

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA BUILDERS ASSOCIATION, et al., :
Petitioners :
 :
v. : No. 27 MD 2010
 :
DEPARTMENT OF LABOR & INDUSTRY, :
Respondent :

BRIEF IN SUPPORT OF PETITIONERS' APPLICATION TO RECONSIDER AND THEREAFTER REVISE ORDER OF MARCH 10, 2010 DENYING APPLICATION FOR SPECIAL RELIEF IN THE NATURE OF A PRELIMINARY INJUNCTION

Petitioners Pennsylvania Builders Association *et al.*, have filed an Application to Reconsider and Thereafter Revise Order of March 10, 2010 Denying Application For Special Relief In the Nature of a Preliminary Injunction. Petitioners submit this Brief in support of that Application.

BRIEF STATEMENT OF THE CASE

The Petition for Review challenges the process by which the Commonwealth “adopted” the 2009 international residential building code (the “IRC”). The request for a Preliminary Injunction was premised on the application to Petitioners, via L&I’s adoption of regulations, of particularized provisions in the 2009 IRC that will substantially harm Petitioners’ business. The hearing evidence identified that harm on an individual company basis and macro economic basis.¹ Dr. Gillen, the expert economist, quantified the adverse economic impact in Exhibit P-17, p. 12, as:

¹ As to the individual companies, see testimony of David Biddison, William Murry, and Jack Mundy. Mr. Biddison’s testimony (N.T. 63-64) is illustrative:

- A loss of \$3.1 billion in additional income to Commonwealth households (wages and spending);
- A loss of \$336 million in additional tax revenues (property taxes, fees and State income tax);
- A loss of 54,638 additional jobs (contractors, architects, suppliers and tertiary spending); and
- A loss of Total Economic Activity of \$9.9 billion (direct, indirect and induced).

Before reaching those conclusions, he explained that “[h]omebuilding activity in Pennsylvania [was] currently at its lowest level in nearly thirty years”; that “construction employment ha[d] declined”; and that “[s]ales of New Homes in the region [we]re at an all-time 40-year low.” Dr. Gillen then explained the ironic results (N.T. 132) that as a result of the new IRC provisions and their associated costs, the housing stock quality would decline:

The irony of this is, of course, ... that the actual outcome of this proposed code adoption will be the exact opposite of its original intention. Rather than people living in new homes with sprinkler systems and better energy efficiency, they’ll disproportionately end up living in older homes that are less energy efficient and, since they’re older, certainly don’t have sprinkler systems.

Q: [H]ow is the business climate currently compared to that of the last several years?

A. It has been very challenging.

Q. Does “challenging” mean bad?

A Yes. In 2006, we had two active communities where we were building homes in the Lehigh Valley, and we closed or settled 210 homes. Between our current four communities located across the state, in 2009 we closed 98 homes. So between half as many communities -- or twice as many communities, we closed half as many homes.

ARGUMENT

PETITIONERS SATISFIED THE “REASONABLY SUITED TO ABATE THE OFFENDING ACTIVITY” CRITERION BECAUSE THE PROPOSED ORDER WAS PROPERLY DIRECTED AT THE ACTIVITY – THE APPLICATION OF THE 2009 CODE PROVISIONS – THAT WERE CAUSING THEM HARM; ACCORDINGLY, THE COURT SHOULD REVISE ITS MARCH 15 ORDER

The Court denied the requested preliminary injunction solely on the basis that Petitioners failed to satisfy requirement that the injunction sought be “reasonably suited to abate the offending activity.” The Court first concluded that enjoining use of the 2009 Code would lead to reinstatement of the 2006 Code, in whole or in part. The Court then found (Slip Op. at 10) that “[s]ince, arguably, the 2006 UCC would suffer from the same infirmity as Petitioners claim plagues the 2009 UCC, a preliminary injunction against enforcement of the 2009 UCC would do *nothing to abate the alleged offending activity, i.e., the unconstitutionality of the process* by which the PCCA adopts Pennsylvania’s construction code.” (emphasis supplied).

That conclusion has two serious errors. First, it misstates and therefore misapplies the “reasonably suited to abate” requirement. In fact, Petitioners readily satisfied that standard. Moreover, that conclusion penalizes Petitioners for acting responsibly in seeking a return to the 2006 standards, as to which they had no quarrel, rather than returning to far older and out-of-date Codes. We discuss both point below.

A. The “Reasonably Suited To Abate The Offending Activity” Criterion Focuses On The Actions Of A Defendant That Caused The Harm At Issue, Not On A Plaintiffs’ Legal Theories

The “abate the offending activity requirement” appears in countless opinions but it is almost never discussed, let alone applied.² Neither the Opinion nor Respondent’s Brief cited any

² Interestingly, the “abate the activity” language first appears in *Albee Homes, Inc. v. Caddie Homes, Inc.*, 207 A.2d 768, 770 (Pa 1965), without discussion, and it has either no cited support or a citation to two cases, neither of which remotely support the point. The “either/or”

case law discussing what that criteria means or applying it.³ Indeed, it appears to the best of Petitioners' research that the criteria has never been referenced in any Pennsylvania appellate case as a basis to deny an injunction. Review of the few cases and the language of the provision confirm, however, that the "reasonably suited to abate" requirement does not refer or relate to the movants' underlying legal theory. Instead, it asks whether the order issued addresses the conduct causing the harm the preliminary objection seeks to stop or prevent. The focus of that criteria is explicitly on the "offending activity," which is, at bottom, the complained-about conduct. Several sources make that clear.

First, this criteria (commonly the "fifth" listed criteria) follows immediately after the requirement that "the *activity* it [referring either to the requested relief or the plaintiff] seeks to *restrain* is actionable" (emphasis supplied). A Court does not restrain a legal theory; it restrains defendants from taking actions. The "activity it seeks to restrain" as used there,

situation arises because the two cited cases, (*Keystone Guild, Inc. v. Pappas*, 159 A. 2d 681 (Pa. 1960), and *Herman v. Dixon*, 141 A. 2d 576 (Pa. 1958)), appear to support a different point (which they do, in fact, support).

³ Respondents' entire argument on this point (Brief at 19-20) was a single paragraph, without any legal citations, as follows:

This [abate the offending activity] requirement highlights the most glaring deficiency in the Petitioners' application for preliminary injunctive relief. As the previous sections of this brief have argued, Petitioners' requested relief (*i.e.*, that the 2009 ICC Codes be thrown out in favor of the 2006 ICC Codes) does nothing to address their underlying contention in this action that the ICC Codes may not be adopted by the General Assembly into the Construction Code Act. As a matter of law, Petitioners' failure to establish this requirement on the face of the application for preliminary injunctive relief bars them from obtaining a preliminary injunction, regardless of the testimony or evidence offered at the hearing scheduled by this Court.

Respondents had previously quoted boilerplate preliminary injunction standards.

unmistakably refers to conduct. Indeed, the early formulation of this criterion, as in *Albee*, was even more explicit: “[e]ven more essential, however, is the determination that the *activity sought to be restrained* is actionable, and that the injunction issued is reasonably suited to abate *such activity*.” 207 A.2d at 770 (emphasis supplied).

Second, the relatively few cases discussing the requirement confirm this plain language view.

Keisler v. Broder, 851 A.2d 944 (Pa. Super. 2004), concerned a mandatory preliminary injunction requiring defendants to provide plaintiffs with the opportunity to review and bill for one out of every three magnetic resonance images. Plaintiffs argued that a contract between the parties required that result and that they were receiving only 10-15% of the reads instead. The trial court’s preliminary injunction ordered defendants “to allocate one-third of the MRI reads to appellees.” *Id.* at 946. Superior Court found the injunction was “reasonably suited to abate the offending activity since the offending activity *is the assignment of no reads to the Kessler Group*.” *Id.* at 953 (emphasis supplied).

In *Commonwealth v. Snyder*, 977 A.2d 28 (Pa. Commw. 2009), four former mortgage consultants challenged a preliminary injunction entered against them. The Commonwealth alleged that defendants’ sale of certain mortgage products violated the Consumer Protection Law. The trial court enjoined defendants “from receiving monies and/or payments for services ... pertaining to the provision of mortgage financing and/or investment products”; and “from entering into contracts and/or agreements, oral verbal, and/or written ... to provide mortgage financing and/or investment products.” Defendants argued that the preliminary injunction was not reasonably suited to abate the offending activity because “there [wa]s no longer any

offending activity that the Commonwealth seeks to abate.” *Id.* at 46. This Court held the injunction proper:

An injunction is a reasonable way of preventing the possibility that Consultants will again sell Wrap Mortgages or other fraudulent mortgage products for someone else.

We conclude the trial court had reasonable grounds to determine the preliminary injunction is reasonably suited to abate the offending activity. [Defendants] deny any duty to Consumers, a situation fraught with concern for consumers who may deal with them in the future. Also, as discussed before, extensive use of unrecorded mortgage-type documents and redirection of mail communications can recur regardless of the current status of Snyder and OPFM.

Judge Friedman, dissenting, described “the offending activity” as “the failure to disclose material information about Wrap Mortgages to customers.” *Id.* at 54. Judge Friedman’s dissent on this issue confirms the “offending activity” analysis:

To abate the offending activity here, the trial court needed only to enjoin Consultants from providing Wrap Mortgage products and/or services to consumers. Such an injunction would have protected future customers from losing money in any Wrap Mortgage ‘Ponzi Scheme’ and would have allowed Consultants to continue working in the mortgage financing field. By enjoining Consultants from providing any mortgage financing and/or investment products and services, the trial court abated activity that was legal and harmed no one. In issuing such an injunction, the trial court exceeded the equitable powers given under the CPL, and, because the injunction unnecessarily enjoined the continuation of legal activity, the injunction was not reasonably suited to abate the offending activity.

Id. at 63.

In *The York Group, Inc. v. Yorktowne Caskets, Inc.*, 924 A.2d 1234 (Pa. Super. 2007), Plaintiffs filed suit to stop a contemplated sale of Yorktowne Casket to another defendant; Batesville Casket, on the basis that it violated a contract and constituted intentional interference with contractual relations. Plaintiffs obtained a preliminary injunction against defendants’

completing the proposed sale together with certain ancillary provisions (provide York with the Right of First Refusal in connection with any proposed sales, refrain from violating a non-assignment provisions). On appeal, Superior Court addressed the “reasonably suited to abate” criteria this way:

Appellants were enjoined from pursuit or consummation of the proposed sale of Yorktowne to Batesville, which constituted a violation of the non-assignment provision of the 2005 distributor agreement, and the court also required Yorktowne to use its best efforts to exclusively promote and sell York’s products ..., and to cease disseminating York’s confidential information to its primary competitor in violation of the confidentiality provision. We find that these provisions were reasonably suited to abate Appellants’ offending activity. Accordingly, we find that the fifth prerequisite required for a grant of prohibitory preliminary injunctive relief has been satisfied.

Id. at 1244.

In *Paupack Township v. Lake Moc-A-Tek, Inc.*, 863 A.2d 615 (Pa. Commw. 2004), the preliminary injunction required the cessation of all car racing activities, based on asserted violations of the Township’s Storm Water Management Ordinance that was causing run-off of water from the track to an adjacent property owner. The track argued that enjoining racing from being conducted at the track was not reasonably suited to abate Speedway’s violation of the Ordinance. Speedway argued that the Township has not demonstrated how preliminarily stopping racing activity would abate the Ordinance violation (*i.e.*, the run off in the absence of an approved storm water management plan). This Court, on appeal, noted that “the racing activities exacerbate the storm water violations because the required maintenance of the track after the races causes earth disturbances of unprotected areas.” *Id.* at 619. Because the owner was at that time unable to take other corrective measures, this Court recognized that “the only way to abate any further violations is to prohibit racing activity.” *Id.* at 619.

At bottom, preliminary injunctions are sought to avoid harm by stopping the actions that cause the harm. The “abate the offending activity” criteria requires that any court order be directed at preventing the activity causing harm, that it neither be overbroad (so as to enjoin activity that does not produce harm) or unduly narrow (so as not to accomplish its purpose) and that it be capable of addressing the harm at hand. Without, no doubt, intending to, Respondent’s counsel said it well (at N.T. 231) in his closing argument: “the law requires that the relief requested actually abate the in the case.” Counsel simply did not apply that requirement to the problem that Petitioners were actually asserting, confusing “offending activity” with a legal theory.

Here, the “problem that’s being asserted”, or in other terms the “offending activity”, was the promulgation of regulations adopting the 2009 Codes, which, in turn, caused particularized provisions of the IRC to take effect, thereby causing substantial harm to home builders. The preliminary injunction sought to avoid that harm by enjoining Labor & Industry “from enforcing regulations promulgated at 39 Pa.B. 7196 adopting the 2009 version of the International Code Council (ICC) International Residential Code and other related codes as the Uniform Construction Code in the Commonwealth; from taking further action to establish those Codes as the Uniform Construction Code in the Commonwealth; and to take affirmative action to advise municipalities and others of such actions.” That requested relief abates the harm as to which Petitioners complain. The IRC provisions that caused them harm would no longer be in effect, thus eliminating/abating the harm itself.

The Court’s contrary conclusion, because it focuses on the wrong “offending activity,” is incorrect and should be revised.

**B. The Court's Analysis Penalizes Petitioners
For Acting Responsibly In Urging A Remedy**

Petitioners could have argued that the applicable code in the event of a preliminary injunction should be the last code not subject to the unlawful delegation to a private party. That would be the 1999 BOCA National Building Code, Fourteenth Edition, and the ICC International One and Two Family Dwelling Code, 1998 Edition, for detached one-family and two-family dwellings and one-family townhouses three or fewer stories in height. *See* 35 P.S. §§ 7210.301(a)(1-2).

Petitioners did not do so because they thought it important to act responsibly. A decade has passed since those Codes, and many Code improvements with which Petitioners agree (or at least have no quarrel with) have been implemented. Petitioners are being punished for doing so, and thus they say explicitly: if suggesting a reversion to the 2006 Code is grounds to deny a preliminary injunction (and Petitioners have discussed above why that is not so), then they modify their prayer for relief and ask the Court to return to the last lawful status.⁴

⁴ The Court stated (at 7) that Petitioners “failed completely” to address the abatement criteria. In general, that criteria relates to a legal determination, and that is certainly how Respondent framed the issued. *See* Brief at 20 (“As a matter of law, Petitioners’ failure to establish this requirement on the face of the application for preliminary injunctive relief bars them from obtaining a preliminary injunction, regardless of the testimony or evidence offered at the hearing scheduled by this Court”). In fact, Petitioners’ counsel addressed the issue in oral argument (at N.T. 226):

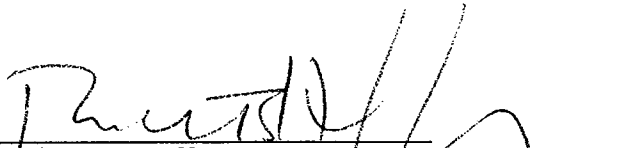
Now, Mr. Cawley says essentially that we can’t win because even the 2006 code is subject to the same infirmity and, therefore, we’d have to go back to the 2004 code and that’s subject to the same infirmity, so I guess we go back to 1999. Well, I think that’s just silly. As a practical matter, Your Honor is in equity. And you have your equity powers, and you have the ability to do something that makes sense. And there’s no -- we’re not asking the Court to go back ten years. That would be a ridiculous thing and would be helpful to nobody. And we’re not required to -- you know, there’s a little sense of practicality here. The 2009 code is causing harm to us in a way that other codes didn’t, so we are content to either go back to the 2006 code or to do a little more surgical excision of the 2009 code.

Finally, the Court stated (Slip Op. at 10, n.6) that the General Assembly had taken “similar action” to that here in the Manufactured Housing Construction and Safety Standards Authorization Act. That Act, in 35 P.S. §1656.3(a), requires manufactured homes to meet “the standards adopted by the United States Department of Housing and Urban Development, pursuant to the National Manufactured Home Construction and Safety Standards Act of 1974. Interestingly, the statute does *not* automatically adopt future standards, which the statute here does. Instead, if the federal standards change, the Department “may” adopt them, via regulations”. §1656.3(b).

But more importantly, that scenario is not “similar” but rather quite different in the salient feature. The legal vice in the Code Construction Act is delegation of state authority to a private entity. The Manufactured Housing Act does not involve a delegation to private parties and does not even involve an automatic adoption of future standards.

CONCLUSION

For these reasons, Petitioners respectfully request that the Court grant their Application and revise the March 10 Order accordingly.

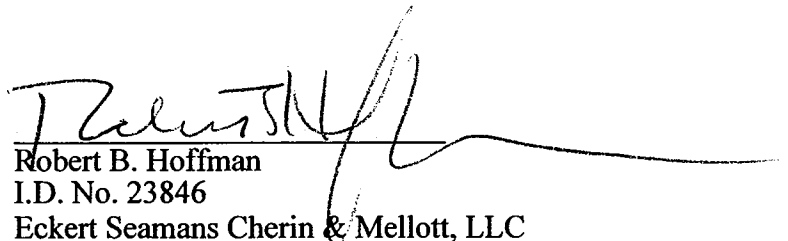

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When Mr. Cawley says we aren't trying to abate the problem, he's got it wrong. The problem we're trying to abate is the 2009 code. So we are directing our force at that.

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2010, I caused a copy of the foregoing document to be sent by email and first class mail, postage prepaid, to the individual listed below:

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