IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Grace Building Co., Inc., Appellant	:	
v.	:	No. 1111 C.D. 2009
	:	Argued: February 8, 2010
Richland Township Board of Supervisors	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** April 15, 2010

Grace Building Co., Inc. (Grace Building) appeals from an order of the Court of Common Pleas of Bucks County that sustained preliminary objections of the Richland Township Board of Supervisors (Board) and dismissed Grace Building's mandamus action seeking a deemed approval of its preliminary land development plan. Grace Building argues that the allegations in its complaint are sufficient to state a cause of action for deemed approval under Section 508(3) of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. § 10508(3).

Grace Building is the equitable owner of parcels consisting of 24.05 acres located within the SRM Suburban Residential Medium zoning district of Richland Township (Township), Bucks County. On January 8, 2008, Grace Building filed an application for preliminary plan approval, proposing to subdivide

its parcels into 185 single-family dwelling lots. The proposed development would be known as "Bungalow Park." On November 6, 2008, Grace Building commenced a mandamus action against the Board seeking a deemed approval of the preliminary plan. Grace Building alleged that the Board failed to act upon its application within the required 90-day period set forth in Section 508(3) of the MPC and Section 22-401.2 of the Quakertown Area Subdivision and Land Development Ordinance (Ordinance), adopted by the Board in 1980. To support its action, Grace Building relied on the following allegations and the exhibits attached to the complaint.

The application packet provided by the Township and completed by Grace Building included a preliminary subdivision and land development application, a preliminary plan checklist, a plan submission checklist and a standard "professional escrow agreement" (escrow agreement). The plan submission checklist included "escrow fees" and an "escrow agreement." Reproduced Record (R.R.) at 28a. Grace Building agreed to deposit initial review fees of $15,000 into a non-interest bearing escrow account to be maintained by the Township as the escrow agent. Paragraph 4 of the Standard Escrow Agreement; R.R. 36a.[1] Grace Building, however, made numerous revisions to other terms of the standard escrow agreement. R.R. at 35a-41a.

In a letter dated January 9, 2008, the Township notified Grace Building that the application was incomplete because the Township solicitor disapproved the escrow agreement as submitted. Exhibit B to the Complaint; R.R. at 43a. The Township enclosed another standard escrow agreement for Grace

[1] Section 22-802 of the Ordinance requires a land use applicant to pay review fees at the time the application is submitted.

Building. On January 15, 2008, Grace Building submitted a newly executed escrow agreement. This time, Grace Building made no change to the standard escrow agreement but added one paragraph, Paragraph 19, which stated: "It is agreed that any fees, terms and/or conditions contained in any of the foregoing paragraphs, which are not specifically authorized by the [MPC], shall be void and unenforceable." Exhibit C to the Complaint; R.R. at 50a.

On February 14, 2008, the Township solicitor sent Grace Building a letter by certified mail, stating:

> By letter dated January 17, 2008, you were informed by letter from this office containing some suggested language that would be acceptable with regard to your proposed revisions. On February 5, 2008, the Township exchanged email with you regarding the status of the Escrow Agreement. On February 9, 2008, you sent a facsimile transmission to the Township and the law office indicating that the modification suggested by the law office is not acceptable. Accordingly, your submission remains incomplete. … [T]here does not appear to be any immediate resolution of the open issues.

Exhibit D to the Complaint; R.R. at 52a. The solicitor returned to Grace Building two checks in the amount of $6350 and $15,000, which had been submitted with the application. He also asked Grace Building to retrieve several boxes of other application materials at the Township building and faxed a copy of the letter to Grace Building's counsel.

Almost nine months later, Grace Building filed a complaint in mandamus and a motion for peremptory judgment seeking a deemed approval of the preliminary development plan. Grace Building alleged that the Ordinance does not require an applicant for preliminary plan approval to submit an escrow agreement and that it is entitled to a deemed approval of the preliminary plan because the Board failed to render a decision on the application within the

mandatory 90-day period in Section 508(3) of the MPC. Section 508(3) provides in relevant part:

> All applications for approval of a plat …, whether preliminary or final, shall be acted upon by the governing body or the planning agency within such time limits as may be fixed in the subdivision and land development ordinance but *the governing body or the planning agency shall render its decision and communicate it to the applicant not later than 90 days following the date of the regular meeting of the governing body or the planning agency (whichever first reviews the application) next following the date the application is filed* …, provided that should the said next regular meeting occur more than 30 days following the filing of the application … the said 90-day period shall be measured from the 30th day following the day the application has been filed.[2]
>
> ….
>
> (3) *Failure of the governing body or agency to render a decision and communicate it to the applicant within the time and in the manner required herein shall be deemed an approval of the application in terms as presented* unless the applicant had agreed in writing to an extension of time or change in the prescribed manner of presentation of communication of the decision, in which case, failure to meet the extended time or change in manner of presentation of communication shall have like effect. [Emphasis and footnote added.]

---

[2] Section 22-401.2 of the Ordinance similarly provides:

> The review process for the plans required by the Municipality shall include no more than 90 days following the date of the regular meeting of the Planning Commission next following the date the application is filed; provided, that should said next regular meeting occur more than 30 days following the filing of the application, the said 90 day period shall be measured from the 30th day following the day the application has been filed. The applicant may agree to waive the time requirement.

Grace Building alleged that the Township received the application for preliminary plan approval on January 8, 2008, as indicated on the application, that the Township planning commission thereafter held a regular meeting on January 15, 2008 and that the mandatory 90-day period in Section 508 of the MPC expired on April 15, 2008. The Board filed preliminary objections in the nature of a demurrer, arguing that the deemed approval provision does not apply because the Township rejected the application as incomplete and that Grace Building waived its right to challenge the rejection due to its failure to timely appeal the rejection.

The trial court sustained the Board's demurrer and dismissed the complaint. The court concluded that the 90-day period in Section 508 of the MPC was never triggered because the application was rejected as incomplete. The court rejected Grace Building's argument that the Township improperly concluded that the application was incomplete because the Ordinance does not explicitly require an escrow agreement. Citing Section 22-105 of the Ordinance, providing that the Ordinance "shall be held to be minimum requirements," the court concluded:

> Grace Building is correct that Section 22-105 … does not address escrow agreements. However, Section 503(1) of the MPC [53 P.S. § 10503(1)] does permit charging of review fees. Section 22-401 of [the Ordinance] requires that all applications … be accompanied by a complete application form, all required information and appropriate fees. Requiring all applicants to execute an escrow agreement is a reasonable and legitimate mechanism designed to ensure the Township is reimbursed for the professional and administrative costs it incurs in reviewing applications and is therefore, an appropriate and permissible requirement of the application process.

Trial Court's Opinion at 5. Grace Building's appeal to this Court followed.

A demurrer tests the legal sufficiency of a complaint. *Office of*

Attorney Gen. v. E. Brunswick Twp., 980 A.2d 720 (Pa. Cmwlth. 2009). In deciding preliminary objections in the nature of a demurrer, all well-pleaded material facts as well as all inferences reasonably deducible from those facts are accepted as true; conclusions of law, unwarranted inferences, argumentative allegations or expressions of opinion, however, are not accepted as true. *Id.* In order to sustain a demurrer, it must appear with certainty that the law will not permit recovery. *Keith v. Dep't of Corr.*, 695 A.2d 938 (Pa. Cmwlth. 1997), *aff'd*, 554 Pa. 245, 720 A.2d 1050 (1998).

Grace Building argues that its allegations are sufficient to state a cause of action for deemed approval. Grace Building maintains that in sustaining the demurrer, the trial court failed to accept as true its allegations that "[t]he Application and Preliminary Plans were submitted in compliance with Part 4 [procedure for subdivision and land development] and Part 7 [plan requirements] of the … Ordinance." Complaint, ¶ 8; R.R. at 6a. Grace Building asserts that the trial court disregarded those alleged facts and instead improperly made its own factual determination that Grace Building failed to submit a complete application. The Board counters that an escrow agreement was listed in the application packet as one of the items required to be submitted and that Grace Building was advised that "[f]ailure to follow the enclosed guidelines will result in the application being rejected." Exhibit A to the Complaint; R.R. at 11a. The Board argues that the 90-day period in Section 508 of the MPC was never triggered because the Township rejected the application as incomplete and that Grace Building failed to contest or appeal the rejection of the application.

The purpose of Section 508(3) of the MPC providing for a deemed approval is to protect land use applicants from inaction or protracted deliberation

by the governing body or agency on proposed development plans. *Peterson v. Amity Twp. Bd. of Supervisors*, 804 A.2d 723 (Pa. Cmwlth. 2002). A municipality has a duty to process and review a land use application in good faith. *Nextel Partners, Inc. v. Clarks Summit Borough*, 958 A.2d 587 (Pa. Cmwlth. 2008). When the municipality "receives an incomplete application that precludes meaningful review, it should act clearly and without delay." *Id.* at 593. In addition, it must discuss technical requirements or interpretation of the ordinance with the applicant and provide the applicant with a reasonable opportunity to respond to its objections to the application or to modify the development plans. *Id.* A developer in turn has a good-faith duty to submit a revised plan in a reasonable and timely manner to enable the municipality to comply with the time limitation. *Id.* Once an application is "accepted and retained," the time limitation under the MPC governs. *Id*. at 594. An action in mandamus is the proper mechanism for obtaining recognition of a deemed approval. *Philomeno & Salamone v. Bd. of Supervisors of Upper Merion Twp.*, 600 Pa. 407, 966 A.2d 1109 (2009).[3]

Grace Building's allegations establish that the following events occurred after the application was submitted. The Township's staff signed the application, indicating that it was "received" on January 8, 2008. R.R. at 11a. The next day, the Township informed Grace Building that the application was incomplete due to the numerous revisions made to the standard escrow agreement. After Grace Building resubmitted an escrow agreement adding one paragraph, the

[3] A writ of mandamus is an extraordinary remedy, which compels official performance of a ministerial act. *Warminster Fiberglass Co. v. Upper Southampton Twp.*, 939 A.2d 441 (Pa. Cmwlth. 2007). A writ of mandamus may be issued only when there is a clear legal right in the plaintiff, a correspondent duty in the defendant and lack of any other appropriate and adequate remedy. *Id.*

Township suggested the acceptable language, which was rejected by Grace Building. The Township did not deposit the review fee checks submitted with the application and later returned those checks after determining that the application remained incomplete. These alleged facts demonstrate that the Township never "accepted" the application or processed it for the Board's consideration, and that the Township then provided Grace Building with an opportunity to resubmit an agreement.

In *Gorton v. Silver Lake Township*, 494 A.2d 26 (Pa. Cmwlth. 1985), this Court considered the land use applicants' entitlement to a deemed approval under similar facts. In that case, the township returned the initial application as incomplete. Three months later, the applicants resubmitted an application. The township again returned the application because it did not contain all the required information. A year later, the applicants sought a deemed approval of the application. The Court concluded that the applicants' failure to submit applications and plats conforming to the township's regulations was sufficient justification for the township's summary rejection of the application and that "Section 508(3) [of the MPC] never came into play." *Id*. at 28. The Court distinguished *Township of O'Hara v. DiSilvio*, 413 A.2d 1174 (Pa. Cmwlth. 1980), in which we affirmed the trial court's order granting a deemed approval, stating: "*DiSilvio* is quite different from this case. There the applications filed were not rejected or objected to when filed. … [Rather] the last of a series of proposed plans had been filed and approved for processing for final plan purposes …. In this case the objection to the appellants' applications was immediate." *Gorton*, 494 A.2d at 28.

Similarly here, the Township immediately objected to the application as incomplete, rejected the resubmitted application and returned the application

materials following the unsuccessful attempt to resolve the dispute over the escrow agreement. As in *Gorton*, therefore, the 90-day period in Section 508(3) of the MPC and Section 22-401.2 of the Ordinance was never triggered. Contrary to Grace Building's assertion, the mere allegation that its application complied with the requirements of the Ordinance alone cannot avoid the grant of a demurrer. *See Dorfman v. Pa. Soc. Servs. Union—Local 668*, 752 A.2d 933, 936 (Pa. Cmwlth. 2000) ("mere conclusory allegations … without supporting factual allegations are not sufficient" to "survive" a demurrer).

Moreover, although this court in *Gorton* also relied upon the fact that the application was woefully incomplete, we find it irrelevant, for purposes of a deemed approval, whether Grace's application was, in fact, complete and should have been accepted or whether the application did, in fact, comply with the Ordinance. The Township acted promptly on the application by rejecting it, so even if that action was improper, no deemed approval will lie.[4]

Because Grace Building's allegations of material fact, accepted as true, fail to state a cause of action for deemed approval, the trial court's order sustaining the Board's demurrer is affirmed.

BONNIE BRIGANCE LEADBETTER,
President Judge

[4] Rather, as suggested in *Gorton*, "[t]he remedy of the landowner whose applications and plats have been rejected for filing and who believes that his submissions conform to the municipality's requirements would seem to be mandamus." 494 A.2d at 28 n.1. We believe that is, indeed, the appropriate remedy – an action in mandamus in the court of common pleas to compel the Township to accept its application for processing and act upon it. If common pleas determines that the application was complete, it can order the governing body to render an adjudication on its merits. Otherwise, it can deny the writ.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Grace Building Co., Inc., Appellant	:	
v.	:	No. 1111 C.D. 2009
Richland Township Board of Supervisors	:	

O R D E R

AND NOW, this 15th day of April, 2010, the order of the Court of Common Pleas of Bucks County in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge