



IN AND FOR THE COURT OF CHANCERY IN 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;)
 DELL TUSH, in her official capacity;)
 MARC APPELBAUM, in his official capacity;)
 RICHARD HANEWINCKEL, in his official)
 capacity; DIANE HANSON, in her 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 as follows:

PARTIES

1. Plaintiff Dewey Beach Enterprises, Inc. ("DBE") is a 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. DBE owns three parcels of land in Dewey Beach (encompassing seven lots), with the parcels located on the bayside of Dewey Beach. The parcels make up an entire block in the Town and are commonly known as Ruddertowne. DBE is the owner of property located at 113 Dickinson Avenue and the Bay, Dewey Beach; Delaware 19971 ("Ruddertowne").

2. 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.

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

4. Defendant, Dell Tush, is the Mayor and a Commissioner of the Town of Dewey Beach, with an official address at 105 Rodney Avenue; Dewey Beach, Delaware 19971.

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

6. Defendant, Richard Hanewinkel, is a Commissioner of the Town of Dewey Beach, with an official address at 105 Rodney Avenue; Dewey Beach, Delaware 19971.

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

8. 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

9. This Court has jurisdiction pursuant to 10 *Del. C.* §§ 341 and 342.

FACTUAL BACKGROUND

(A) Substantive Errors of Ordinance 634

10. On June 29, 2007, the Town, through unanimous vote of the Commissioners, adopted the Dewey Beach Comprehensive Plan (the "Comprehensive Plan"). A true and correct

copy of the Comprehensive Plan is attached as Exhibit A. The State of Delaware, Office of Management and Budget Planning, certified the Comprehensive Plan on July 29, 2007.

11. Section 702 (d) of Title 22 of the Delaware Code provides:

After a comprehensive plan or portion thereof has been adopted by the municipality in accordance to this chapter, the comprehensive plan ***shall have the force of law and no development shall be permitted except as consistent with the plan.***

22 Del. C. § 702 (d). (emphasis added).

12. The Town's zoning code in place prior to the adoption of the Comprehensive Plan provided for only one resort-business ("Old RB") zoning district within the Town and contained no floor area ratio ("FAR") restriction. Ruddertowne is located in the Old RB zoning district.

13. The Comprehensive Plan required a complete revision of the zoning districts within the Town and specifically instructed the Town to "review and update its zoning and subdivision ordinances, emphasizing an expanded commercial-land-use area. . . ." See Comprehensive Plan at 21. The Comprehensive Plan adopted "a strategy of urban growth and redevelopment. . . ." *Id.* The Comprehensive Plan sought to "create additional opportunities for local commercial establishments that provide year-round community support." *Id.* at 20. To implement this policy, the Comprehensive Plan calls for the expansion of the "commercial-land-use area" by creating three resort-business districts. *Id.* at 21.

14. The Comprehensive Plan designates the three resort-business districts as RB-1, RB-2 and RB-3. *Id.* RB-1 is the "most intensely developed, most dense, zone." *Id.* RB-2 is the zone created for "the middle level of development intensity." *Id.* RB-3 is the zone with "the least intense commercial development." *Id.* Moreover, the Comprehensive Plan mandates "relaxed bulk standards . . . for contiguous tracts consisting of at least 80,000 square feet. . . ." *Id.* at 22.

15. On January 10, 2009, the Town adopted Ordinance No. 634 amending the Dewey Beach Zoning Code (hereinafter referred to as "Ordinance 634"). A true and correct copy of the entire document that the Town provided in response to a request for the as-enacted Ordinance No. 634 is attached as Exhibit B. Chapter 185 of the Dewey Beach Municipal Code is the Dewey Beach Zoning Code. Ordinance 634 deleted in its entirety chapter 185 of the Dewey Beach Municipal Code and inserted a new chapter 185 (the "new Zoning Code"). Ordinance 634 also purported to amend the Dewey Beach Official Zoning Map (the "Amended Map"). The purpose of the new Zoning Code and the Amended Map was to bring the Town's zoning districts in compliance with the Comprehensive Plan. See Ordinance 634.

16. However, the new Zoning Code directly contravenes the Comprehensive Plan adopted by the Town. As required by the Comprehensive Plan, the new Zoning Code creates three new RB zoning districts. The new Zoning Code also creates two Planned Resort Business (PRB) districts (also referred to as "Overlay Districts") for contiguous tracts of land encompassing at least 80,000 square feet. Although the Comprehensive Plan mandates relaxation of bulk standards found in the Old RB, the new Zoning Code achieves the opposite. All of the newly created RB zoning districts and Overlay Districts in the new Zoning Code contain new or more restrictive bulk standards than the Old RB. For instance, when the Comprehensive Plan was adopted, the Old RB did not contain a FAR. Each of the three new RB zoning districts and Overlay Districts within the new Zoning Code contain a FAR. Because all newly created RB zoning districts and Overlay Districts contain more restrictive bulk standards than the Old RB, the new Zoning Code is fatally inconsistent with the Comprehensive Plan.

17. Further, the new Zoning Code directly contravenes the Comprehensive Plan because the new Zoning Code fails to assign relaxed bulk standards to the RB-1 district, and fails

to make RB-1 the most intensely developed, most dense zoning district in Dewey Beach. In fact, the Bulk Zoning Standards in RB-1 are the same as those in RB-2. *See* new Zoning Code, Table 2. Fundamentally, RB-1 (the most dense and intensely developed zone) and RB-2 (the middle level of development intensity) cannot have the same bulk standards and still meet the requirements set forth in the Comprehensive Plan.

18. Pursuant to the Comprehensive Plan, Ruddertowne is located in the area designated RB-1, the most intense and most dense district. Further, Ruddertowne is comprised of a number of contiguous parcels spanning at least 80,000 square feet. Accordingly, relative to the Old RB district, the Comprehensive Plan mandates relaxed bulk standards for Ruddertowne. *See* Comprehensive Plan at 22. The new Zoning Code, enacted pursuant to Ordinance 634, does not afford Ruddertowne the relaxed bulk standards mandated by the Comprehensive Plan and is, therefore, invalid.

19. DBE's property rights have been adversely affected by the unlawful adoption of Ordinance No. 634. The new Zoning Code implemented through Ordinance 634 is inconsistent with the Comprehensive Plan and is, therefore, unauthorized by 22 *Del. C.* § 702(d). Consequently, Ordinance 634 must be voided.

(B) Procedural Errors of Adoption of Ordinance 634

20. In order to lawfully enact an ordinance, the Town must meet the following statutory requirements:

- (a) The subject of the ordinance must be properly advertised on the Town Council's agenda for introduction and referral to the Planning and Zoning Commission;
- (b) The ordinance must be introduced in writing at the Town Council's public meeting;

(c) Town Council must refer the ordinance to the Planning and Zoning Commission for a public meeting;

(d) The Planning and Zoning Commission must hold a public hearing, after proper public notice, on the proposed ordinance and make a recommendation back to the Town Council;

(e) Town Council must properly advertise that it plans to vote on the ordinance;

(f) Town Council must provide the public with complete and accurate copies of the entire ordinance as proposed;

(g) A majority of the Commissioners must vote in favor of the ordinance;

(h) The vote of each Commissioner, together with the rationale, must be entered on the record.

21. The Town failed to follow the procedural safeguards set forth above when adopting Ordinance 634. For instance, upon information and belief, Ordinance 634 and the Findings of Fact, incorporated therein, were drafted shortly before the Town Council meeting on January 10, 2009. It was at this meeting that Town Council adopted Ordinance 634. Accordingly, Ordinance 634 and the incorporated Findings of Fact were never properly introduced in writing and referred to the Planning and Zoning Commission for review, public hearing and recommendation as required by law. Because the Town did not strictly comply with the procedural requirements, Ordinance 634 is invalid.

22. Further, Ordinance 634 states that it amends the Dewey Beach Official Zoning Map (the "Amended Map"). However, upon information and belief, Town Council failed to make the proposed Amended Map available for public review during the public hearings,

including but not limited to the hearing held on January 10, 2009. The zoning map alerts the public to the Town's proposed rezoning of each parcel of land, providing members of the public with a meaningful opportunity to comment on the new Zoning Code as it specifically relates to the allowed use of his property.

23. In addition, Ordinance 634 is invalid because the Town did not attach a copy of the Amended Map to the Ordinance, and, upon information and belief, the Amended Map does not exist. Agents of DBE attempted to obtain a copy of the Amended Map, to no avail. A copy of the Amended Map is not located on the Town's website, as is required by the new Zoning Code. A copy of the Amended Map is not recorded with the Sussex County Recorder of Deeds, as is required by the new Zoning Code. A copy of the Amended Map is not available at the Town's offices, as is required by the new Zoning Code. When agents of DBE attempted to obtain a copy of the Amended Map directly from the Town, agents of the Town stated that the Amended Map was the same as the map within the Comprehensive Plan, but could not provide a copy. A map within the Comprehensive Plan cannot be the Amended Map. For example, the new Zoning Code indicates that the Amended Map identifies the locations of the Overlay Districts, and none of the maps within the Comprehensive Plan do so. Because the Amended Map affects each portion of the Zoning Code, the new Zoning Code was improperly enacted and is, therefore, invalid in its entirety.

24. Still further, and among other procedural problems, the Town allowed David King to participate in crafting the new Zoning Code. David King has been a member of the Planning and Zoning Commission at all times relevant to the adoption of the new Zoning Code. On July 17, 2007, the State Public Integrity Commission issued an opinion advising David King that he shall not participate in matters concerning the Ruddertowne development project. In a

January 24, 2008 letter, this opinion was upheld upon reconsideration by the State Public Integrity Commission. A true and correct copy of the opinion issued by the State Public Integrity Commission is attached as Exhibit C. Despite this admonition, David King participated in drafting the new Zoning Code.

25. Specifically, and among other things, David King created, supported and lobbied for the creation of a FAR in the new Zoning Code. Further, upon information and belief, David King lobbied for more restrictive bulk standards in the RB-1 zone directly effecting Ruddertowne. Because of David King's inappropriate participation, the new Zoning Code was improperly enacted and, therefore, invalid.

26. Ordinance 634 directly affects Ruddertowne. As a property owner in the Town of Dewey Beach, DBE's procedural due process rights with respect to Ruddertowne have been violated by the Town. As a direct result of the numerous errors in procedure during the Town's creation and purported enactment of Ordinance 634, which professes to include Findings of Fact, the new Zoning Code and the Amended Map, DBE was not afforded an adequate opportunity to comment on or participate in the adoption of Ordinance 634, as required by law. Ordinance 634 unlawfully restricts the ability of DBE to develop Ruddertowne, the only tract of land covering at least 80,000 square feet in the Town. Accordingly, Ordinance 634 is invalid and must be voided.

COUNT I - PERMANENT INJUNCTION

27. Plaintiff incorporates by reference paragraphs 1 through 26.

28. Plaintiff can establish actual success on the merits of its claim challenging the adoption of Ordinance 634. Ordinance 634 improperly enacted the new Zoning Code which is inconsistent with the Comprehensive Plan. In adopting Ordinance 634, the Town failed to follow the proper procedure required to enact an ordinance. Ordinance 634 is illegal, arbitrary and capricious and adopted in violation of DBE's procedural due process rights.

29. Plaintiff will suffer irreparable harm if the Court does not grant it the injunctive relief requested. Absent injunctive relief, Ordinance 634 will stand. As a result, DBE will be unable to develop its property in the manner that would be permitted if the new Zoning Code was amended consistent with the Comprehensive Plan.

30. The harm to be suffered by Plaintiff outweighs any harm that would befall the Defendants. Plaintiff is requesting only that the Defendants be required to observe their legal responsibility to comply with due process requirements and to enact a Zoning Code consistent with the Comprehensive Plan.

COUNT II - DECLARATORY JUDGMENT

31. Plaintiff incorporates by reference paragraphs 1 through 30.

32. There is a real and justiciable controversy between the parties regarding the validity of Ordinance 634, and the interests of the parties are adverse.

33. Plaintiff has a real and current interest in invalidating Ordinance 634.

34. This controversy is ripe for judicial determination. Defendants have not complied with their legal obligation to strictly comply with the applicable procedural requirements and to enact a Zoning Code that is consistent with the Comprehensive Plan.

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WHEREFORE, DBE respectfully requests that this Court enter judgments and grant it relief against the Defendants as follows:

(a) enter a permanent injunction prohibiting the Defendants from enforcing, relying on or taking any action based on Dewey Beach Ordinance No. 634 and mandating that the Defendants comply with all applicable procedural requirements and enact a Zoning Code that is consistent with the Comprehensive Plan;

(b) enter a declaratory judgment that Dewey Beach Ordinance No. 634 violates the Comprehensive Plan, is illegal, invalid and of no lawful force and effect;

(c) grant the Plaintiff its attorneys' fees, costs and such other and further relief as the Court deems just and proper.

Dated: March 16, 2009

WOLFBLOCK, LLP

/s/ Kathleen M. Jennings

Kathleen M. Jennings (No. 913)

Shawn P. Tucker (No. 3326)

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