

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FRANK E. ACIERNO,)
)
 Plaintiff,)
)
 v.) Civil Action No. 92-385-SLR
)
 NEW CASTLE COUNTY,)
)
 Defendant.)

MEMORANDUM ORDER

At Wilmington this 8th day of January, 2002, having reviewed defendant's renewed motion for summary judgment and the papers submitted in connection therewith, and having heard oral argument on the same;

IT IS ORDERED that said motion (D.I. 308) is granted for the reasons that follow:

1. By memorandum order issued February 8, 2001, the court denied defendant's motion for summary judgment as it related to plaintiff's substantive due process claim. (D.I. 305) More specifically, the court held that, should plaintiff prove that defendant violated his substantive due process rights when it voided his revised record plan of June 1988, reinstatement of said plan could provide meaningful relief under the "sunsetting" provision of the Unified Development Code ("UDC"). That provision read at the time as follows:

Construction of development or improvements shown on an approved record plan for a major subdivision or major land development shall commence within five (5) years from the date of adoption of these regulations.

UDC Article 01 of § 01.130B, at 01-2 (Dec. 31, 1997). The court concluded that, "absent evidence of record concerning legislative intent or accepted application contrary to the plain meaning of the sunset provision, there is no basis for the court to exclude plaintiff from its scope." (Id. at 7)

2. Trial was scheduled to commence on January 14, 2002. (D.I. 307)

3. On November 30, 2001, defendant renewed its motion for summary judgment on the basis of new legislation adopted on or about November 19, 2001.

a. The sunset provision now states:

Construction of development or improvements shown on an approved record plan for a major subdivision or major land development shall commence within five (5) years from December 31, 1997; except that, as provided in Section 40.01.120, any approved record plan for: . . . any major subdivision or major land development plan that was unbuildable immediately prior to the adoption of this Chapter for any reason . . . shall remain unbuildable and shall remain exempt from, and not eligible for protection under, this sunset provision.

UDC Article 01 § 40.01.130. (D.I. 310, Ex. C at 3-4)

b. The clarifying ordinance defines the term "unbuildable" as follows:

Unbuildable. For purposes of Article 01 of this Chapter, an approved record plan for a subdivision or land development shall be deemed unbuildable if, immediately prior to the adoption of this Chapter, such plan did not comply with all applicable laws, including zoning and subdivision regulations, and no longer fell within any period of protection under former code provisions, so that a valid building permit could not have been issued for construction of development or improvements.

UDC Article 33 Division 40.33.300. (D.I. 310, Ex. C at 5-6)

c. The synopsis to the ordinance states that these amendments are intended "to clarify the scope and meaning of Sections 40.01.120 and 40.01.130 of the UDC with regard to the non-application of its sunseting provisions to an approved record plan for a subdivision or major land development that was not buildable at the time of adoption of the UDC." (D.I. 310, Ex. C at 6-7)

d. The synopsis further explains:

County Council adopted the sunseting provisions of the UDC to reduce the number of plans approved under former New Castle County Code provisions that could be built, not to increase the number of former Code plans that could be built. An approved record plan for a subdivision or land development under former Code provisions that was rendered unbuildable, due to, for example, zoning changes and the expiration of any applicable period of protection

under former Code sunseting provisions, is not eligible for an additional sunseting period under the UDC. The current sunseting provisions are intended to apply only to an approved record plan of a subdivision or land development that remained buildable as of the adoption of the UDC. This Ordinance is intended to clarify that purpose and, by doing so, to prevent the construction of developments pursuant to record plans that were unbuildable prior to the adoption of the UDC. . . .

(D.I. 310, Ex. C at 7)

e. The clarifying ordinance was proposed on or about September 25, 2001. Defendant's Department of Land Use recommended adoption of the clarifying ordinance on or about October 18, 2001. The New Castle Planning Board, by unanimous vote, recommended adoption of the clarifying ordinance by County Council on or about October 18, 2001. The Land Use Committee of County Council considered the ordinance at a public meeting held on November 6, 2001, in which plaintiff's counsel participated. County Council adopted the ordinance by a 6-0 vote at its November 13, 2001 meeting. Finally the County Executive signed the ordinance into law on November 19, 2001. (D.I. 310 at ¶¶ 7-9)

4. Defendant argues in support of its renewed motion for summary judgment that, in light of the clarifying

amendment, the case is now moot because plaintiff cannot build even if his record plan were reinstated.

5. Plaintiff does not dispute the legal principle that clarifying legislation may render a case moot. See, e.g., United States Dep't of Justice v. Provenzano, 469 U.S. 14, 15 (1984); Diffenderfer v. Cent. Baptist Church, Inc., 404 U.S. 412, 414 (1972); McLarty v. Borough of Ramsey, 270 F.2d 232, 234 (3d Cir. 1959). Instead, plaintiff argues that, even under the new legislation, his record plan was "buildable" immediately prior to the adoption of the UDC.

6. The court disagrees. First, the court finds that plaintiff's record plan did not fall within any period of protection under former Code provisions. The period of protection under former Code Section 23-81(18) expired in 1981, ten years after the effective date of the original rezoning ordinance.¹ The period of protection under former Code Section 23-81(21), repealed in October 1987, expired at the earliest in 1979, five years after approval of the original record development plan, or at the latest in 1993, five years after plaintiff's record resubdivision plan was approved in 1988.

¹The effective date of the original zoning ordinance is April 1971, when the Westhampton property was rezoned to DPUD. See Acierno v. Cloutier, 40 F.3d 597, 600 (3d Cir. 1994).

7. Second, the court finds that the process described for continuing development under a zoning classification after the expiration of any period of protection does not extend the period of protection, as argued by plaintiff. See Acierno, 40 F.3d at 602 n.3, 617, 619 n.15.

8. In conclusion, plaintiff's plans could not be built under either the 1992 R-1-B zoning classification or the current Suburban zoning classification.² Plaintiff's plans, if reinstated, would not qualify for the protection of the UDC's sunset provision as amended. Therefore, even if plaintiff were to prevail on his challenge to defendant's April 1992 voiding ordinance, the court can provide no effective relief. The case is dismissed as moot.

United States District Judge

²See D.I. 309 at 8 n.3.