

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| The Preservation Alliance | : | |
| for Greater Philadelphia, | : | |
| Petitioner | : | |
| | : | |
| v. | : | |
| | : | |
| The Pennsylvania Convention | : | |
| Center Authority; and, The | : | |
| Pennsylvania Department of | : | |
| General Services, | : | No. 614 M.D. 2007 |
| Respondents | : | |

BEFORE: Keith B. Quigley, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE QUIGLEY

FILED: January 22, 2008

The Preservation Alliance for Greater Philadelphia (Preservation Alliance or Alliance) has filed a petition for review with this Court seeking permanent injunctive relief against the Pennsylvania Convention Center Authority (Authority) and the Pennsylvania Department of General Services (DGS) (collectively referred to hereinafter as the Respondents) that would preclude Respondents from engaging in further demolition of historic buildings located at 111-113 North Broad Street and 115 No. Broad Street in Philadelphia. The Preservation Alliance also requests that the Court: (1) direct the Respondents to reassemble or reconstruct those buildings for the purpose of historic preservation, and to do so in accordance with standards developed for such buildings; (2) direct Respondents to comply with a Memorandum and Agreement relating to the

buildings; and (3) award the Preservation Alliance such additional relief that the Court deems appropriate. Presently before the Court for resolution are preliminary objections filed by DGS and the Authority.

As described in the petition for review, the purpose of the Preservation Alliance is to preserve and protect historic resources in the Philadelphia region on behalf of the public and the Alliance's members. Part of the Alliance's purpose is to review development plans submitted to various agencies and boards.

In this case, the Authority is seeking to expand the Pennsylvania Convention Center, and the plans for expansion include the removal of two buildings the Alliance contends are historic. During the planning process the Authority engaged in consultations with the Pennsylvania Historical and Museum Commission (Museum Commission), and other entities, including the Preservation Alliance. The Alliance contends that Sections 508 and 510 of the History Code, 37 Pa.C.S. §§508 and 510 mandated these consultations.¹

Following the consultation with those entities, the Authority entered into a Memorandum and Agreement with the Museum Commission concerning the demolition and preservation of buildings in the area the Authority sought for expansion. The Memorandum provided for the preservation of the building at 111-113 N. Broad Street (the Philadelphia Life Insurance Company building (PLICO)) and an addition to that building located at 115 N. Broad Street. The Alliance contends that these buildings, which are located in the Broad Street Historic District (which is listed on the National Register of Historic Places), are eligible to be placed on the Pennsylvania Register of Historic Places. The Alliance, referring

¹ These two sections are part of the chapter of the History Code called the Historic Preservation Act.

to a specific provision of the Memorandum, asserts that it is an entity responsible for the implementation of a historic preservation mitigation fund² the Memorandum creates.

According to the petition for review, in 2007, the Authority informed the Museum Commission that it believed that the subject buildings were in so severe a state of disrepair that they would have to be demolished. The Museum Commission requested in September 2007, that the Authority have an independent engineering study performed. Following the performance of a study³ the Authority notified the DGS that the Authority believed that the PLICO building and its addition would have to be demolished because of structural instability. The Alliance submitted a written commentary in response to various engineering reports, suggesting reasons why it believed the studies were not reliable, and hence, why the buildings should not be demolished. The Museum Commission conducted an analysis of the matter, and in a letter dated December 20, 2007, directed to DGS, indicated its belief that the buildings were structurally sound and should be preserved, in accordance with the terms of the Memorandum. DGS responded to the Museum Commission on December 21, 2007, indicating that the Museum Commission's role in the matter was merely advisory, that the Memorandum did not provide authority for the Museum Commission to direct DGS how to address the situation, and that the buildings would be demolished without further notice.

² The Alliance contends that the Museum Commission is responsible for appropriations to this fund.

³ The petition for review is not entirely clear if this study was the one performed at the request of the Museum Commission. The petition states ambiguously that "more study had been conducted."

The Preservation Alliance's petition for review includes two causes of action: (1) Breach of Contract (Count I); and (2) Violation of the History Code (Count II). With regard to Count I, the Alliance asserts that the Memorandum constitutes a contract, that demolition of the buildings constitutes a breach of the contract, that the breach has caused harm to the Alliance and the public, and that the Alliance is a third-party beneficiary⁴ of the contract entitled to enforce the contract.

Count II asserts that the Authority itself, or by virtue of the imprimatur and involvement of DGS, has not complied with Sections 508 and 510 of the History Code. The Alliance contends that the Authority and the Museum Commission entered into the Memorandum in accordance with the History Code, and that the Memorandum reflects the reasoned conclusion of those parties that the buildings at issue should not be demolished under the History Code. The Preservation Alliance contends that the Authority has violated the Code by unilaterally, or by arrangement with DGS, deciding to demolish the buildings without reassessing the original consensus concerning the buildings the parties to the Memorandum agreed would be demolished and those that would not be demolished. For example, the Alliance suggests that a reassessment would have provided for the preservation of other historically significant buildings that were to be demolished in exchange for an agreement to allow the demolition of the subject buildings. The Alliance contends that this piecemeal approach violates the History Code.

⁴ The Alliance makes the legal claim that it is a third-party beneficiary of the Memorandum by virtue of its status as an expert in the area of historic preservation and the value of its approval or disapproval of demolitions of historically important structures, and also because of its role, mentioned above, in the mitigation fund.

The Authority and DGS preliminarily object to the petition for review, asserting the following grounds: (1) the Alliance does not have standing because it has failed to alleged facts showing how the Respondents' actions have caused it to be aggrieved; (2) the Alliance has failed to aver facts that state a claim for breach of contract; and (3) the Alliance has failed to aver facts that state a claim under the History Code.

In addressing preliminary objections, the Court must consider only the well-pleaded facts and any reasonable inferences that the facts will allow. *Clark v. Beard*, 918 A.2d 155 (Pa. Cmwlth. 2007).

Standing

With regard to the standing issue, we note initially that the Authority claims that the Memorandum upon which the Alliance relied was revised, and suggests that the parties who signed the Memorandum removed references to the Alliance in the revision. The amendment does indicate that the parties agreed to the removal of a provision that would have designated a certain fund for the use of historical preservation entities, including the Alliance. The Alliance is mentioned nowhere else in the Memorandum. However, as noted above, the Court is not able to accept as fact the Authority's assertions regarding the particular documents that may be at issue in this case. Accordingly, we may consider only the Authority's argument that the terms of the original Memorandum to which the petition for review refers fails to provide the Preservation Alliance with standing to bring a breach of contract action.

We believe that the Court may resolve this issue by considering the claim made by both the Authority and DGS that the Alliance has no standing as a third-party beneficiary.

In *Hicks v. Metropolitan Edison Co.*, 665 A.2d 529 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, 544 Pa. 638, 675 A.2d 1253 (1996), this Court considered a claim that a litigant was a third-party beneficiary of a contract. The Court quoted *Scarpitti v. Weborg*, 530 Pa. 366, 609 A.2d 147 (1992),⁵ which had concluded that, generally a person may be deemed to be a third-party beneficiary only when all of the parties to a contract express an intent to benefit the third party in the contract itself. The Court noted that an exception to this requirement exists where the circumstances involving the contract and third-party are so compelling that a court concludes that the recognition of the third-party's rights is necessary to ensure that the contracting parties' intention is effectuated.

In *Scarpitti*, our Supreme Court considered the claim of owners of land in a subdivision who brought a breach of contract claim against the subdivision architect who they claimed had failed to uniformly enforce deed restrictions. They claimed that the architect and the developer had an agreement whereby the developer would review all construction plans within the development. The architect approved development that violated the deed restrictions, which conduct constituted a breach of the contract. The Scarpittis argued that they were third-party beneficiaries of the contract, and the Supreme Court agreed. The Supreme Court observed that the property owners were an intended beneficiary of the contract even though they were not named individually --- they were a part of the class of persons who the parties agreed to benefit by virtue of the contract.

⁵ We note that three voting justices of the Supreme Court only concurred in that opinion.

In this case, the Authority points to authority from this Court holding that, where a contract involves one party that is a governmental body, the exception described in *Scarpitti* does not apply. *Drummond v. University of Pennsylvania*, 651 A.2d 572 (Pa. Cmwlth. 1994), *petition for allowance of appeal denied*, 541 Pa. 628, 661 A.2d 875 (1995). In that case, the Court noted that “[g]enerally a promisor who contracts with a government is not subject to contractual liability to a member of the public because individual members of the public are merely incidental beneficiaries unless a different intention is manifested within the contract. *Id.*, at 578. This standard requires that the contracting parties have more than a mere intent to benefit the third party. Instead, the contract must include some affirmative language indicating the contracting parties’ intent that the entity entering the contract with the government would be subject to suits brought by third parties for failure to perform within the terms of the contract. *Id.* at 578-9, (quoting *Nguyen v. United States Catholic Conference*, 548 F. Supp. 1333 (W.D.Pa. 1982), *affirmed*, 719 F.2d 52 (3d Cir. 1983)).

In this case, and because the Court at this stage of the proceedings may only consider the well-pleaded facts, we must consider whether the “mitigation/preservation fund” provision of the original Memorandum constitutes the type of language that would subject the Authority to suit for failure to perform. That provision states:

The [Authority] shall set up a preservation fund to assist the historic building preservation efforts in the area adjacent to the Project. This capital fund will be set up with a stipulated amount of not greater than \$1,000,000. The amount of money available annually from the fund will be studied and the area in which money from the fund will be used will be defined. The type of programs for which money from the Fund can be used will also be studied and the governance and award money from the fund will be specified. All of

the actions listed above will be studied with input from the following groups: Philadelphia Historical Commission, the Pennsylvania Historical and Museum Commission, the AIA Historic Resources Committee, the ... [Alliance], and the [Authority]. A formal recommendation on all of these issues shall be developed and submitted to PHMC for approval prior to the set up of the preservation fund. The money for the fund will be deposited with an approved non-profit agency.

Even if this provision remains valid, we believe that the pleaded facts are insufficient to provide the Alliance with the relief it seeks under the terms of the Memorandum. Clearly, this provision provides the Alliance only with an inchoate right to be part of the decision-making with regard to the use of funds placed in the "mitigation/preservation fund." These rights, if enforceable at all, have no bearing on the other subject matter of the Memorandum. Further, as noted above, because this Memorandum, if an enforceable contract, involves a governmental entity, there must be a clear expression by the parties that they intended to bestow a benefit upon the alleged third-party beneficiary.

Although the noted provision permits the Alliance to be part of the decision-making process with regard to the fund, the Alliance has pointed to no pleaded facts hindering its rights under this particular provision. There are no other provisions in the Memorandum evincing an intent to bestow a benefit upon the Alliance more significant to the relief the Alliance seeks. Accordingly, we agree with the Authority and DGS that the Alliance has no standing to bring its breach of contract claim.

As to the Alliance's status under the History Code, we note that Section 512 of the Code, 37 Pa. C.S. §512, relating to enforcement of historic preservation laws and policies, states that "any ... person or other legal entity may maintain an action in an administrative tribunal or court for the protection or

preservation of any historic resource in this Commonwealth.” This provision clearly provides statutory standing for a party or person seeking to enforce the policies of the Historic Preservation chapter of the Code. Accordingly, we will proceed to consider the demurrers to the Alliance’s claims brought under the Historical Preservation chapter of the History Code.

Violations Under the History Code

The Authority and DGS demur to the Alliance’s claim under the History Code. The Authority asserts that the two provisions under which the Alliance brings its claim, Section 508 and 510 do not apply to the Authority and that the Code does not provide for the relief the Alliance requests. The Code, the Authority contends, applies to a Commonwealth agency only if the agency owns or controls the property. In this case, the Alliance does not appear to assert that the Authority, rather than DGS, is the owner or controller of the subject buildings. Further, the Authority states that, although the Alliance has asserted that the buildings would be eligible to be placed on the Pennsylvania Register of Historic Places, no such register has yet been compiled or created, nor do any criteria presently exist for the placement of a building on such a list. Neither section of the Code, the Authority argues, requires anything more than that a party who owns an historic resource consult with the Museum Commission. Finally, the Authority and DGS contend, the Code contains no authority for the termination of demolition projects.

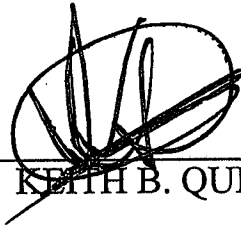
We agree with the Authority that these provisions of the History Code provide no foundation for an action against any party other than the owner or controller of the property, in this case presumably DGS. Under Section 508, we agree with the Authority that the Alliance has failed to plead a cause of action

against it. As to DGS's demurrer, we note that Section 508, like other provisions of the Code, appears to reflect the legislative intent that Commonwealth agencies whose actions may affect historic resources must consult with the Museum Commission, but that they are not directly bound by the advise or suggestions that the Commission offers. In *O'Connor v. Pennsylvania Public Utility Commission*, 582 A.2d 427 (Pa. Cmwlth. 1990), this Court rejected a claim brought under Section 507(a) of the Code, 37 Pa.C.S. §507(a), relating to permits for archaeological field investigations on Commonwealth land. In that case, despite the clear grant of standing in Section 512 to a "person" for the purpose of protecting or preserving historical resources, the Court concluded that Section 507(a) provided the Museum Commission only with an advisory role. After having reviewed the language of Section 507(a), we have little difficulty in reaching a similar conclusion with regard to Section 508, which requires the particular Commonwealth agency to "consult the [C]ommission," "[s]eek the advice of the [C]ommission," "initiate measures and procedures to provide for the maintenance of historic resources under their ownership," "institute procedures and policies to assure that their plans ... and activities contribute to the preservation of all historic resources in the Commonwealth," and "[s]ubmit the procedures and policies to the [C]ommission for review and comment." Section 508 places no greater burden on the Commonwealth than the directives of Section 507(a).

The averments in the petition for review, while asserting that Section 508 placed a duty with DGS to abide by the Memorandum, do not aver that DGS failed in any of the above-noted specific requirements. The Alliance asserts that the conduct of the Authority and DGS with regard to the consultation requirement

was piecemeal at best and DGS thereby failed to comply with the mandate to “consult” with the Museum Commission; however, the Code provides no elaboration with regard to the nature of the consultation that is required to satisfy the Code. The petition for review makes clear that the Authority or DGS, at some point, consulted with the Museum Commission. Because the averments seem to support this conclusion, and because the Code, by its terms, places no more than an advisory role with the Museum Commission, we agree with the Authority and DGS that the Alliance has failed to state a cause of action under the History Code.

Based upon the foregoing discussion, the Court will sustain the Authority’s and DGS’s preliminary objection to Count I on the basis of standing and will sustain their preliminary objections in the nature of a demurrer to Count II. Accordingly, the petition for review is dismissed.



KEITH B. QUIGLEY, Senior Judge

File Copy Recipient List

Addressed To: Stephen S. Aichele, Esq.
Saul Ewing, LLP
1200 Liberty Ridge
Wayne, PA 19087

Herbert Bass, Esq.
Fox Rothschild, L.L.P.
2000 Market St 10th Fl
Philadelphia, PA 19103-3291

Paul Boni, Esq.
Law Offices of Paul Boni
325 Chestnut St Ste 1109
Philadelphia, PA 19106-2611

The Honorable Joseph T. Doyle
Saul Ewing, LLP
1200 Liberty Ridge Ste 200
Wayne, PA 19087-5569

David Vincent Dzara, Esq.
Pepper Hamilton, L.L.P.
3000 Two Logan Sq
Philadelphia, PA 19103-2799

Michael F. Eichert, Jr., Esq.
603 North Office Bldg
Harrisburg, PA 17125

John M. Elliott, Esq.
Elliott Greenleaf & Siedzikowski, P.C.
925 Harvest Drive
Blue Bell, PA 19422

Stewart John Greenleaf, Jr., Esq.
Elliott Greenleaf & Siedzikowski, P.C.
925 Harvest Drive PO Box 3010
Blue Bell, PA 19422

Mr. Trent Hargrove
Chief Counsel
603 North Office Building
Harrisburg, PA 17120

James Downey Hollyday, Esq.
Pepper Hamilton, L.L.P.
3000 Two Logan Square
18th & Arch Streets
Philadelphia, PA 19103

Francis X. Kelly, Esq.

Philadelphia Regional Port Authority
3460 N Delaware Avenue
Philadelphia, PA 19134

Barbara W. Mather, Esq.
Pepper Hamilton, L.L.P.
3000 Two Logan Square
Philadelphia, PA 19103-2799

Marc Edmond Needles, Esq.
Fox Rothschild, L.L.P.
2000 Market St 10th Fl
Philadelphia, PA 19103-3291

Dean Richard Phillips, Esq.
Elliott Greenleaf & Siedzikowski, P.C.
925 Harvest Dr PO Box 3010
Blue Bell, PA 19422-0780

David B. Snyder, Esq.
Fox Rothschild, L.L.P.
2000 Market St 10th Fl
Philadelphia, PA 19103

Christine Welsh, Esq.
Fox Rothschild, L.L.P.
2000 Market Street
Philadelphia, PA 19103

Elizabeth Utz Witmer, Esq.
Saul Ewing, LLP
1200 Liberty Ridge Dr #200
Wayne, PA 19087

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