

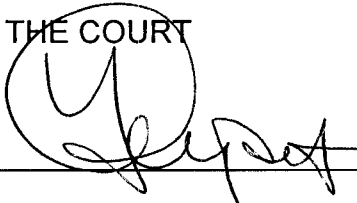
**IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA – CIVIL TRIAL DIVISION**

UNIVERSITY CITY HISTORIC SOCIETY,	:	COURT OF COMMON PLEAS
Petitioner,	:	CASE NO. 160601358
v.	:	CONTROL NO 16067000
CITY OF PHILADELPHIA DEPARTMENT OF	:	
LICENSES & INSPECTIONS, ET AL.,	:	
Respondent.	:	

ORDER

AND NOW THIS 20th day of JULY 2016, it is hereby ORDERED that the attached Findings of Facts and Conclusions of Law shall be filed in support of the Order issued on July 19, 2016 and referenced therein.

BY THE COURT





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CITY OF PHILADELPHIA DEPARTMENT OF	:	
LICENSES & INSPECTIONS, ET AL.,	:	
Respondent.	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROCEDURAL HISTORY

1. On June 15, 2016 Petitioner University City Historic Society (“Petitioner”) filed an emergency request to stay demolition permits for 4046-448 Chestnut Street (“subject property”), issued by respondent City of Philadelphia Department of Licenses & Inspections (“L&I”).¹
2. This Court Ordered an emergency hearing on June 16, 2016 at 9:00 a.m. and issued a stay to the demolition pending the hearing.(See attached Order)
3. A hearing was held on June 15th, 16th and 17th and on June 17th, this Court further stayed the demolition pending full hearing and ordered that Petitioner post a \$1,000 bond. (See attached Order) This Court also ordered that the respondents file an Answer to the Petition on or before June 22, 2016 and issued a Rule to Show cause for June 23, 2016.
4. On June 22, 2016, counsel for the City submitted an answer the petition, but did not file a verification to its answer to the petition.
5. On June 23, 2016 counsel for Intervenor filed an Answer to the Petition and filed a verification signed by counsel.
6. Neither counsel ordered the notes of testimony from the hearings before this Court.

¹ The Petitioners have also requested an injunction and mandamus.

7. This Court's order of June 17, 2016 issuing a Rule to Show Cause, directed that this petition would be decided under Pa.R.C.P. 206.7.
8. Without a verified answer filed, all averments of fact in the petition may be deemed admitted for the purposes of procedure after issuance of a Rule to Show Cause.²
9. Further hearing was held on June 23rd and June 27th, 2016 and this matter held under advisement until today for decision in accordance with the Rule of July 17, 2016.

² Pursuant to Pa.R.C.P. 206.3, a petition or an answer containing an allegation of fact which does not appear of record shall be verified. Pa.R.C.P. 206.7(a) states that "[i]f an answer is not filed, all averments of fact in the petition may be deemed admitted for the purposes of this subdivision and the court shall enter an appropriate order."

FINDINGS OF FACTS

At the hearings on this matter, Petitioner established a likelihood of success based on these initial Findings:

10. On March 1, 2016, respondent 4046-48 Chestnut Street, LP (“4046-48”) purchased the subject property from its previous owner, Fenster Properties, LP (“Fenster”) (deed submitted to the Court as Petitioner’s Exhibit C).³
11. On March 17, 2016, Terence Froman, Inc. (“Froman”), a demolition contractor, applied to L&I for a permit for the total demolition of the subject property on behalf of 4046-4048 (applications attached as Respondent’s affidavit of Mr. Potter Exhibit B).
12. Based on the circumstantial evidence provided, this Court finds that not all required paperwork was submitted to L & I for a building permit to issue for demolition of the property under Section A-301.4 of the Philadelphia Administrative Code.
13. Prior to any L & I permit being issued, but after the application was submitted, Petitioner, on May 10, 2016, nominated the subject property to the Philadelphia Historical Commission (“the Historical Commission”) for consideration for inclusion on its Register of Historic Places (applications attached at Petitioner’s Exhibits A and B).
14. The nomination was administratively accepted by the Historical Commission.
15. On May 16, 2016, pursuant to Philadelphia Code § 14-1004(2)(a) and prior to the L & I’s issuance of any demolition permit, the Commission sent notice of the nomination’s receipt *and acceptance* to Fenster as the registered owner appearing in the real estate tax records of the Department of Revenue at the time of the receipt of the nomination by the Historical Commission. A letter was also sent, addressed to “Owner” at the street address of the subject property.⁴

³ Pa.R.C.P. 206.7(c) states that when “[a]n answer is filed raising disputed issues of material fact, the petitioner may take depositions on those issues, or such other discovery as the court allows, within the time set forth in the order of the court. If the petitioner does not do so, the petition shall be decided on petition and answer and all averments of fact responsive to the petition and properly pleaded in the answer shall be deemed admitted...” The parties here took no depositions, no discovery and did not order the notes of testimony, the parties simply submitted exhibits.

⁴ Phila. Code § 14-1004(2)(a) states that “...the Historical Commission shall send written notice of the proposed designation to the owner of the property proposed for designation...Notice shall be sent to the

16. Accordingly, no later than on May 16th the subject property was “being considered by the Historical Commission for designation as historic.”
17. On May 26th, 2016, after the date when the property was under consideration for historic designation, L&I granted demolition permits for the subject property to Fenster and to Froman, as “owners” of the subject property through permit numbers 677093 and 694801, permitting them to demolish the property in 21 days, on June 16, 2016 (permits attached as Petitioner’s Exhibit D, hereinafter the May 26th permit.)
18. The applicant for the May 26th permit was Froman, the licensed contractor; It does not appear that Froman’s application was accompanied by an affidavit by the actual owner, 4046-48, or by Froman, or that the application was accompanied by a signed statement by Froman that 4046-48 has authorized the proposed work and that Froman was authorized to make the instant application.⁵
19. When L&I issued the May 26th permits, the permits were incorrectly issued to Fenster as owner of the subject property, rather than to the true owner 4046-4048.
20. Petitioner has completed applications for administrative appeals of the issuance of the demolition permits to both the City of Philadelphia Zoning Board of Adjustment and the City of Philadelphia Board of License and Inspection Review. (Petitioner’s Exhibits E and F).
21. On June 15, 2016, Petitioner filed its motion for a stay of the demolition permits pending administrative appeals to the City of Philadelphia Zoning Board of Adjustment and to the City of Philadelphia Board of License and Inspection Review, as well as pending potential designation of the subject property as historic by the Historical Commission.
22. On June 15, 2016, L&I “reissued” the demolition permits to the true current owner of the subject property, 4046-48. The amended permits came with new permit numbers. (The June 15th permits)

registered owner’s last known address as the same appears in the real estate tax records of the Department of Revenue and sent to “Owner” at the street address of the property in question.”

⁵ These findings are based upon this Court’s recollection of testimony of City personnel presented at the hearing of this matter. This Court reserves the right to supplement such findings when (and if) the Notes of Testimony are submitted to it.

23. The re-issuance of the permits appeared to be based on the verbal directives of someone within L & I and not upon the submission of additional paperwork. (See footnote 5)
24. No evidence was submitted to this Court indicating that there had been any tangible documentation of an amendment to the original applications before L&I issued the June 15th permits.
25. The administrative appeal period relevant to these permits ran through July 15, 2016.

CONCLUSIONS OF LAW

26. The original demolition permits issued to Froman and to Fenster on May 26, 2016, as well as the demolition permits issued to 4046-48 on June 15, 2016 are invalid, as they were not issued according to the procedure articulated in Section A-301 of the Philadelphia Administrative Code.⁶
27. Such permits were also invalid because they were issued during the time period that the subject property was “under consideration” for designation as a historic property.
28. Pursuant to the four-part test for granting of a stay of a governmental decision as articulated in Process Gas,⁷ Petitioner has met each of the four elements for a stay to be granted.
29. The demolition permits at issue are invalid because they do not follow the procedure outlined in Section A-301 of the Philadelphia Administrative Code.
30. The May 26th permits are invalid because they were applied for by someone other than those permitted to apply for permits under Section A-301.4 of the Philadelphia Administrative Code.
31. Section A-301.4 of the Philadelphia Administrative Code articulates who may apply to L&I for a building permit:

Application for a permit shall be made by the owner or lessee of the building or structure, or agent of either, by the registered design professional employed in connection with the proposed work; or other licensed person authorized or required to apply by the technical codes. *If the application is made by a person other than the owner in fee, it shall be*

⁶ Phila. Admin. Code § A-301.

⁷ Pennsylvania Public Utility Comm'n v. Process Gas Consumers Group, 467 A.2d 805 (Pa. 1982).

*accompanied by an affidavit of the owner or the qualified applicant or a signed statement of the qualified applicant to the effect that the proposed work is authorized by the owner in fee and that the applicant is authorized to make such application. (Emphasis added).*⁸

32. The June 15th permits appear invalid because they amend the May 26, 2016 permits without the requisite amendment documents required by Section A-301.7 of the Philadelphia Administrative Code.
33. Section A-301.7 of the Philadelphia Administrative Code articulates the proper procedure for amendments to a building permit application:

...[A]mendments to a plan, application, or other records accompanying the same shall be filed at any time before completion of the work for which the permit is sought or issued. Such amendments shall be deemed part of the original application and shall be filed therewith and requisite fees paid.⁹
34. The June 15th permits were reissued pursuant to the original applications from March 17, 2016. Therefore, the June 15, 2016 permits do not fall under the Section A-301.7 amendment procedure, and should therefore have been subject to the Section A-301.4 restrictions on who may apply for a building permit.
35. For a valid building permit to be issued, 4046-48, as current owner of the subject property, must at least submit an affidavit authorizing both the work and the application itself, if the current owner does not submit the application himself.
36. No evidence was submitted to this Court indicating that 4046-48 filed any building permit applications that triggered the issuance of the June 15th permits, and therefore those permits were issued subsequent to the original applications from March 17, 2016 without any paper trail requesting them.
37. Therefore, the June 15, 2016 permits, are invalid because they were issued pursuant to the original March 17, 2016 applications without following the statutory procedure for amending applications or submitting a true and correct application for them.

⁸ Phila. Admin. Code § A-301.4.

⁹ Phila. Admin. Code § A-301.7.

38. The petitioner has met each of the four elements warranting the grant of a stay articulated in *Process Gas*.
39. A petitioner seeking the grant of a stay must establish every one of the following prerequisites, and if the petitioner fails to establish any one of them, there is no need to address the others:
- a. The party seeking a stay must make a strong showing that he is likely to prevail on the merits;
 - b. The party seeking a stay must show that without the requested relief, he will suffer irreparable injury;
 - c. The party seeking a stay must show that the issuance of a stay will not substantially harm other interested parties in the proceedings; and
 - d. The party seeking a stay must show that the issuance of a stay will not adversely affect the public interest.¹⁰
40. The decision to grant or deny a stay pending appeal is vested in the trial court's discretion.¹¹
41. The above conclusions indicate that the petitioner made a strong showing that the building permit is invalid.
42. Further, with regard to the stay pending the historic designation process, Section 14-1005(6)(f) of the Philadelphia Code states as follows:
- L&I shall not issue any building permit for the demolition, alteration, or construction of any building, structure, site, or object that is being considered by the Historical Commission for designation as historic or that is located within a district being considered by the Historical Commission for designation as historic where the building permit application is filed on or after the date that notices of proposed designation have been mailed, except that L&I may issue a building permit if the Historical Commission has approved the application or has not taken final action on designation *and* more than 90 days have elapsed from the date the permit application was filed with the Historical Commission. *Where the Historical Commission takes final action on*

¹⁰ Pennsylvania Public Utility Comm'n v. Process Gas Consumers Group, 467 A.2d 805, 808-09 (Pa. 1982).

¹¹ Insilco Corp. v. Rayburn, 543 A.2d 120, 126 (Pa. Super. 1988).

designation within the time allotted herein, any building permit application on file with L&I shall be deemed to have been filed after the date of the Historical Commission's action for purposes of this Chapter 14-1000. (Emphasis added.)

43. The nomination application was submitted to the Historical Commission on May 10, 2016, within the 90 days it is entitled to take final action without allowing L&I to issue a building permit.
44. L&I, therefore, incorrectly issued permits regarding the subject property on May 26, 2016, and June 15th after the Historical Commission had received the nomination and sent out notice of that nomination to property owners.
45. Respondents assert that because the permit applications to L&I were submitted before petitioners nominated the subject property to the Historical Commission, 4046-48 should be allowed to proceed with demolition as scheduled under permits that were applied for timely and in good faith, in order to protect the primacy of the first filed application.
46. Respondents assert that this code provision bars the issuance of permits *only* where the owner has received notice that the property has been designated or is under consideration for designation as historic prior to the application for a building permit
47. Respondents' arguments ignore the last line of Philadelphia Code Section 14-1005(6)(f), which states that when the Historical Commission takes final designation action within 90 days of nomination, any building permit application on file with L&I is retroactively deemed to have been filed after the date of the Historical Commission's final action.
48. There is no way to read the last line of the code provision and reconcile it with the interpretation that Respondents assert. There would be no need to ever retroactively determine the filing date of an application unless, in a situation like this one, the nomination to the Historical Commission is meant to trump the first filed application doctrine.
49. Should the Historical Commission not act within the 90 day window, pursuant to Section 14-1005(6)(f), L&I may then issue a building permit, subject of course to any proper administrative appeal and/or court stay.

50. In its Proposed Findings of Fact and Conclusions of Law, counsel for the City refers to the Maritrans criteria required for preliminary injunctive relief, arguing that Petitioner has failed to meet its high burden of proof.¹²
51. This Court, however, need not complete a Maritrans analysis in this case, as this Court is not making a decision on the underlying right to injunctive relief. Rather, this Court is simply determining whether the issuance of a stay is necessary to allow this case to proceed through administrative appeal on the merits
52. Moreover, it is worth noting that the Maritrans criteria do look remarkably similar to the Process Gas criteria that this Court is using to rule on the issuance of a stay in this opinion. This similarity only adds to the likelihood that Petitioner may later prevail on the merits during its administrative appeals.
53. Further, counsel for the City asserts that, in reviewing the actions of City agencies, "it is well established that an agency's construction of its own regulations is entitled to substantial deference."¹³
54. Counsel therefore urges this Court to accept Dr. Farnham's interpretation of Philadelphia Code Section 10-1005(6)(f).
55. Dr. Farnham, however, is not the Philadelphia Historical Commission. He is its Executive Director and works for it, but his interpretation in no way makes it that of the Historical Commission itself.¹⁴

¹² Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003) (stating that the six criteria for obtaining a preliminary injunction are: 1) that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; 2) that the greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will 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, must show 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) (citing Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1283 (Pa. 1992)).

¹³ Turchi v. Philadelphia Bd. of License & Inspection Review, 20 A.3d 586, 592 (Pa. Cmwlth 2011).

¹⁴ Without the notes of testimony, the Court is unable to evaluate Mr. Miller's claims that the Court was outwardly hostile toward Dr. Farnham during his testimony as to his interpretation of the statute. In regards to the allegations that the Court, sua sponte, cross examined Dr. Farnham, however, the Court submits that this matter was submitted to the Court as an emergency motion. As such, the Court performed online legal research related to the Commission's authority to issue a stay when an article from the Philadelphia Inquirer about a factually similar case was found. The Court submits that the record will reflect that the Court did issue an apology to Mr. Miller following the July 17th proceedings. The Court also submits that the record will also reflect that all counsel at times over the multi-day hearing zealously represented their clients, at times at the price of due respect to the court and courtroom decorum.

56. Nothing was submitted to this Court, via a certified record or notes of decision, as evidence of how the Historical Commission interprets the pertinent code provision.
57. Further, the rules of statutory construction requiring that every word of a statute must be read to have meaning would negate the Commission's interpretation that ignores such language.
58. This Court, therefore, is not "setting aside an agency's interpretation of its own ordinance or regulations" under the "clearly erroneous" standard, as counsel for the City suggests.¹⁵
59. Instead, this Court is adopting an interpretation of the provision that gives meaning to each word of the statute and protects both the rights of the property owner and the substantial public interest in ensuring that demolition permits are issued in accordance with the Philadelphia Code, including those related to preserving historic buildings and structures.
60. Respondents argue that the City of Philadelphia and the Philadelphia Code have always given deference to the first to file, and that all respondents have at all times comported themselves with clean hands and in a lawful manner. The factual circumstances of these contentions are not circumstantially supported or negated.
61. However, this Court has found that the permits were invalid for a number of reasons, as set forth in the factual findings above.
62. Respondents assert that 4046-4048 purchased the subject property with the express understanding that the property could be demolished and rebuilt as a 25-unit student housing apartment building. Froman was hired as the demolition contractor expressly because he promised to commence demolition immediately so that the planned project could be completed by August 1, 2017, to serve as student housing for academic year 2017-2018.
63. Respondents further argue that the issuance of a stay threatens this construction project as well as the livelihoods of each member of 4046-48 who has contributed money necessary to purchase the subject property and who has personally signed to guarantee and stand as surety for the loan for construction financing.¹⁶

¹⁵ Kohl v. New Sewickley Tp. Zoning Hearing Bd., 108 A.3d 961, 968-69) (Pa. Cmwlth 2015) (stating that the interpretation of whomever is charged with the administration and execution of an ordinance is entitled to deference and should not be disregarded unless shown to be clearly erroneous).

¹⁶ In its brief, 4046-4048 leveled claims of bias at the Court for limiting the testimony of Mr. Potter to an affidavit. While this Court does not have the record before it, upon transcription, the Court submits that the record will show that counsel continued to argue with the Court and to insist that more time be

64. However, the areas of invalidity in the permits set forth above were brought about, in part, because apparently Froman and Fenster initiated the demolition permit and there was confusion in the application process as to who was the owner of the property.
65. Where the administrative appeal period on the permits at issue did not run until July 15th, it is speculative at best how much monetary harm will necessarily be done due to the issuance of a stay through October 16th to allow the administrative appeals and historic designation process at issue here.
66. The construction project may, or may not, be completed by August 1, 2017, but that does not absolutely preclude student housing apartments from being leased until academic year 2018-2019, particularly since the building can currently be leased for student housing and the area at issue has a constant influx of undergraduate and graduate students throughout the academic terms.
67. Respondents assert that Petitioner's relief sought is unconstitutional in that it deprives Respondent 4046-48 of its property rights guaranteed by the Constitutions of the Commonwealth of Pennsylvania and of the United States of America.
68. The right to destroy private property, however, is not granted the same legal protections as the right to use. Clearly there is some minimum level of the right to destroy, in order to allow for development and progress, and to maintain some level of autonomy for private property owners. However *valid demolition permits* must be obtained to do so and until such *valid permits* are obtained, no property owner may destroy property within the City of Philadelphia.
69. Wasting something that could reasonably be put to good use, including preservation of historical and cultural value, however, conflicts with many of the values held by most societies; the proverb of "waste not, want not" reflects a belief in the prudent use of resources that cuts across cultures and time.¹⁷
70. Further, improper demolition impacts the health and safety of those who live and work and visit the area at issue.

granted to make his presentation, even though the Court had repeatedly indicated that it had ruled and determined that a temporary stay should be issued. 4046-4048's view that the Court limited its ability to present its case was instead this Court simply directing the parties to submit their evidence through affidavits, as it may under Pa.R.C.P. 206.7(d) (stating that after the issuance of a Rule to Show Cause, the respondent may take depositions or other such discovery, *as the court allows*) (emphasis added).

¹⁷ Kellen Zale, *The Government's Right to Destroy*, 47 Ariz. St. L.J. 269, 276 (2015).

71. Changes made to Black's Law Dictionary over time highlight the common law decline in acceptance of any property owner's right to destroy.¹⁸ The 1990 edition of Black's Law Dictionary defined "owner" as follows:

The person in whom is vested the ownership, dominion, or title of property; proprietor. He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy or do with as he pleases, *even to spoil or destroy it*, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right.¹⁹

72. By the 1999 edition, the language detailing destruction had been removed, leaving simply "[o]ne who has the right to possess, use, and convey something; a proprietor."²⁰ This edit reflects a trend in American law rejecting the right to destroy, hesitating to outright authorize all owners' plans to destroy.²¹

73. Society's interest in the real property of private owners – its interests in ensuring sustainable uses of property, preservation of historic resources, and the prevention of threats to the public health or safety through improper or dangerous demolition– is most effectively addressed by limiting private owners' right to destroy, through legal mechanisms such as land use through *validly issued* permits and historic preservation laws, the doctrine of waste and enforcement of deed restrictions and conservation easements.²²

¹⁸ Lior Jacob Strahilevitz, *The Right to Destroy*, 114 Yale L.J. 781, 783 (2005).

¹⁹ Black's Law Dictionary 1105 (6th ed. 1990).

²⁰ Black's Law Dictionary 1130 (7th ed. 1999).

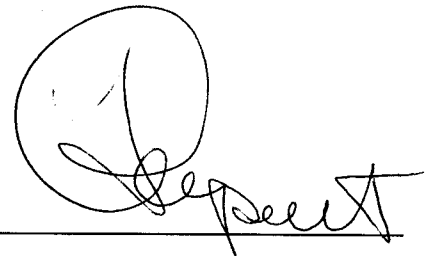
²¹ Strahilevitz, 114 Yale L.J. 781, 784.

²² Zale, 47 Ariz. St. L.J. 269, 316.

CONCLUSION

For the reasons set forth herein, Petitioner's Motion for Stay is granted. This matter is stayed until October 15, 2016 to allow proper administrative appeals from the asserted invalid demolition permits at issue.

BY THE COURT:



Carpenter, J.

Dated: July 19, 2016.