

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL DIVISION

NATIONAL GENERAL :
PROPERTIES, INC., :
Plaintiff :
v. : No. 12-0948
FRANKLIN TOWNSHIP AND CARL E. :
FAUST, IN HIS CAPACITY AS :
BUILDING CODE OFFICIAL, :
Defendants :

Civil Law - Uniform Construction Code - Equity Jurisdiction -
Administrative Remedies - Preliminary Injunction

1. A municipality which has adopted the state Uniform Construction Code ("UCC") as its municipal building code is required to create or designate an appeals board to hear and decide appeals taken from decisions made by the local building code official who administers and enforces the UCC.
2. A fundamental prerequisite to the exercise of equity jurisdiction is the unavailability of an adequate remedy at law. Consequently, absent some demonstrated constitutional, statutory or regulatory infirmity, a party challenging a decision of the local building code official is not entitled to equitable relief and must first exhaust his administrative remedies under the UCC (i.e., appeal to the appeals board) before proceeding to court.
3. The need to exhaust administrative remedies before proceeding to court applies notwithstanding a property owner's belief that the appeals board is prejudiced and cannot fairly and impartially decide the appeal. Before the impropriety of an official hearing a case can be raised on appeal because of bias, unfairness or procedural irregularities, such claims must first be raised before the official or administrative body whose impartiality has been questioned.
4. A preliminary injunction will not be granted absent a *clear right* in the plaintiff and *immediate* and *irreparable harm* if interim relief is not granted. A failure to establish

any one of these prerequisites is sufficient to deny the requested injunction.

5. The prerequisites for the grant of a preliminary injunction - immediacy, irreparable harm, and a clear right - to enjoin enforcement of the UCC against a property owner who is occupying property without an occupancy permit have not been met where the owner's appeal of the building code official's order to show cause/order to vacate to the appeals board automatically stays enforcement; the owner has failed to establish any actual harm, much less harm incapable of being fully compensated by monetary damages; and the owner's right to an occupancy permit is unclear in light of pending issues with respect to the owner's need to have a valid highway occupancy permit and which question compliance with requirements of the Pennsylvania Sewage Facilities Act, both of which remain unanswered.

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Defendants	:	
F. Peter Lehr, Esquire		Counsel for Plaintiff
John J. Mahoney, Esquire		Counsel for Defendants

Nanovic, P.J. - December 31, 2012

MEMORANDUM OPINION

National General Properties, Inc. ("Owner") has requested that we enjoin an administrative hearing scheduled before the UCC Joint Board of Appeals ("Appeals Board") on Owner's appeal

of an order issued by the local building code official.¹ For the reasons which follow, we find it would be inappropriate to exercise equity jurisdiction or to grant injunctive relief.

FACTUAL AND PROCEDURAL BACKGROUND

On February 25, 2012, Carl E. Faust, in his capacity as the building code official for Franklin Township, Carbon County, Pennsylvania ("Township") issued an order to show cause to Owner as to why its building located at 450 Interchange Road in the Township should not be vacated.² The reason given for the order

¹ Pursuant to Section 501 of the Uniform Construction Code Act ("Act"), 35 P.S. §§ 7210.101-7210.1103, a municipality which has adopted an ordinance for the administration and enforcement of the Act shall establish or designate a board of appeals to hear appeals from decisions of the code administrator. In order to administer and enforce the provisions of the Act, the municipality must enact an ordinance concurrently adopting the current Uniform Construction Code as its municipal building code. 35 P.S. § 7210.501(a)(1).

On June 15, 2004, Franklin Township elected to administer and enforce the provisions of the Act, as amended from time to time, and its regulations. See Franklin Township Ordinance No. 2004-01. Simultaneously, the Township adopted the Uniform Construction Code ("UCC"), 34 Pa.Code, Chapters 401-405, as amended from time to time, as its municipal building code. The Township, together with nine other municipalities in Carbon County, also established a UCC Joint Board of Appeals for the purpose of hearing and ruling on appeals from determinations of building code officials in their respective municipalities.

² The parties dispute the proper characterization of Mr. Faust's letter dated February 25, 2012. (Owner's Exhibit 9). The Township contends this letter is a notice of violations under UCC § 403.82. The Owner contends the letter is an order to show cause/order to vacate pursuant to UCC § 403.83. Although the letter is not a model of precision, it does state that action is being started to have all tenants in the building vacated, that the reason for this decision is the Owner's failure to obtain any legal occupancy permits for tenant spaces in the building, and that the Owner has thirty days to submit a written response and to appeal from "this order to vacate." The letter further states that if certain information previously requested was provided - *i.e.*, a building permit application for each tenant space, appropriate plans, and a letter from the sewage enforcement officer pertaining to the septic system drain field - "the vacate proceeding will be temporarily stayed." Given this language, we believe the February 25, 2012 letter is

was Owner's alleged failure to obtain "any legal occupancy permits" for its tenants, a violation of Section 403.46(a) of the Uniform Construction Code ("UCC"), 34 Pa.Code § 403.46(a), which states that a building may not be used or occupied without a certificate of occupancy.

The building was purchased by Owner in 2007 and subsequently renovated. It contains four rental suites. At the time the order was issued, three of these suites were occupied and being used for commercial purposes: (1) a pet store; (2) offices for an engineering firm; and (3) as a beauty salon and spa. The order also stated that under the UCC the Owner had thirty days to submit a written response.

On March 27, 2012, Owner appealed the building code official's decision to the Appeals Board using a form petition made available for this purpose by the Township. See UCC § 403.122(a) (requiring a municipality to provide a form petition for filing appeals). As part of this appeal, Owner included correspondence from its counsel dated March 27, 2012, explaining the basis of the appeal. In this correspondence, counsel stated that the property was acquired by Owner on December 28, 2007; that Owner made various renovations to different sections of the

properly termed as an order to show cause/order to vacate within the meaning of UCC § 403.83.

building between 2008 and 2010, all pursuant to building permits issued by the Township; and that these renovations had been inspected and approved by the appropriate building code official. Consequently, counsel claimed the building code official was obligated to issue a certificate of occupancy for the property pursuant to UCC § 403.46(b) (requiring a building code official to issue a certificate of occupancy within five business days of receipt of a final inspection report indicating compliance with the UCC).

On April 9, 2012, the Township Secretary sent to the Appeals Board the form petition Owner had completed in making its appeal. Also included in this mailing was a February 6, 2012 letter from Faust to a principal of Owner and a February 16, 2012 letter from Faust to Owner's counsel. These letters identified and documented specific information which had previously been requested by Faust before certificates of occupancy could be issued and which had only been alluded to in the February 25, 2012 vacate order. The information requested included building permit applications for each tenant space, completed architectural plans, and a letter from the sewage enforcement officer addressing the capacity of the existing on-lot septic system to accept added loads to the system, as well as information pertaining to road access and storm water

management. See UCC §§ 403.42 (requiring building permits prior to construction) and 403.42a(b) (requiring copies of Department of Transportation highway access permits to be attached to applications for building permits).³ On April 12, 2012, the Township secretary also forwarded a copy of counsel's March 27, 2012 letter to the Appeals Board.

The Appeals Board originally scheduled a hearing on the Owner's appeal for May 9, 2012. This was later continued at Owner's request to June 20, 2012. Prior to this date, on May 2, 2012, Owner filed with the court a complaint in mandamus seeking to compel the issuance of a certificate of occupancy. This complaint, which names both the Township and Faust as defendants, alleges, in essence, that there is no basis in law or fact for Owner having been denied the issuance of a certificate of occupancy, and that UCC § 403.46(b) requires the permit to be issued.

On the same date the mandamus complaint was filed, Owner also filed, to the same term and docket number, a petition for preliminary injunction seeking, *inter alia*, to stay the hearing

³ Section 403.43(d) of the UCC further provides:

A building code official may not issue a permit for any property requiring access to a highway under the Department of Transportation's jurisdiction unless the permit contains notice that a highway occupancy permit is required under Section 420 of the State Highway Law (36 P.S. § 670-420) before driveway access to a Commonwealth highway is permitted.

before the UCC Appeals Board and to enjoin the Township and its officials from pursuing the pending enforcement action to vacate the building. In this petition, Owner contends that the procedural requirements of the UCC were not met, primarily because Owner's complete appeal (consisting of both the form petition and counsel's letter) was not forwarded to the Appeals Board within five business days as required by UCC § 403.83(c), and that its rights to fundamental due process were infringed upon by the Board's receipt of copies of Faust's letters of February 6, 2012 and February 16, 2012. These letters, according to Owner, contain irrelevant and extraneous information which has irremediably prejudiced the Board and prevents Owner from receiving a full and fair hearing before the Board. Owner also claims the Board was never provided a copy of the order appealed from, Faust's letter of February 25, 2012.

A hearing on Owner's Petition for Preliminary Injunction was held on May 11, 2012. At this hearing, several issues arose which we requested counsel brief. These are discussed below.

DISCUSSION

Equity Jurisdiction

A fundamental prerequisite to the exercise of equity jurisdiction is the unavailability of an adequate remedy at law. Commonwealth, DPW v. Eisenberg, 454 A.2d 513, 514-15 (Pa. 1982).

In this regard, UCC § 403.122(a) permits an Owner to appeal a building code official's decision to an appeals board. UCC § 403.122(i) authorizes the board to deny the appeal, in full or in part; to grant the request, in full or in part; or to grant the request upon certain conditions being satisfied. Moreover, Owner did, in fact, file an appeal to the Appeals Board prior to filing its mandamus action and collateral request to enjoin proceedings before the Board. Therein, Owner asserted its compliance with the UCC and entitlement to a certificate of occupancy pursuant to UCC § 403.46(b).⁴ Significantly, this issue is within the scope of claims to be submitted to the Appeals Board for resolution.⁵

⁴ Parenthetically, the grounds for appeal stated in Owner's petition to the Appeals Board are essentially the same as those set forth in its complaint in mandamus, which is an action at law. Though this itself raises the apparent incongruity of an equitable proceeding (*i.e.*, Owner's request for a preliminary injunction) issuing under the auspices of an action at law, more to the point is that a mandamus action, like one in equity, may not be maintained when another remedy or cause of action exists. "[M]andamus is an extraordinary writ which will only be granted to compel official performance of a ministerial act or mandatory duty where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other appropriate and adequate remedy." Matesic v. Maleski, 624 A.2d 776, 778 (Pa.Cmwlth. 1993). Further, "[a] party challenging administrative decision-making that has not exhausted its administrative remedies is precluded from obtaining judicial review by mandamus or otherwise." *Id.*

⁵ On this issue, UCC § 403.121(b) provides:

The board of appeals shall hear and rule on appeals, requests for variances and requests for extensions of time. An application for appeal shall be based on a claim that the true intent of the act or Uniform Construction Code has been incorrectly interpreted, the provisions of the act or Uniform Construction Code do not fully apply or an equivalent form of construction is to be used.

UCC § 403.122(f) further provides:

A board of appeals shall only consider the following factors when deciding an appeal under section 501(c)(2) of the act:

To the extent Owner claims the Appeals Board has been irreparably prejudiced by receipt of Faust's correspondence of February 6 and 16, 2012, and cannot fully and impartially decide its appeal, this fear is premature. First, it is unclear which members of the Board, if any, have received or reviewed such correspondence. It is also unclear whether the Board sits *en banc* or in panels. Before the impropriety of an official hearing a case can be raised on appeal because of bias, unfairness or procedural irregularities, such claims must first be raised in the first instance before the official or administrative body whose impartiality has been questioned. HYK Construction Company, Inc. v. Smithfield Township, 8 A.3d 1009 (Pa.Cmwlth. 2010), *appeal denied*, 21 A.3d 1195 (Pa. 2011).

[R]ecusal motions are directed in the first instance to the official whose recusal is sought, for that official's self-assessment. It is only after that official's refusal to recuse, and some substantive action adverse to the movant, that the issue is ripe for review, for abuse of discretion, by another body.

Id. at 1017 n.9 (citations omitted).⁶

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- (1) The true intent of the act or Uniform Construction Code was incorrectly interpreted.
 - (2) The provisions of the act do not apply.
 - (3) An equivalent form of construction is to be used.

⁶ Nor is it clear that the matters which Owner argues are unrelated to the UCC process are, in fact, unrelated. Faust testified that the Township has in place a resolution which prohibits the issuance of an occupancy permit unless all other laws and regulations are complied with. (N.T. 5/11/12, p.109); see also UCC § 403.102(n) (requiring a municipality to provide a list of all other required permits necessary before issuance of the building permit, but stating that the municipality will not be liable for the completeness of any

Owner has thus failed to demonstrate any constitutional, statutory, or regulatory infirmities with respect to the administrative remedy available under the UCC. Rather than exhaust this administrative remedy, Owner now seeks, without adequate justification, to abort that which it initially invoked.⁷

Authority of Joint Municipal Appeals

list). According to Faust, if a change in use occurs of property whose access is from a state highway, PennDOT must be notified and allowed to determine the need for or effect on any existing highway occupancy permit. Further, since sewage from the building flows into an on-lot septic system shared by three other properties, the capacity of this system to accept any changes in the type or volume of sewage effluent must be reviewed by the sewage enforcement officer. Complicating this matter is that waste from a beauty salon is considered industrial waste and, according to Faust, is prohibited from being deposited into a shared septic system. (N.T. 5/11/12, pp.107-110).

It is also worth noting that the reasons given in Faust's letters for not issuing a certificate of occupancy are not qualitatively different from the reasons cited in counsel's March 27, 2012 letter for why a certificate of occupancy should be issued, also forwarded to the Board. Both are arguments reinforced by facts which each side contends are important for the Board to know before making a decision. While we do not condone the unsolicited distribution of *ex parte* information to a hearing board, we ascribe no improper motives to the information forwarded to the Board by the Township secretary in her letter of April 9, 2012. The information contained in Faust's two letters provided further background to the order under appeal on why the certificates of occupancy were not issued, in contrast to that argued by the Owner in its appeal, and was not unknown to Owner. See also UCC § 403.122(d) (permitting an appeals board to base its decision on documents received and the written brief or argument of the parties, unless a hearing is requested). In sum, we have no difficulty in believing that the Appeals Board understands the distinction between advocacy and evidence and can decide for itself whether there is any need to recuse.

Finally, we do not see how any delay in forwarding Owner's appeal and counsel's letter which accompanied that appeal to the Appeals Board deprived Owner of fundamental due process to its prejudice. Nor have we been provided any legal authority to support this proposition. To the extent the underlying order to vacate may not have been provided to the Board, we do not understand why this is not easily corrected by simply providing a copy to the Board at this time.

⁷ Moreover, in the event Owner feels aggrieved by any ruling or adjudication of the Board, pursuant to Section 752 of the Administrative Agency Law, 2 Pa.C.S.A. § 752, Owner retains the right to file an appeal to this court.

Board to Decide UCC Appeals

In Middletown Township v. County of Delaware Uniform Construction Code Board of Appeal, 42 A.3d 1196 (Pa.Cmwlth. 2012) (*en banc*), the Commonwealth Court held that Section 501(c)(1) of the Uniform Construction Code Act ("Act"), 35 P.S. § 7210.501(c)(1), requires a municipality which has adopted the UCC as its municipal building code and elected to administer and enforce the provisions of the Act in house, or through the employment of one or more construction code officials acting on its behalf, to establish its own board of appeals to hear appeals from the denial of a permit application, rather than designate an appeals board established by a separate municipality, or one created jointly by the adopting municipality with one or more other municipalities.⁸ At the time

⁸ As to the manner and means by which the Act may be administered and enforced, the Act provides:

Municipal administration and enforcement.--This act may be administered and enforced by municipalities in any of the following ways:

- (1) By designation of an employee to serve as the municipal code official to act on behalf of the municipality for administration and enforcement of this act.
- (2) By the retention of one or more construction code officials or third-party agencies to act on behalf of the municipality for administration and enforcement of this act.
- (3) Two or more municipalities may provide for the joint administration and enforcement of this act through an intermunicipal agreement under 53 Pa.C.S. Ch. 23 Subch. A (relating to intergovernmental cooperation).
- (4) By entering into a contract with the proper authorities of another municipality for the administration and enforcement of this act. When such a contract has been entered into,

Middletown was decided, Section 501(c)(1) provided:

A municipality which has adopted an ordinance for the administration and enforcement of this act or municipalities which are parties to an agreement for the joint administration and enforcement of this act shall establish a board of appeals as provided by Chapter 1 of the 1999 BOCA National Building Code, Fourteenth Edition, to hear appeals from decisions of the code administrator. Members of the municipality's governing body may not serve as members of the board of appeals.

As interpreted by the majority in Middletown, this language prevents a municipality which has decided to enforce the Act on its own from designating an appeals board created by another municipality, or established jointly with other municipalities, to hear appeals regarding its administration and enforcement of the Act. Middletown, 42 A.3d at 1200 ("[T]his provision only authorizes municipalities to join with a board of appeals that it did not create when it enters into an agreement for the joint administration and enforcement of the Act.").

Middletown Township had elected to administer and enforce the provisions of the Act itself and designated an appeals board created by Delaware County as its appeals board. Because of

the municipal code official shall have all the powers and authority conferred by law in the municipality which has contracted to secure such services.

- (5) By entering into an agreement with the department for plan reviews, inspections and enforcement of structures other than one-family or two-family dwelling units and utility and miscellaneous use structures.

35 P.S. § 7210.501(b).

this election, the Commonwealth Court determined “[Middletown Township] was required to establish its own board of appeals under Section 501(c)(1).” *Id.* at 1200-1201. In consequence of its failure to do so, the Court held that the Township’s designation of the county board to hear UCC appeals was invalid and any decision made by that board was void and unenforceable for want of jurisdiction.

While Franklin Township, like Middletown, elected to administer and enforce the provisions of the UCC itself, and designated a joint board to hear appeals, Section 501(c)(1) has since been amended to provide:

A municipality which has adopted an ordinance for the administration and enforcement of this act or municipalities which are parties to an agreement for the joint administration and enforcement of this act shall establish or designate a board of appeals as provided by Chapter 1 of the 1999 BOCA National Building Code, Fourteenth Edition, to hear appeals from decisions of the code administrator. Members of the municipality’s governing body may not serve as members of the board of appeals. *A municipality may establish a board of appeals or may establish or designate a joint board of appeals in accordance with 53 Pa.C.S. Ch. 23 Subch. A (relating to intergovernmental cooperation).*

35 P.S. § 7210.501(c)(1) (amended 2012) (emphasis on new language added to the statute).

This amendment, enacted on October 24, 2012, with an effective date of December 23, 2012, is now in full force. Its terms, by virtue of the Township’s previous election to

administer and enforce the provisions of the Act, as amended from time to time, are therefore inherently part of what is being administered and enforced by the Township. In consequence, the Appeals Board designated by the Township to hear appeals from decisions made by its building code officials is now authorized to do so.

Merits of Preliminary Injunction

The granting of a preliminary injunction is an extraordinary remedy. A.M. Skier Agency, Inc. v. Gold, 747 A.2d 936, 939 (Pa.Super. 2000). A preliminary injunction will not be granted absent a *clear right* in the plaintiff and *immediate and irreparable harm* if interim relief is not granted. Keystone Guild, Inc. v. Pappas, 159 A.2d 681, 683 (Pa.Super. 1960) (emphasis added).

For a preliminary injunction to issue, the party requesting the injunction must establish (1) that an injunction is necessary to prevent an immediate and irreparable harm that cannot be adequately compensated by damages; (2) that greater injury would result from refusing an injunction than by granting it, and, concomitantly, that issuance of an injunction would not substantially harm other interested parties in the proceedings; (3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, that it is likely to prevail on the merits; (5) that the injunction it seeks is reasonably suited to abate the offending activity; and (6) that a preliminary injunction will not adversely affect the

public interest. Summit Town Ctr., Inc. v. Shoe Show of Rocky Mt., Inc., 828 A.2d 995, 1001 (Pa. 2002) (citations omitted). If a petitioner fails to establish any one of these prerequisites, there is no need to address the others. County of Allegheny v. Commonwealth, 544 A.2d 1305, 1307 (Pa. 1988).

Owner has not convinced us that these prerequisites have been met. As to immediacy, the filing of the appeal with the Appeals Board acts as a stay to the enforcement action. UCC §§ 403.83(e), 403.122(c).

Next, Owner's fear that it may lose tenants, and its tenant's customers, if a hearing before the Appeals Board is held and the Township is not enjoined from continuing its enforcement action, is speculative at this point. No actual harm, much less harm incapable of being fully compensated by monetary damages, has been shown. New Castle Orthopedic Assocs. v. Burns, 392 A.2d 1383, 1387 (Pa. 1978) (plurality) (stating that "actual proof of irreparable harm" required for a preliminary injunction, and concluding that injunction granted in that case was improper because record failed to indicate irreparable harm). This appears particularly true when the aggrieved party, as here, will receive a hearing, which has yet to be held, and will be allowed to conduct its business in the interim.

Finally, it is by no means clear that Owner will succeed in its request for an occupancy permit. Section 403.46(b) of the UCC, upon which Owner relies, provides that a certificate of occupancy shall be issued within five business days after receipt of a final inspection report indicating compliance with the UCC. The final inspection upon which Owner relies identifies six open violations. (Owner's Exhibit 8). Further, the need to have a valid highway occupancy permit and to comply with the requirements of the Pennsylvania Sewage Facilities Act, 35 P.S. §§ 750.1-750.20a, before a certificate of occupancy will issue, has not been answered.

CONCLUSION

In denying Owner's request for a preliminary injunction, we do not decide the merits of its claim to a certificate of occupancy. We hold only that because Owner has failed to exhaust its administrative remedies and failed to show that such remedies are inadequate, equity will not intervene. We have further determined that even if such administrative remedies did not exist, Owner has failed to establish its entitlement to relief.

BY THE COURT:

P.J.