

 SERGOVIC CARMEAN WEIDMAN
McCARTNEY & OWENS, P.A.

John A. Sergovic, Jr.
David J. Weidman
Shannon R. Owens
Rachel Bleshman
Tyler J. Friedman

Website: www.sussexattorney.com

Shannon Carmean Burton
Deirdre A. McCartney
Harold W.T. Purnell, II
George B. Smith, of Counsel

July 19, 2023

VIA EMAIL AND FIRST-CLASS MAIL

(CompPlan@dover.de)

Department of Planning and Community Development
Board of Adjustment of the City of Dover
15 Loockerman Plaza
Dover, DE 19901

Re: Site Development Plan S-23-06 College Road Apartments at Railroad Avenue/Grove Street

Details of the Appellants (Dr. Wilma Mishoe and The Apartments at Mishoe Cove, L.L.C.) Basis for Appeal of the City of Dover Planning Commission Approval of Site Development Plan S-23-06 on June 20, 2023, by which they are Aggrieved to the Board of Adjustment of the City of Dover:

On June 20, 2023, the City of Dover Planning Commission (hereinafter the “Commission”) voted to approve Site Development Plan S-23-06 (hereinafter the “Site Development Plan”).¹ Approval of the Site Development Plan occurred in error. Dr. Wilma Mishoe and the Apartments at Mishoe Cove, L.L.C. (hereinafter the “Mishoes”)² hold title to Raymond/Jason Street, which Patel College Properties, LLC and Patel Excess College Road, LLC

¹ A copy of the written decision is not available at this time. A copy of the decision will be provided under separate cover when made available.

² Please Note that Dr. Mishoe has signed the Application twice, once in her individual capacity and once in her capacity as managing member of her the Apartments at Mishoe Cove, LLC.

(hereinafter “PCP”) seeks to use for ingress and egress to their proposed apartment complexes. The Commission improperly determined that Raymond/Jason Street had been annexed by the City of Dover and was therefore available for PCP to use as ingress and egress to their proposed apartment complexes.

The Board of Adjustment of the City of Dover (hereinafter the “Board”) has the ability to hear and decide appeals where it is alleged by the appellant there is an error in any order, requirement, decision or refusal made by an administrative official or agency based on or made in the enforcement of the zoning regulations per Appendix B, Article 9, Section 2.2 of the Dover Code of Ordinances. Ord. No. 2010-18, 8-9-2010. When the Commission acts on a site plan, it acts not in a legislative capacity, but in a partial ministerial and partial quasi-judicial capacity. *East Lake Partners v. City of Dover Planning Com’n*, 655 A.2d 821, 825 (1994). Acting in a ministerial capacity puts appellate review of the Commission’s Site Development Plan decision within the jurisdiction of the Board. Furthermore, an appeal to the Superior Court through a writ of certiorari is only available when a lower entity has acted in a judicial or quasi-judicial capacity, there is no other adequate remedy at law, and there is no right to an appeal. *Delta Eta Corp. v. City of Newark*, 2023 LEXIS 36 at *22 (Del. Ch. Feb. 2, 2023).

Furthermore, under Appendix B, Article 10, Section 2.13 of the Dover Code of Ordinances, the threshold for a zoning review is described as site development plans involving construction of a single-family detached, single-family attached, or single-family semidetached dwelling; an accessory structure; or a nonresidential change of use for which no building addition or increase in impervious surface is proposed. Ord. No. 2011-14, 8-8-2011. Section 2.14 describes an administrative site plan as all site plans which do not meet the threshold for zoning review. *Id.* Accordingly, the approval of the above-referenced site by the City of Dover Planning Commission

was based upon an administrative review, made by an agency acting in an administrative capacity, rendering the Board the proper avenue for appellate relief.

The Commission should not have approved the Site Plan due to the issues surrounding PCP's interest, or lack thereof, in Raymond/Jason Street. Raymond/Jason Street is a paper street which is a part of the property owned by the Mishoes, tax map parcel number 2-00-067.00-01-17.00/000 ("Parcel 17"). While the Board is generally without conclusive authority to adjudicate private title disputes incident to the granting of building permits or variances, however, disputed ownership may be the basis for denial of a building permit. *MacDonald v. Board of Adjustment*, 558 A.2d 1083, 1087. The Superior Court in *MacDonald* later clarifies that this rule is limited to easements, and the proper forum for a title dispute is the courts. *Id.* at 1088. However, the Superior Court notes that a party must still meet the burden of ownership. *Id.* In the *MacDonald* matter before the Superior Court, presentation of a deed was sufficient to establish ownership to the building inspector in a ministerial decision. *Id.* In this matter, the burden of ownership was not satisfied by PCP. The burden in this case requires a showing that Raymond/Jason Street was a properly annexed street available for use of ingress and egress by PCP.

There is no physical, maintained road in the portion of Raymond/Jason Street at issue, rather, this area of Raymond/Jason Street, which appears on maps and surveys is located upon a parcel owned by the Mishoes. The residents of said parcels use the land over paper Raymond/Jason Street for their personal enjoyment. A private drive created by the Mishoes and maintained at their own expense, runs adjacent to the portion of Raymond/Jason Street at issue for ease of access to other parts of their property. The private drive is located entirely on property which is undisputedly owned by the Mishoes. Furthermore, the width of Raymond/Jason Street is approximately thirty-

five feet (35'). Even if available as a means of access, it is incapable of serving as a sufficient manner of egress and ingress for the proposed 385 apartment units.

The annexation of Raymond/Jason Street by the City of Dover was improper and the Commission committed an error of law by approving the Site Development Plan. Evidence was provided to the Commission concerning issues with the annexation process as well as Dr. Wilma Mishoe's ownership. City Solicitor Nicholas H. Rodriguez, Esq. ("Mr. Rodriguez"), stated his belief that recording and plotting of an 1899 plot by the College Settlement Company constituted automatic dedication to public use. This is contrary to Delaware law. When a private entity plots and depicts paper streets on a recorded plot, there is only an offer of dedication which is not complete without acceptance. *See KELLEY v. PHILLIPS*, 13 Del. Ch. 261, 269 (July 21, 1922) (stating that while a conveyance of land bordering upon an unopened street on a city map may be said to constitute a dedication, it is well established that such dedication is not complete until there has been acceptance by duly constituted public authorities or by public use); *Nolan v. Eastern Co.*, 241 A.2d 885, 890 (Del. Ch. Apr. 17, 1968) (holding that the mere approval of a plot-plan by the board of directors of the then Street and Sewer Department did not constitute acceptance of the road in question as a public street); *Amer v. NVF Co.*, 1994 LEXIS 106, at *12 (Del. Ch. May 23, 1994) (reiterating that the two essential elements of dedication, under both the statute and at common law, are a landowner's affirmative intent to dedicate and an acceptance of the land by the public authority); and *Lickle v. Frank W. Diver, Inc.*, 238 A.2d 326, 330 (Del. 1968) (determining that sewer installation in the bed of the street, the establishment of grades, the erection of a street sign, and the appearance of the street on City maps was insufficient evidence to show an implied dedication to a public use). In this matter there was no action on the part of the Delaware Department of Transportation, the duly constituted authority, which created an acceptance of any

potential dedication. Nor has there been any public use which would constitute acceptance. As previously stated, the portions of Raymond/Jason Street which the city improperly annexed run through the lawns and wooded areas of property owned and enjoyed by the Mishoes. Numerous trees are present in these areas which render public use of the portion of Raymond/Jason Street at issue impossible as a means by vehicular ingress and egress.

Furthermore, the annexation was not done in compliance with the City of Dover Charter. All the owners of the Mishoe property were required to make an application for annexation in order for the approval of Council Resolution No. 2021-26, annexing Raymond/Jason Street into the City of Dover, to comply with Section 1.05 of the Dover Charter. Neither Dr. Mishoe nor the Apartments at Mishoe Cove, L.L.C. made an application for annexation. Without all owners of the property petitioning for annexation, the City Council was required to hold a vote in accordance with Section 1.05(2) of the Dover Charter. Previous annexations of portions of Raymond/Jason Street and adjoining lands on April 9, 1973 and September 12, 1983 of land based upon the College Settlement Company 1899 plot, evidence that the 1899 plotting and recording did not constitute an automatic dedication and acceptance, as there would have been no need to annex land which already is within the City of Dover boundaries. Thus, the Commission was under the mistaken belief that the portion of Raymond/Jason Street at issue had been properly annexed into the City of Dover when it approved the Site Development Plan.

Additionally, the Commission seemed unaware that the Mishoes had voiced opposition to the Site Development Plan as far back as April 26, 2022. At the April 17, 2023 Planning Commission meeting there were comments made regarding the timing of when Mr. Rodriguez and the City of Dover first became aware of the Mishoe family's opposition to PCP's Proposal (of Use of the portion of Raymond/Jason Street at issue (hereinafter the "Proposal")). Mr. Rodriguez stated

that the first written opposition and ownership dispute claim he received was in a letter the undersigned sent to the Commission on April 13, 2023. Mr. Rodriguez appeared to support comments made by at least two Planning Commissioners who implied the Mishoe family's claim had an ulterior motive due to the "last minute" nature of the opposition. This was neither the first notification nor the first written notice Mr. Rodriguez or the City had received regarding the Mishoes' position.

Upon hearing about a recommendation for approval at a Planning Commission meeting on March 21, 2022, Dr. Mishoe became aware that the Proposal would affect her property. Dr. Mishoe gathered and reviewed her property surveys and deeds of record in the Kent County Recorder of Deeds, to confirm her beliefs regarding her property rights. She also met in person with the Kent County Planner. Dr. Mishoe subsequently attended Dover City Council Committee of the Whole meetings on April 26, 2022, June 28, 2022, and again on July 26, 2022 to voice her opposition and to assert the claim of ownership to portions of the effected property. After the July 26, 2022 City Council meeting, Mr. Rodriguez called Dr. Mishoe and requested she meet with him. Dr. Mishoe agreed and attended the meeting with her sister, Rita Mishoe Paige, on or about August 18, 2022. Dr. Mishoe took copies of various deeds, surveys, and reports and presented them to Mr. Rodriguez. Mr. Rodriguez requested that he be allowed to make a copy of one of the deeds which Dr. Mishoe presented at this meeting. Dr. Mishoe complied with this request. She later learned that Mr. Rodriguez had shared the copied deed with the Dover City Planner.

On or about September 19, 2022, an additional meeting took place, upon Mr. Rodriguez's request. It was Dr. Mishoe's understanding that she would be meeting with Mr. Rodriguez, Dawn Melson-Williams, and Mary Ellen Gray. Dr. Mishoe attended the meeting with her son, Dr. Travis Mishoe Sudler, and was surprised to find that about four or five representatives

of PCP were also at the meeting. Dr. Mishoe was not aware that PCP would be present at the meeting, nor that it would be represented by counsel.

Dr. Mishoe and other property owners in her neighborhood later met with PCP representatives on at least two separate occasions, on site at the disputed property, to discuss the details of the Proposal. When Dr. Mishoe disagreed with PCP's desired use of her property, PCP asserted it was City property which Dr. Mishoe did not own. Dr. Mishoe again stated her belief that she did own the property in question and did not understand how the property could have been annexed without a request from her. She further noted that she does not pay taxes to the City of Dover on the property, she pays them to Kent County.

On or about October 18, 2022, Dr. Mishoe and property owners from her neighborhood met with Mr. Rodriguez in the College Settlement neighborhood. Mr. Rodriguez observed the neighborhood and stated that he understood the character of the neighborhood, primarily that it was a quiet, safe neighborhood and home to many senior residents and residents with physical disabilities. Mr. Rodriguez also commented to Dr. Mishoe that PCP should not come through the neighborhood through Raymond/Jason Street. On November 4, 2022, Shannon R. Owens, Esquire, an attorney with our firm, sent a letter to Mr. Rodriguez and the Dover City Council plainly stating our firm's representation of Dr. Mishoe and her opposition to the Proposal and setting forth the ownership issue and requesting additional time to resolve the issues.

Dr. Mishoe eventually came to believe, due to Mr. Rodriguez's comments and various interactions with her, that PCP would take a different route to create access to the College Road Apartments. For this reason, until sometime shortly before the March 20, 2023 Planning Commission meeting, the Mishoe family took no further action in regard to the issue. Until the Mishoe family became aware that the Proposal still intended the road access for the College Road

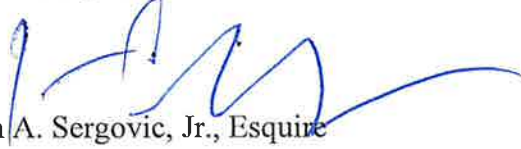
Apartments to run through Raymond/Jason Street, Dr. Mishoe had no reason to think there was a need for any additional opposition to the Proposal. A written petition was submitted to the Dover Planning Commission on or about March 17, 2023 again opposing the Application.

Despite the multiple interactions between Mr. Rodriguez and Dr. Mishoe between July 2022 and November 2022, he failed to correct the Planning Commission members' statements at the April 17, 2023 Planning Commission meeting. He also failed to perform a title search despite being on notice of the Mishoes' opposition to his position on ownership of Raymond/Jason Street and Dr. Mishoe providing him with copies of deeds, surveys, and reports for his review.

It is important to note that the Mishoes' title claim is also established under the doctrine of adverse possession. Exchanges of Parcel 17 ran back and forth between Dr. Mishoe's father and mother, Luna Mishoe and Hattie Mishoe ("L and H Mishoe") and JEMM Investors ("JEMM") a number of times beginning in the 1980's. It is unclear which of the Mishoes or JEMM had proper title to Raymond/Jason Street. However, the deed from Hattie Mishoe to the Mishoe Trust asserting title to Raymond/Jason Street in Deed Book C 054, page 162 was recorded on January 7, 1994 and provides the starting period for a claim of adverse possession. The Mishoes and their invitees (tenants) have been the only open, notorious, hostile, adverse, exclusive, continuous users in actual possession of the land since this time. The annexation of the Raymond/Jason Street did not occur until December 13, 2021, well over the twenty-year period establishing adverse possession. Furthermore, Dr. Mishoe and her predecessors in title have been paying taxes on Parcel 17 since 1991. The description on the Kent County tax bill for Parcel 17 on the Mishoes' tax bills refers to "Parcels D-E-H-I – Jason Street" based upon the deeds in the Mishoe chain of title, starting in 1994.

For the foregoing reasons, the Site Development Plan was approved in error. If you have any questions, the undersigned stands ready to address them.

Very truly yours,



John A. Sergovic, Jr., Esquire

JAS/tjf

Enclosures

cc: Dr. Wilma Mishoe (via email)
The Apartments at Mishoe Cove (via email)
Douglas D. Barry, PE, Pennoni (via email dbarry@pennoni.com)
Brian T. Riffin, Esq. (via email brian@parkway-law.com)
Dominic J. Balasico, Esq. (via email dominic@parkway-law.com)
Nicholas Rodriguez, Esq. (via email nrodriguez@schmittrod.com)
Glenn Mandalas, Esq. (via email glenn@bmbde.com)