



IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE

DEWEY BEACH ENTERPRISES, INC.,)
)
 Plaintiff,)
)
 v.)
)
 TOWN OF DEWEY BEACH, a municipal)
 corporation of the State of Delaware,)
 COMMISSIONERS OF DEWEY BEACH:)
 MAYOR RICHARD N. SOLLOWAY, in his)
 official capacity; MARC APPELBAUM, in his)
 official capacity; DIANE HANSON, in her)
 official capacity; JAMES PRZYGOCKI, in his)
 official capacity; and MARTY SEITZ, in his)
 official capacity,)
)
 Defendants.)

C.A. No. _____

COMPLAINT

Plaintiff, Dewey Beach Enterprises, Inc., by and through its undersigned attorneys, hereby brings this action for injunctive relief and declaratory judgment against the Defendants and alleges as follows:

NATURE OF THE ACTION

1. This is an action to invalidate a zoning ordinance that abrogates the authority granted by the Delaware General Assembly to the Town of Dewey Beach and its Board of Adjustment and directly contravenes State and municipal procedural requirements for adoption of an ordinance relating to zoning. The ordinance at issue, Ordinance No. 682, is the latest improper attempt by the Town of Dewey Beach to forestall a substantial redevelopment initiative to build a mixed-use commercial and residential complex in the Town by precluding structures in excess of 35 feet “unless varied or granted a special exception by public referendum.” Ordinance No. 682, at 2. To insulate itself from revision, the ordinance conditions any

amendment to the relevant section of the municipal code on the *unanimous* approval of *all* acting Commissioners.

2. The ordinance is substantively infirm for at least two reasons:

3. *First*, it effectively delegates legislative power to grant zoning variances to the voting citizens of Dewey Beach in contravention of State law. *See 22 Del. C. §§ 321, 327.*¹ This assignment also frustrates the authority explicitly vested with the Board of Adjustment pursuant to Dewey Beach Zoning Code § 185-66.

4. *Second*, by mandating a *unanimous* vote of *all* acting Commissioners to amend the Dewey Beach Code, the ordinance violates the procedural requirements mandated by the General Assembly in the Dewey Beach Town Charter. The Dewey Beach Town Charter specifically designates a quorum for purposes of a vote as “a *majority* of the Commissioners appointed or elected to the Town Commissioners of Dewey Beach,” *Dewey Beach Town Charter* Section 12, and permit amendments by “affirmative vote of a *majority*.” *Id.* Section 13. (emphasis added).

5. Beyond its substantive flaws, the Town Commissioners’ approval of the ordinance was procedurally flawed. In their haste to cement yet another height restriction on new construction, the Commissioners enacted Ordinance No. 682 without regard to existing procedural safeguards. This too renders the ordinance invalid.

6. Due to the Commissioners’ noncompliance with the procedures mandated by State and municipal law, adoption of provisions in direct conflict with the governing Dewey Beach Zoning Code and Dewey Beach Town Charter and unlawful usurpation of legislative

¹ The Delaware Code endows municipal boards of adjustment with the power to “authorize, in specific cases, such variance from any zoning ordinance, code or regulation that will not be contrary to the public interest [. . .].” *22 Del. C. § 327.*

authority, the plaintiff seeks an injunction and a declaratory judgment as the appropriate forms of relief in this Court.

PARTIES

7. Plaintiff Dewey Beach Enterprises, Inc. (“DBE”) is a commercial and residential real estate development corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business at 124 Dickinson Avenue, P.O. Box 649, Rehoboth Beach, Delaware 19971. Located on the bayside of Dewey Beach, DBE owns three parcels of land, occupying seven lots. These parcels, encompassing an entire block in the town, are commonly referred to as Ruddertowne and include DBE property located at 113 Dickinson Avenue and the Bay, Dewey Beach, Delaware 19971.

8. Defendant Town of Dewey Beach (“Dewey Beach” or “Town”) is a Delaware municipal corporation chartered by special enactment of the Delaware General Assembly, with an official address at 105 Rodney Avenue, Dewey Beach, Delaware 19971.

9. Defendant Commissioners of Dewey Beach (“Commissioners” and collectively referred to with the Town and all individual Commissioners named below as the “Town”) is the governing body of the Town of Dewey Beach. Its offices are also located at 105 Rodney Avenue, Dewey Beach, Delaware 19971.

10. Defendant, Richard N. Solloway, is the Mayor and a Commissioner of the Town of Dewey Beach, with an official address at 105 Rodney Avenue, Dewey Beach, Delaware 19971.

11. Defendant, Marc Appelbaum, is a Commissioner of the Town of Dewey Beach, with an official address at 105 Rodney Avenue, Dewey Beach, Delaware 19971.

12. Defendant, Diane Hanson, is a Commissioner of the Town of Dewey Beach, with an official address at 105 Rodney Avenue, Dewey Beach, Delaware 19971.

13. Defendant, James Przygocki, is a Commissioner of the Town of Dewey Beach, with an official address at 105 Rodney Avenue, Dewey Beach, Delaware 19971.

14. Defendant, Marty Seitz, is a Commissioner of the Town of Dewey Beach, with an official address at 105 Rodney Avenue, Dewey Beach, Delaware 19971.

JURISDICTION

15. This Court possesses jurisdiction over this matter pursuant to 10 *Del. C.* §§ 341 and 342.

FACTUAL ALLEGATIONS

16. Beginning in June of 2007, DBE submitted to the Town the first of three proposals to redevelop Ruddertowne as a mixed-use commercial and residential complex. The original concept proposed a welcome center, a bayside boardwalk, public restrooms and parking, a convention center, a “funland” for children and a 68-foot structure that would house a 120 room five-star hotel and condominium complex. Although approved by the Ruddertowne Architectural Review Committee on June 22, 2007, following the September 2007 election of new Commissioners, the proposal was subsequently rejected.

17. The third of DBE’s plans, a scaled-down version proposing a 35-foot high structure – though initially approved by the Town’s Building Inspector and Town Solicitor – was subsequently rejected by the Town. Upon appeal, the Supreme Court of the State of Delaware reversed the Town’s denial of this plan.²

18. On July 10, 2010 the Town adopted Ordinance No. 682: An Ordinance To Amend Chapter 185, Zoning, Section 185-46, Of The Municipal Code Of The Town Of Dewey Beach,

² *Dewey Beach Enterprises, Inc. v. Board of Adjustment of the Town of Dewey Beach*, No. 465, 2009 (July 30, 2010) (Berger, J.) (reversing Superior Court affirmance of Board of Adjustment’s denial of DBE building permit and holding that residential lot size requirements do not apply to mixed use structures under the Dewey Beach Zoning Code).

Delaware, 2005, As Amended, Relating To The Dewey Beach Building Height Limitation (hereinafter, “Ordinance No. 682” or the “ordinance,” attached hereto as Exhibit A). The ordinance injected into § 185-46 of the Dewey Beach Zoning Code provisions governing the maximum height standard, authorization of variances and the process for amending the relevant section of the Code.

19. Specifically, Ordinance No. 682 amends § 185-46(B) to provide, in relevant part, “[t]he allowable height of a building within the Town’s zoning code shall not be increased beyond 35 feet [. . .] and no exclusions to the allowable height of a building in any zoning district shall be permissible unless it is approved in a referendum election by two thirds (2/3) of all eligible voters who vote in the referendum election.” Ordinance No. 682, at 2.

20. Further, Ordinance No. 682 amends § 185-46(C) relating to amendments and instructs, “[t]his Section may only be amended, adjusted, modified, revised, repealed, rescinded, or changed in any way by a unanimous vote at a Town meeting, with all the Town Commissioners participating.” *Id.*

21. Each of these provisions directly conflicts with prevailing law under the Delaware Code, Dewey Beach Zoning Code and the Dewey Beach Town Charter.

22. The Delaware General Assembly, pursuant to 22 *Del. C.* ch. 3, has explicitly vested the authority to grant variances from any zoning ordinance with the Board of Adjustment. In accordance with State law, prior to adoption of Ordinance No. 682, the authority to grant variances from any zoning ordinance was explicitly vested by the Town of Dewey Beach in the Board of Adjustment. *Dewey Beach Zoning Code* § 185-66. Ordinance No. 682 undertakes to assign that authority to the eligible voters of the Town in contravention of the Delaware Code, Dewey Beach Zoning Code and established case law prohibiting such delegations of legislative

authority to the populous. In this way, Ordinance No. 682 directly contravenes existing law and is, therefore, invalid.

23. The Dewey Beach Town Charter granted by the Delaware General Assembly defines a quorum for purposes of Commission decision-making as “a majority of the Commissioners appointed or elected to the Town Commission of Dewey Beach.” *Dewey Beach Town Charter* at Section 12. The Charter thereafter provides that ordinances may be passed by “affirmative vote of a majority of Commissioners.” *Id.* at Section 13. Ordinance No. 682 attempts to circumvent existing law by imposing a unanimous vote of all Commissioners to amend or modify the Code. This conflict with the authority granted by the General Assembly in the Dewey Beach Town Charter renders Ordinance No. 682 unlawful.

24. The Town’s improper efforts to stop DBE’s redevelopment plans reveal a protracted animosity toward the developer and toward initiatives to revitalize the Dewey Beach commercial center even though this initiatives are consistent with the Comprehensive Plan. Comments were made by certain Commissioners at the July 10, 2010 hearing which evidenced this animosity.

25. The Commissioners knew that they were usurping the authority of the General Assembly when they voted in favor of Ordinance No. 682.. The Commissioners recognized that the General Assembly had not enacted a proposed amendment to the Dewey Beach Charter that would have set the maximum building height at 35 feet. When House Bill No. 50 was considered by the Delaware House of Representatives, House Amendment 1 was adopted to render the proposed Charter amendment compliant with the 22 *Del. C.* § 321, et seq., delegation of variance authority to the Board of Adjustment. After House Bill No. 50 failed to pass, the Commissioners embarked on a plan to bypass the General Assembly, yet adopt an ordinance that

they felt “had the strength of a Charter change.” Through Ordinance No. 682, the Commissioners were blatantly, and without authority, “bringing it back from Dover into our local community.” Whatever the Town’s motivations, its approval process with respect to Ordinance No. 682 also presents procedural shortcomings.

26. To validly approve a zoning ordinance, the Town Commission must: (i) provide 15 days advance notice of the introduction of an ordinance by Town Council in a local newspaper of general distribution; (ii) introduce the ordinance in writing; (iii) hold a public hearing during which the Town Council refers the ordinance by resolution to the Planning and Zoning Commission for recommendation; (iv) provide 15 days advance public notice of the Planning and Zoning Commission hearing; (v) hold a public Planning and Zoning Commission hearing in which the ordinance is voted upon and the recommendation of the Commission is sent to the Town Council; (vi) provide 15 days advance public notice of a second Town Council hearing to approve the ordinance as received by the Planning and Zoning Commission; (vii) hold a second public hearing to approve the ordinance; (viii) verbally vote in favor of the ordinance by majority, entering each Commissioner’s vote and the reason for their vote on the record.

27. Until the July 10, 2010 hearing at which Ordinance No. 682 was voted upon, Ordinance No. 682 was not introduced in writing by the Town Commissioners. Instead, the April 10, 2010 Town Council Meeting Minutes reflect a request by the Town Commissioners to the Planning and Zoning Commission to “help council write an ordinance that would bolster the 35-feet and that the only way to change the 35 feet is by future referendum.” *See* Town of Dewey Beach Minutes of April 10, 2010 9:00AM Town Council Meeting at 4, attached hereto as Exhibit B. Thus, the Town Commissioners did not comply with the requirement that they hold a public hearing at which they introduce an ordinance in writing and refer it to the Planning and

Zoning Commission for a recommendation and vote. Moreover, upon information and belief, the April 10, 2010 Town Commissioners' Meeting was not properly noticed 15 days prior to the hearing.

28. On or about May 8, 2010, the Planning and Zoning Commission presented, discussed and voted on recommendation(s) to the Commissioners of an ordinance. *See* Agenda For The Dewey Beach Planning and Zoning Public Hearing, May 8, 2010, attached hereto as Exhibit C. Upon information and belief, the May 8, 2010 Planning and Zoning Commission meeting was not properly noticed. Moreover, although the Town Commissioners had not referred a draft ordinance to the Planning and Zoning Commission, a draft of an ordinance prepared by some unknown person or entity at some unknown date in advance of May 8, 2010 was discussed and revised at the hearing. Curiously and conspicuously, no minutes of the May 8, 2010 Planning and Zoning Commission hearing are available on the Town's website.

29. By June 11, 2010, the Town Commissioners' agenda proposed to approve a draft amendment of the ordinance. *See* Agenda, Dewey Beach Town Council Meeting, Friday June 11, 2010, at 2, attached hereto as Exhibit D. Curiously, available (at least as of August 11, 2010) on the Town's website for the June 11, 2010 meeting are two competing documents: 1) a draft Ordinance No. 679, titled An Ordinance to Amend Chapter 185, Zoning, Section 185-46, of the Municipal Code of the Town of Dewey Beach, Delaware, 2005, as amended, Relating to the Dewey Beach Building Height Limitation, linked with the title Ordinance Requiring Referendum for 35 feet, attached hereto as Exhibit E; and 2) a draft resolution, titled Resolution by the Commissioners of the Town of Dewey Beach Proposing that a Public Hearing be Held on the Subject of Amending Chapter 185, Zoning, Section 185-46, of the Municipal Code of the Town of Dewey Beach, Delaware, 2005, as Amended, Relating to the Dewey Beach Building Height

Limitation, which is dated as of May 31, 2010, and apparently was the first version of a draft authored by Town Solicitor Glenn Mandalas (the “Resolution,” attached hereto as Exhibit F). Instead of considering either Ordinance No. 679 or the Resolution, the Town scheduled a hearing for July 10, 2010 where Ordinance No. 682 was ultimately enacted. *See* Town of Dewey Beach Minutes of June 11, 2010 6:00PM Town Council Meeting at 2, attached hereto as Exhibit G.

30. Curiously, the draft version of Ordinance No. 682 voted on at the July 10, 2010 Town Council hearing was dated July 8, 2010. *See* Ordinance No. 682 Version 6 dated July 8, 2010, attached hereto as Exhibit H. A logical question is how the Planning and Zoning Commission could have rendered a recommendation on a version of an ordinance dated two days before the vote of the Town Commissioners and two months after the Planning and Zoning Commission’s May 8, 2010 meeting. Moreover, it is unclear whether, when, where and by whom Versions 1-5 of the ordinance were considered. It bears mentioning that, before the passage of Ordinance No. 682, the Town Commissioners held numerous executive sessions for which the available minutes do not reflect the motion to go into executive session and/or the reason therefore.

31. The problem with the Town’s failure to follow well-established procedural requirements is compounded by the fact that three days prior to the July 10, 2010 Town Council Hearing to approve the ordinance, the Town’s website featured a link to the purported, proposed ordinance which, instead, led viewers to a draft resolution attaching an early draft and subsequent revisions of a proposal. *See* Resolution by the Commissioners of the Town of Dewey Beach Proposing that a Public Hearing be held on the Subject of Amending Chapter 185, Zoning, Section 185-46, of the Municipal Code of the Town of Dewey Beach, Delaware, 2005, As Amended, Relating to the Dewey Beach Building Height Limitation, Version 2, dated June

27, 2010 (“Resolution Version 2,” attached hereto as Exhibit I). Resolution Version 2 states that the Commissioners met on June 11th and proposed a public hearing to determine whether it is in the public interest to amend the height restrictions. Resolution Version 2 contained an ordinance requiring the Commissioners to adopt a resolution proposing to the voters that the height limitation be increased, that the manner of measuring height be modified, or that there be an exclusion of the allowable height of a building in any zoning district. The resolution would contain a proposed ordinance that, if adopted, would accomplish one of these three goals. Other steps were proposed in this version, which speaks for itself. Thus, the document publicly available as the “ordinance” to be considered in the days immediately preceding the Commissioners’ vote did not, therefore, provide notice of the actual ordinance under consideration. At some point after July 7, 2010, however, the link available on the Town’s website for the July 10, 2010 meeting was changed to the Version 6 draft ordinance dated July 6, 2010.

32. The adoption of Ordinance No. 682 explicitly disregards the procedural requirements mandated by State and municipal law to amend zoning regulations, contravenes the governing Delaware Code, Dewey Beach Zoning Code, Dewey Beach Town Charter and Delaware case law and further risks for Dewey Beach a substantial redevelopment initiative and investment. For the reasons stated above, this Court should enjoin enforcement of Ordinance No. 682 and grant a declaratory judgment in favor of the Plaintiff.

COUNT I - PERMANENT INJUNCTION

33. Plaintiff hereby repeats and realleges the allegations contained in paragraphs 1 through 32 above as if fully set forth herein.

34. Plaintiff can establish actual success on the merits of its claim challenging the adoption of Ordinance No. 682. The ordinance improperly permits zoning variances by public

referendum and in so doing, usurps the authority vested in the Board of Adjustment in violation of the Delaware Code and the Dewey Beach Zoning Code. The ordinance, moreover, imposes discrepant supermajority thresholds to amend the relevant section of the Municipal Code inconsistent with the Dewey Beach Town Charter as granted by the General Assembly. In adopting the ordinance, the Town did not timely provide access to the proposed ordinance as advertised on its website. The Town also failed to adhere to prevailing State and municipal law requiring adequate public notice in adopting zoning ordinances. Ordinance No. 682 is, therefore, illegal, arbitrary and capricious, and its adoption stands in violation of DBE's procedural due process rights.

35. As a direct result of the Town's failure to comply with applicable notice procedures and its consequent enactment of a substantively invalid ordinance, Plaintiff has suffered injury. At base, inadequate public notice introducing Ordinance No. 682 and the Planning and Zoning Commission's hearing compromise Plaintiff's due process rights. The ordinance further abrogates Plaintiff's viable commercial interests in Dewey Beach notwithstanding the validity of Plaintiff's Ruddertowne redevelopment initiative under the Comprehensive Plan, codified by the State of Delaware in 2007.

36. The infringement of Plaintiff's due process rights and direct contravention of the Delaware Code, the Dewey Beach Zoning Code and the Dewey Beach Town Charter far outweigh any harm that would befall the Defendants should Ordinance No. 682 be deemed invalid. Plaintiff is requesting only Defendants' fidelity to the controlling substantive and procedural laws, which directly conflict with Ordinance No. 682.

COUNT II - DECLARATORY JUDGMENT

37. Plaintiff hereby repeats and realleges the allegations contained in paragraphs 1 through 36 above as if fully set forth herein.

38. The interests of the parties are adverse as there exists a real and justiciable controversy between the parties regarding the validity of Ordinance No. 682.

39. Plaintiff has a real and current interest in invalidating Ordinance No. 682.

40. This controversy is ripe for judicial determination. Defendants have not adhered to their legal obligation to strictly comply with the applicable procedural requirements governing the adoption of zoning ordinances and the substantive municipal law.

WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment:

(a) Enjoining Defendants from enforcing, relying on or taking any action based on Ordinance No. 682 and mandating that Defendants comply with all applicable procedural requirements to enact zoning ordinances consistent with the law;

(b) Entering a declaratory judgment that Ordinance No. 682: (i) substantively violates the Delaware Code, the Dewey Beach Code and Dewey Beach Town Charter; (ii) was adopted in contravention of the State of Delaware and Town of Dewey Beach procedural requirements; and (iii) is illegal and void *ab initio*; and

(c) Granting the Plaintiff its attorneys' fees, costs and such other and further relief as this Court may deem just and proper.

Dated: August 12, 2010

DRINKER BIDDLE & REATH LLP

/s/ Shawn P. Tucker

Shawn P. Tucker (No. 3326)
Karen V. Sullivan (No. 3872)
Wilmington Trust Center
1100 North Market St., Ste. 1000
Wilmington, DE 19801
(302) 467-4200 - Phone
(302) 467-4201 - Fax
shawn.tucker@dbr.com
karen.sullivan@dbr.com

-and-

Kathleen M. Jennings (No. 913)
AARONSON, COLLINS & JENNINGS, LLC
8 East 13th Street
Wilmington, DE 19805
(302) 655-4600 - Phone
(302) 655-4622 - Fax
KJennings@acjdelaware.com