



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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September 5, 2019

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Re: *Dulles Professional Center Condo Unit Owners Association, et al. vs. Board of Supervisors of Fairfax County, Virginia, et al.*, Case No. CL-2018-11870

Dear Counsel:

This matter comes before the Court on pleas in bar by all defendants as to the only remaining count of this action—Count II.

PROCEDURAL HISTORY

This declaratory action has been brought by the “Dulles Professional Center Condominium Unit Owners Association and three individual defendants, all of whom own units in the condominium. They seek a judicial declaration that certain actions taken by the Fairfax County Board of Supervisors was ultra vires and that this Court declare invalid the approval of the defendants’ application of the defendants’ townhouse development application.

OPINION LETTER

The Dulles Professional Center is an office condominium located on a parcel of land within the Dulles Suburban Center, a segment of Dulles, Virginia near the plotted site for the Dulles Metro Station. Plaintiffs are the Dulles Professional Center Condominium Unit Owners Association and three individual unit owners of units within the Dulles Professional Center: Spectrum Innovative Properties, LLC, McWhorter LLC, and Mulpuri Properties, LLC (collectively, the “DPC Unit Owners”).

The plaintiffs have sued the Board of Supervisors of Fairfax County and two private entities. The two private entities are JLB Dulles Tech, LLC and Stanley Martin Companies, LLC. JLB Dulles is the record owner of a property that abuts approximately 600 feet of the southwestern boundary of Plaintiffs’ Parcel. Stanley Martin has a contract to purchase the property.

In 2017, the Board of Supervisors approved an application from JLB Dulles to construct apartments on defendants’ parcel. The JLB Apartment Approval also provided for the construction of two lanes of a contemplated four lane extension of McNair Farms Drive on the portion of Defendants’ parcel abutting plaintiffs’ property. Plaintiffs were informed the remaining two lanes were to be built on plaintiffs’ parcel sometime in the future, either upon redevelopment at the redeveloper’s cost or by a taking. No timely appeal was taken from the 2017 approval.

On July 10, 2018, the Board of Supervisors approved a new proposal from Stanley Martin to build townhomes on defendants’ parcel, adopting the same construction plan for the McNair Extension (the “Stanley Martin Approval”). Plaintiffs timely challenged that approval on August 10, 2018.

This action originally consisted of four counts. All defendants, over the course of two hearings, demurred to all four counts.

Judge David Oblon, by order dated January 7, 2019, sustained the Board’s demurrer to Counts I, III, and IV.¹ Judge Oblon granted leave to amend Count I, but dismissed Counts III and IV and did not grant leave to amend. Judge Oblon specifically ruled that the plaintiffs did not have standing to bring the actions in Counts I, III, and IV.

At a second hearing Judge Oblon ruled on demurrers filed by all defendants. At this hearing, by order dated March 15, 2019, Judge Oblon sustained the demurrer to Count I and granted leave to amend the complaint. As a result of the two demurrer hearings before Judge Oblon, only Count II remains before the Court in this plea in bar hearing.²

Count II, alleges the Board of Supervisors acted arbitrarily and capriciously by failing to comply with Section 16-101(4) of the Fairfax County Zoning Ordinance during its deliberation

¹ In the first demurrer hearing, only the demurrer of the Board of Supervisors was before the Court.

² The plaintiffs did not avail themselves of the opportunity to file a second amended complaint.

prior to the Stanley Martin Approval. Plaintiffs argue that the Board of Supervisors applied the incorrect standard and failed to consider the substantial injury to the use and value of Plaintiffs' parcel that will be caused by the Stanley Martin Approval. Due to the Board of Supervisors' alleged failure to consider the substantial negative impact on the use and value of Plaintiffs' parcel, the plaintiffs allegedly suffered an injury "estimated to be at least \$3.3 million (and possibly higher) in the decreased fair market value of their parcel".

In this plea in bar all defendants argue that the plaintiffs lack standing to bring this action and that their claim is time barred because the plaintiffs did not appeal the 2017 decision of the Board of Supervisor within thirty days.

STANDING

Defendants argued plaintiffs' lack of standing in the demurrer hearings. However, in this hearing the argument for the lack of standing is different than the argument the defendants used in the demurrer hearings. As to the lack of standing argument in the first and second hearings, the defendants prevailed as to Counts I, III, and IV. Judge Oblon specifically found that the plaintiffs had standing as to Count II. A threshold question before the court in this plea in bar is whether this Court is bound by Judge Oblon's ruling that the plaintiffs did have standing as to Count II.

I do not believe I am bound by Judge Oblon's decision. The plaintiff relies on the law of the case doctrine. That reliance is misplaced. The law of the case doctrine does not bind a trial court prior to appeal. *In re Brown*, 295 Va. 202 (2018); *Robbins v. Robbins*, 48 Va. App. 466 (2006). I am not bound by Judge Oblon's decision.

In their opposition brief, the plaintiffs' state: "The only standing issue Judge Oblon has not already addressed—*because neither the County nor the Corporate Defendants previously raised this issue*—is the narrow issue of whether the Dulles Association, as a condominium association, and the unit owners, as owners of their own units, are proper parties to challenge this July 10, 2018 Board approval (emphasis added) *Plaintiffs' Brief in Opposition to Plea in Bar of JLB Dulles Tech LLC & Stanley Martin Companies, LLC*, at p. 3. It is not that I am disagreeing with Judge Oblon's decision, and I certainly am not overruling Judge Oblon, as I have no authority to do so. I am asked to resolve a different issue and my analysis differs from Judge Oblon's.

According to Va. Code §55-79.80(A)(2), a unit owner's association shall have the power to make or cause to be made additional improvements on and as part of the common elements. Here, the named plaintiffs are three individual owners and the Dulles Professional Center Condominium Unit Owners Association. It might be asked, then, if the plaintiff is the Unit Owners Association, what is the basis of the lack of standing argument?

The answer lies within the bylaws of Dulles' bylaws. Section 3.10 of the bylaws creates a board of directors. Section 3.10 states, in pertinent part:

The Board of Directors shall have the power to act as agent for the unit owners of all of the units and for each of them, to manage, control and deal with the interests of such unit owners in the common elements of the Condominium to permit the Board of Directors to fulfill all of its power, rights, functions and duties.

Therefore, the fact that the plaintiff calls itself the Unit Owners Association does not resolve the issue. But for Section 3.10 of the bylaws, I believe the Unit Owners Association would be correct in its assertion that it has standing. Section 3.10, however, grants to a board of directors the authority that the Unit Owners Association might otherwise have to bring this action. This action should have been brought by the board of directors. This plaintiff has no standing to bring this action.

The Supreme Court of Virginia addressed the issue of standing for a condominium unit owners association in *Kuznicki v. Mason*, 273 Va. 166 (2007), cited by all parties. There, the Supreme Court interpreted Va. Code §§55-79.53(A) and 55-79.80(A) and held that as to individual owners, only the condominium unit owners' associations have standing to institute claims or actions concerning common elements. Insofar as this case includes three individual owners of the condominium, the answer is clear: the individual owners lack standing.

Because my decision as to standing resolves this case, I do not address the other issues raised by the defendants in their plea in bar.

The plea in bar as to Count II is sustained and the count is dismissed. Counsel for the defendants shall prepare an order reflecting this decision and circulate it among counsel.

Sincerely,

A large black rectangular redaction box covers the signature area.

Robert J. Smith