



**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Submitted: February 15, 2006
Decided: June 8, 2006

Richard L. Abbott, Esquire
Abbott Law Firm LLC
724 Yorklyn Road, Suite 240
Hockessin, DE 19707

Collins J. Seitz, Jr., Esquire
Max B. Walton, Esquire
Connolly Bove Lodge & Hutz LLP
1007 N. Orange Street, 9th Floor
P.O. Box 2207
Wilmington, DE 19899

Re: *Frank E. Acierno v. New Castle County and New
Castle County Department of Land Use*, Civil Action
No. 1173-N

Dear Counsel:

This is Plaintiff Frank E. Acierno's fourth suit concerning the expiration of the Christiana Fashion Center ("Fashion Center") record plan. The New Castle County Department of Land Use ("Department of Land Use")¹ determined that the Fashion Center record plan expired because Acierno failed to obtain a letter of approval from the Delaware Department of Transportation ("DelDOT") as required by the New Castle County Code. Acierno appealed the Department of Land Use's expiration of the record plan to the New Castle County Planning Board ("Planning Board"). The Planning Board upheld the expiration of the record plan. Several suits followed both in this Court and in

¹ The Department of Land Use was formerly known as the Department of Planning.

the Delaware Superior Court. Defendants New Castle County and the Department of Land Use now move for dismissal of this action for want of subject matter jurisdiction and because Acierno has failed to state a claim upon which the Court may grant relief.

For the reasons stated below, the Court concludes that the Statute of Repose, 10 *Del. C.* § 8126(b), divests this Court of subject matter jurisdiction. It is thus unnecessary to reach Defendants' other arguments.

I. BACKGROUND²

A. The Parties

Acierno is the owner of a 185 acre parcel of land identified as New Castle County Tax Parcel 09-03.00-082 and located on the east side of Delaware Route 7 and north of the Christiana River.

New Castle County is a political subdivision of the State of Delaware. The Department of Land Use is a New Castle County Department established and empowered by state law.

B. The Fashion Center Record Plan

In June 1997, Acierno applied to New Castle County for approval and recordation of the Fashion Center record plan. The road to approval is lengthy and required, among other things, submission of all items identified in Section 32-97(d) of the 1995 New

² The facts set forth herein are taken from the Complaint unless otherwise indicated.

Castle County Code (the “1995 County Code”).³ One of the required items is a “[l]etter of approval from DelDOT relative to provision of streets, curb cuts and other pertinent matters”;⁴ another is a “[l]etter from DelDOT containing its recommendations and comments on any required traffic impact study.”⁵

On May 12, 2000, New Castle County preliminarily approved the Fashion Center record plan.⁶ Acierno then had eighteen months to complete the application or the Fashion Center record plan would expire.⁷ Acierno requested and the County granted him two extensions of this deadline because he was unable to obtain the required letter of approval from DelDOT. On February 8, 2002, DelDOT Secretary Nathan Hayward, III, sent a letter to the Department of Land Use informing it that DelDOT recommended that

³ The parties agree that the 1995 County Code governed New Castle County’s review of Acierno’s land use application. *See* Defs.’ Opening Br. in Support of Their Mot. to Dismiss (“DOB”) at 3 n.3; *see generally* Compl. (citing almost exclusively to the 1995 County Code); Pl.’s Answering Br. in Opp. to Defs.’ Mot. to Dismiss (“PAB”) (same). By its terms, the New Castle County Unified Development Code, the successor to the 1995 County Code, only applies to land use applications submitted on or after July 2, 1997. Section 40.01.120, *available at* <http://www.co.new-castle.de.us/CZO/nccportal.asp>.

⁴ 1995 County Code § 32-97(d)(5).

⁵ *Id.* § 32-97(d)(6).

⁶ Compl. Ex. 7.

⁷ 1995 County Code § 32-97(a); Compl. Ex. 7.

the County “deny or defer” approval of the Fashion Center record plan.⁸ Secretary Hayward expressed DelDOT’s concern that the proposed Fashion Center would aggravate the existing traffic problems at the intersection of Interstate 95 and State Route 1.⁹ Three days later, DelDOT provided the Department of Land Use with its comments on the traffic impact study.¹⁰ In that letter, DelDOT wrote that it “ha[d] concerns about this project that go beyond the scope of the [traffic impact study]. Those concerns are addressed in a separate letter from Secretary Hayward, which should be considered as stating [DelDOT’s] position with regard to this project.”¹¹ On March 13, 2002, the Department of Land Use expired the Fashion Center record plan because Acierno had not provided the County with a “[l]etter of approval from DelDOT relative

⁸ DOB Ex. F. Although Acierno did not attach Secretary Hayward’s letter to the Complaint, the Court may consider it for purposes of a motion to dismiss for want of subject matter jurisdiction. *See Yancey v. Nat’l Trust Co.*, 1993 WL 155492, at *6 (Del. Ch. May 7, 1993) (acknowledging the right of a defendant to challenge a plaintiff’s jurisdictional allegations by material extrinsic to the pleadings); *Anonymous v. State*, 2000 WL 739252, at *4 (Del. Ch. June 1, 2000) (considering materials integral to the complaint on a Rule 12(b)(1) motion to dismiss for want of subject matter jurisdiction).

⁹ DOB Ex. F at 4 (“the concrete skeleton of transportation infrastructure in the affected area is not strong enough to accommodate the additional demands imposed by the doubling of the retail space proposed by [the Fashion Center record plan and another plan].”).

¹⁰ Compl. Ex. 10.

¹¹ *Id.* at 1; *see also id.* at 17 (“[DelDOT’s] position regarding this project is stated in the February 8 letter from Secretary Nathan Hayward, III. . . . DelDOT recommends that New Castle County deny or defer the development requests”).

to provision of streets, curb cuts and other pertinent matters,” as required by 1995 County Code Section 32-97(d)(5).¹²

C. Acierno Appeals to the Planning Board

Acierno appealed the Department of Land Use’s decision to the Planning Board. Notice of Acierno’s appeal, along with the reason the Department of Land Use expired the Fashion Center record plan, was published in the *Wilmington News Journal* on May 4, 2002. The notice read, in pertinent part:

Appeal of a Department of Land Use final decision declaring the Christiana Fashion Center Record Plan . . . submission unsatisfactory, thereby expiring the plan. Record Plan submission lacks a letter of approval from DelDOT relative to the provision of streets, curb cuts and other pertinent matters, as required by former New Castle County Code Section 32-97(d)(5).¹³

Other Department of Land Use notices accompanied the notice of the denial of approval of the Fashion Center record plan.¹⁴

A majority of the Planning Board voted to affirm the Department of Land Use’s decision. In its letter opinion dated May 21, 2002, the Planning Board wrote that “[t]he [1995 County Code] unambiguously requires a letter of approval from DelDOT as a component of record plan submission. Since the submission for the Christiana Fashion

¹² Compl. Ex. 11.

¹³ DOB Ex. H.

¹⁴ *See, e.g., id.* (listing “new exploratory plans under review” and the revised agenda of the Resource Protection Area Technical Committee).

Center lacked such a letter, the Department [of Land Use] did not err in rejecting it.”¹⁵ The Planning Board then concluded that “an orderly and logical review of the evidence, including DelDOT’s explicit recommendation to deny or defer the development request for the project, leads to the conclusion that the requirement found in Section 32-97(d)(5) was not met.”¹⁶ On May 22, the *Wilmington News Journal* reported the Planning Board’s decision and the reason for it in an article appearing on page one.¹⁷ The article quoted Acierno’s then current attorney as saying “[w]e will probably end up having to litigate the issue.”¹⁸

D. Acierno Brings Suit Against DelDOT in this Court

Just a few weeks after the Planning Board’s decision, Acierno brought suit in this Court against Secretary Hayward and DelDOT. Acierno sought, among other things, to compel DelDOT to issue a letter of approval.¹⁹ In an opinion issued July 1, 2004, this Court disqualified Acierno’s counsel because his continued representation of Acierno

¹⁵ Compl. Ex. 12 at 2

¹⁶ *Id.*

¹⁷ DOB Ex. H.

¹⁸ *Id.*

¹⁹ *Acierno v. Hayward*, 2004 WL 1517134, at *3 (Del. Ch. July 1, 2004).

would violate Rule 1.9 of the Delaware Lawyers' Rules of Professional Conduct.²⁰ That case has sat idle since then.

E. Acierno Brings Suit in the Superior Court

In July 2002, Acierno petitioned the Superior Court for a Writ of Certiorari reversing the Planning Board's decision. In that action, Acierno contends that the Planning Board lacked jurisdiction, that the Planning Board violated Acierno's constitutional due process rights by applying an incorrect standard of review and that the Planning Board erred as a matter of law in upholding the expiration of the record plan because Acierno substantially complied with the requirements of the 1995 County Code. On March 31, 2006, the Superior Court requested supplemental briefing.²¹ The petition remains pending and the Superior Court has taken it under advisement.

In November 2003, Acierno petitioned the Superior Court for a Writ of Mandamus commanding the Department of Land Use to grant final approval to the Fashion Center record plan.²² The Superior Court agreed with Acierno that the Department of Land Use's "act of approving a record major plan as to form is in fact non-discretionary."²³

²⁰ *Id.* at *1.

²¹ Letter from Defendants' Counsel to the Court (Apr. 12, 2006) (enclosing copy of Letter from the Superior Court to Counsel, No. 02A-07-008 (CHT) (Mar. 31, 2006)).

²² *Acierno v. New Castle County*, 2004 WL 745715, at *1 (Del. Super. Apr. 7, 2004).

²³ *Id.* at *4.

Thus, mandamus could lie and the sole issue before the Superior Court was whether the letter from DelDOT constituted a letter of approval as required by the 1995 County Code. The court concluded that “DelDOT’s letter, by its express language, specifically recommended denial or deferment of the development requests made for this project. It is hard to see how a review as to form could reach any decision other than that the Plan lacked a DelDOT letter of approval.”²⁴ The Court thus denied Acierno’s petition.

F. Acierno Again Brings Suit in this Court

Finally, in March 2005, Acierno initiated this action seeking a permanent injunction prohibiting the County from deeming the record plan expired, a mandatory injunction ordering the Department of Land Use to forward the plan to the New Castle County Council (“County Council”) for final approval, a declaratory judgment invalidating the Planning Board’s decision²⁵ and specific performance of an alleged contract between Acierno and New Castle County. Defendants moved to dismiss under Court of Chancery Rule 12(b)(1) for lack of subject matter jurisdiction both because the Statute of Repose bars this action and because Acierno has an adequate remedy at law

²⁴ *Id.*

²⁵ Acierno seeks a declaratory judgment invalidating the Planning Board’s decision on the same grounds he seeks such relief in his Superior Court certiorari action. *See* Compl. ¶¶ 70–73 (alleging that the Planning Board lacked jurisdiction, that Acierno substantially complied with the 1995 County Code and that the Planning Board abused its discretion).

and under Rule 12(b)(6) for failure to state a claim upon which the Court may grant relief.

G. Acierno's Rule 56 Motion

After the parties completed briefing Defendants' motion to dismiss, Acierno filed a motion pursuant to Court of Chancery Rule 56 to consider Defendants' motion as one for summary judgment and to defer consideration of it until Plaintiff could take certain discovery. Acierno's Rule 56 motion is not well-founded because this Court may consider materials outside of the pleadings for purposes of deciding a Rule 12(b)(1) motion to dismiss for want of subject matter jurisdiction.²⁶

II. ANALYSIS

A. Legal Standard on a Motion to Dismiss for Lack of Subject Matter Jurisdiction

The Court of Chancery will dismiss an action for want of subject matter jurisdiction "if it appears from the record that the Court does not have jurisdiction over the claim."²⁷ The plaintiff "bears the burden of establishing this Court's jurisdiction, and where the plaintiff's jurisdictional allegations are challenged through the introduction of

²⁶ See *supra* n.8.

²⁷ *AFSCME Locals 1102 & 320 v. City of Wilmington*, 858 A.2d 962, 965 (Del. Ch. 2004) (internal citation omitted).

material extrinsic to the pleadings, he must support those allegations with competent proof.”²⁸

B. The Statute of Repose

The Statute of Repose codified at 10 *Del. C.* § 8126(b) provides that

No action, suit or proceeding in any court, whether in law or equity or otherwise, in which the legality of any action of the appropriate county or municipal body finally granting or denying approval of a final or record plan submitted under the subdivision and land development regulations of such county or municipality is challenged, whether directly or by collateral attack or otherwise, shall be brought after the expiration of 60 days from the date of publication in a newspaper of general circulation in the county or municipality in which such action occurred, of notice of such final approval or denial of such final or record plan.

The statute’s provisions “are jurisdictional and therefore may not be waived.”²⁹ The statute is intended “to ‘promote predictability and stability in land use’ and therefore must be applied strictly.”³⁰

²⁸ *Yancey*, 1993 WL 155492, at *6 (internal citation omitted).

²⁹ *Sterling Prop. Holdings, Inc. v. New Castle County*, 2004 WL 1087366, at *3 (Del. Ch. May 6, 2004) (internal citations omitted); *S. New Castle County Alliance, Inc. v. New Castle County Council*, 2001 WL 855434, at *1 (Del. Ch. July 20, 2001); *see also Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 421 (Del. 1984) (“[B]ecause the statute of repose is a substantive provision, it relates to the jurisdiction of the court; hence, any failure to commence the action within the applicable time period extinguishes the right itself and divests . . . the court of any subject matter jurisdiction which it might otherwise have.”) (internal quotation omitted).

³⁰ *Admiral Holding v. Town of Bowers*, 2004 WL 2744581, at *2 (Del. Super. Oct. 18, 2004) (quoting *Council of Civic Organizers of Brandywine Hundred, Inc. v.*

C. Application of the Statute of Repose

Defendants argue that Acierno brought this suit after the expiration of 60 days from publication of notice of the fact of the Fashion Center record plan's expiration in the *Wilmington News Journal*. Therefore, they conclude, this Court lacks jurisdiction. Acierno responds that 1) the appropriate county body, *i.e.*, County Council, did not finally deny approval of the record plan, 2) record plan expiration is not record plan denial and 3) the notice in the *Wilmington News Journal* does not constitute publication under the terms of the statute.³¹

1. The Department of Land Use was the appropriate county body

A review of the applicable sections of the 1995 County Code dispenses with Acierno's first argument. Section 32-97(h) provides that the Department of Land Use shall review a record plan as to content once that Department determines that the plan is acceptable as to form. "When approved as to content, the director [of the Department of

New Castle County, 1991 WL 279374, at *5 (Del. Ch. Dec. 26, 1991)); *see also Council of South Bethany v. Sandpiper Dev. Corp.*, 1986 WL 13707, at *2 (Del. Ch. Dec. 8, 1986) ("[I]t is highly significant that [10 Del. C. § 8126(a)] creates an extraordinarily short (60 day) period during which zoning regulations must be challenged. . . . [T]hat policy translates directly to the interest of local communities in stable land use regulatory arrangements and in freedom from the uncertainty and disruption that would result if such arrangements were permitted to remain legally vulnerable for long periods.").

³¹ All three of Acierno's arguments in response to Defendants' challenge to this Court's subject matter jurisdiction are legal arguments. As such, further factual discovery is unnecessary to enable the Court to determine whether it has jurisdiction.

Land Use] shall endorse the plan and forward it to the County Council.”³² If the Department of Land Use does not approve a record plan as to content or form, the plan never gets to the County Council.

Once the County Council receives a record plan from the Department of Land Use, it may approve the plan or refer it back to the Department “for the purpose of investigating or responding to such issues or questions concerning the compliance of the plan with the subdivision regulations or any other statute or ordinance to which compliance is required.”³³ If the County Council refers the record plan back to the Department of Land Use, the Department may either 1) recommend that the County Council approve the plan, in which case the Council must do so, 2) recommend that the County Council approve the plan subject to agreement of the developer to certain conditions, in which case the Council must approve the plan once the developer agrees to the conditions, or 3) rescind the plan.³⁴ Under any scenario, the Department of Land Use has final say over at least denial of a record plan.³⁵

³² 1995 County Code § 32-97(h).

³³ *Id.* § 32-97(i).

³⁴ *Id.* § 32-97(j).

³⁵ Technically, the County Council is the body that finally approves a record plan, *i.e.*, the County Council is the last body to sign off on a plan after the Department of Land Use has approved the plan. This fact is not relevant here because, under the 1995 County Code, the County Council may not deny approval of a record plan without the Department of Land Use’s acquiescence. The Department then, not the County Council, had final say under the 1995 County Code. *But see S.*

The Department of Land Use never forwarded the Fashion Center record plan to County Council because the plan did not comply as to form. Under the 1995 County Code, the County Council is afforded no role in such situations.³⁶ Thus, the Department of Land Use was the “appropriate county . . . body” to deny approval of the record plan.

2. Plan expiration is the functional equivalent of plan denial

Acierno next argues that the Department of Land Use’s “expiration” of the record plan pursuant to 1995 County Code Sections 32-97(d) and (g) is not the same as “denying approval of a . . . record plan” as the latter terms are used in the Statute of Repose. This is a semantic distinction without a legal difference. The 1995 County Code does not speak of expiration versus denial. Rather, it establishes a number of preconditions to approval.³⁷ A developer must satisfy each of these prerequisites if its plan is to advance to the next stage of the approval process. If a developer failed to comply with any of

New Castle County Alliance, Inc., 2001 WL 855434, at *2 (“under the New Castle County Unified Development Code . . . the County, not the Department [of Land Use], has the final authority to *approve* a subdivision plan. If the plan is not approved, the Council may refer it back to the Department to address the Council’s concerns.”) (emphasis added).

³⁶ Acierno’s citation to 1995 County Code Section 32-97(i), PAB at 18, is to no avail. That section allows the County Council to approve a record plan forwarded to it by the Department of Land Use or to refer the plan back to the Department. It does not, however, allow the County Council to finally deny approval of the plan.

³⁷ *See, e.g.*, 1995 County Code §§ 32-97(a) (developer must submit plan for recordation within 18 months of preliminary approval), 32-97(g) (developer must comply as to form), 32-97(h) (Department of Land Use must approve as to content).

these prerequisites, the 1995 County Code did not permit the Department of Land Use to approve the developer's plan. In fact, the Department had no choice but not deny approval to the record plan. As the Department of Land Use said in its March 13, 2002, letter to Acierno, "[w]ithout a formal approval of the streets, curb cuts, and other pertinent matters, however, the New Castle County Code *does not permit the Department to take any other action* except deem the record plan submission unsatisfactory and thereby expire the plan."³⁸ For purposes of the Statute of Repose, record plan expiration is the functional equivalent of record plan denial.

Acierno last argues that the Statute of Repose is inapplicable because "there has never been any newspaper publication regarding a supposed 'final denial.'"³⁹ According to Acierno, the notice that appeared in the May 4, 2002 edition of the *Wilmington News Journal* was merely a notice of the Planning Board hearing at which he was to present his appeal of the denial of approval of the Fashion Center record plan.

The Statute of Repose does not specify the form that the required published notice shall take. It merely states that the 60 day period shall run "from the date of publication . . . of notice of such final approval or denial of such final or record plan."⁴⁰ The *Wilmington News Journal* notice clearly states that the Department of Land Use deemed

³⁸ Compl. Ex. 11 (emphasis added).

³⁹ PAB at 18.

⁴⁰ 10 *Del. C.* § 8126(b).

Acierno's submission unsatisfactory and denied approval to the Fashion Center record plan.⁴¹ The notice then provides the reason why the Department of Land Use denied approval to the plan.⁴² It is difficult to conceive how or why this publication does not satisfy the Statute of Repose's requirement, especially when Acierno has cited no case, and this Court has found none, holding that a publication ostensibly for one purpose cannot satisfy another.

Although the parties did not so argue, it is possible that the final denial of the Fashion Center record plan occurred when the Planning Board upheld the Department of Land Use's decision to expire the plan on May 21, 2002. Notice of the Planning Board's decision was published in the *Wilmington News Journal* on May 22, 2002. In a page one article, the *News Journal* reported that a majority of the Planning Board "said DelDOT's written approval is required to ensure development only occurs when roads are in place to support it."⁴³ The article thus reported the Planning Board's decision to deny a record plan and the reason for that decision. Acierno had actual notice of the Planning Board's decision and the newspaper publication of that decision.⁴⁴

⁴¹ See DOB Ex. H. ("Appeal of a Department of Land Use final decision declaring the Christiana Fashion Center Record Plan . . . submission unsatisfactory, thereby expiring the plan.").

⁴² See *id.* ("Record Plan submission lacks a letter of approval from DelDOT relative to the provision of streets, curb cuts and other pertinent matters . . .").

⁴³ *Id.*

⁴⁴ See *id.* (quoting Acierno's attorney).

In the absence of a more specific definition in the 1995 County Code, “publication” takes on its ordinary meaning.⁴⁵ “One leading dictionary defines *publication* as ‘[t]he action of making publicly known; public notification or announcement; promulgation.’”⁴⁶ *Black’s Law Dictionary* describes “publication” as “[t]o make public; to make known to people in general . . . [t]he act of publishing anything; offering it to public notice, or rendering it accessible to public scrutiny.”⁴⁷ The notice in the *Wilmington News Journal* of the Department of Land Use’s expiration of the plan certainly satisfies the ordinary meaning of publication. Similarly, the article reporting the Planning Board’s decision satisfied the ordinary meaning of publication, especially where, as here, the affected party had actual notice of the decision.

Further, the public policy behind the Statue of Repose – promoting predictability and stability in land use – supports the Court’s conclusion. The Department of Land Use expired the Fashion Center record plan four years before Acierno commenced this action; the Planning Board upheld that decision just shy of four years before this action was

⁴⁵ *Ross v. Dep’t of Correction*, 697 A.2d 377, 378 (Del. 1997) (“One of the fundamental rules of statutory construction is that the words in a statute must be given their ordinary meaning.”); *see also Matter of Surcharge Classification 0133 by Del. Comp. Rating Bureau, Inc.*, 655 A.2d 295, 303 (Del. Super. 1994) (“Where, as here, the words used in a statute are undefined, they should be given their ordinary common meaning.”) (internal citations omitted).

⁴⁶ *Bradford v. Am. Media Operations, Inc.*, 882 F. Supp. 1508, 1519 (E.D. Pa. 1995) (quoting XII THE OXFORD ENGLISH DICTIONARY 782 (2d ed. 1989)).

⁴⁷ BLACK’S LAW DICTIONARY 1396 (4th ed. 1968).

filed. To allow Acierno to challenge such denial several years later would contravene the purpose of the Statue of Repose, *i.e.*, encouraging prompt challenges of land use decisions so as to promote predictability and stability in land use.

III. CONCLUSION

Defendants have shown that the Statute of Repose, 10 *Del. C.* § 8126(b), bars Acierno's challenge to the expiration of the Fashion Center record plan because he initiated this suit more than 60 days after both publication of notice of the denial of approval of the plan by the Department of Land Use and the affirmance of that decision by the Planning Board. Defendants' motion to dismiss for lack of subject matter jurisdiction is GRANTED. Defendants' motion to dismiss because of Acierno's failure to state a claim upon which the Court may grant relief is DENIED WITHOUT PREJUDICE AS MOOT.⁴⁸

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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⁴⁸ In any event, the Court would have declined to reach many of the issues raised by Defendants' motion because the exact same issues are currently under submission in the Superior Court certiorari action. *See* DOB Ex. G ([Acierno's] Opening Br. in the certiorari action (Apr. 25, 2005)).