jure* cannot be a County project.

CONCLUSION

Based upon the foregoing, the three (3) remand questions should properly be answered: a) Yes; b) No; and c) No. Numerous Code requisites in Chapter 12 must be followed in order to legally approve a County flood control project. But numerous procedural prerequisites were not satisfied, precluding the possibility that the County has a formal legal role in the Federal Flood Control Project. Instead, the County is a mere gratuitous donor of services and funds. The County's self-proclamation of involvement in the Federal Flood Control Project does not make it so. As a result, the Court should reverse the Trial Court and remand this matter with instructions to dismiss the condemnation action with prejudice.

ABBOTT LAW FIRM



Richard L. Abbott (#2712)
724 Yorklyn Road, Suite 240
Hockessin, DE 19707
(302) 489-2529

Attorneys for Defendant-Below/
Appellant

Dated: January 23, 2014