IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bethlehem Manor Village, LLC, Silk Mill Partners, LP and Richard Lee Snyder, Appellants	:	
v.	:	No. 501 C.D. 2010
	:	Argued: September 14, 2010
The Zoning Hearing Board of the City of the Bethlehem and Moravian Village of Bethlehem	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: March 17, 2011

Bethlehem Manor Village, LLC, Silk Mill Partners, LP, and Richard Lee Snyder (collectively, Appellants) appeal from an order of the Court of Common Pleas of Northampton County (Trial Court) denying Appellants' appeal from an order of the Zoning Hearing Board of the City of Bethlehem (ZHB). The ZHB's order denied the request of Moravian Village of Bethlehem (Moravian Village) for a validity variance and a special exception to change one nonconforming use to another, and granted Moravian Village's request for a use variance. We affirm.

The following facts reflect those made by the ZHB in this matter. Moravian Village is the equitable owner of real property comprised of multiple parcels (the Property),[1] and located in the City of Bethlehem (Bethlehem) within Northampton County.

The Property was listed for sale in 2007; it is not adequate for most light industrial (LI) uses for which it is zoned, due to its odd shape, including a bifurcation by a ravine which makes the rear portion not easily accessible and not usable for development. The Property is unique in including a portion below street level, being wedge shaped, and having access issues due to the proximity of a traffic signal. Significant expense would be needed to improve the Property for a number of the listed permitted uses within the existing LI Zoning District. Of the thirteen parcels that comprise the Property, some parcels have lawful nonconforming uses, while others are either undeveloped or are conforming. The entire neighborhood around the Property is a mixture of conforming and nonconforming uses.

Moravian Village proposed to merge the Property's existing parcels and construct an assisted living and memory care complex intended to serve multiple households.[2,3] Five current ingress points would be changed to two. The

[1] Moravian Village entered into an agreement of sale for the Property in March, 2009, which sale is contingent upon the variance(s) sought herein. Nitschmann, LLC (Nitschmann) is the legal owner of the Property. Previously, Nitschmann had sought a use variance and a dimensional variance with respect to the Property, also seeking to construct, *inter alia*, an assisted living/memory care facility. Those requests were denied by decision and order of the ZHB dated April 9, 2010. See Reproduced Record (R.R.) at 140a.

[2] Moravian Village owns and operates a retirement community and assisted living center

(Continued....)

proposed use has no environmental impact. The proposed plan does not meet the objective, specific criteria of Section 1325.08 of the Zoning Ordinance of the City of Bethlehem (Zoning Ordinance).[4] Moravian Village first sought a zoning permit from a zoning officer, which was denied. Thereafter, Moravian Village filed an appeal with the ZHB, and concomitant requests for a validity variance, a special exception to change a lawful nonconforming use to another nonconforming use, and a use variance (hereinafter, collectively, the "Application").

Moravian Village advanced three alternative theories in its Application to the ZHB in its efforts to further its proposed use. First, Moravian Village requested a validity variance, asserting that the Property's location within an LI District unreasonably restricted development because of the unique characteristics of the Property, and that it could therefore not be developed for any legitimate use within such district. Secondly, Moravian Village sought a special exception to change a lawful nonconforming use to another, under Section 1323.07 of the Zoning Ordinance.[5] Thirdly, Moravian Village sought a use variance under Section 1325.06 of the Zoning Ordinance.

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across an intersection from the Property.

[3] Bethlehem is currently amending its comprehensive plan, including proposed amendment to the district covering the Property which would allow the proposed use. The amended comprehensive plan has not yet been finalized or approved by Bethlehem.

[4] See Certified Record (C.R.).

[5] The ZHB permitted Moravian Village to advance this second theory via amendment to its original Application.

Hearings before the ZHB were subsequently held, at which all parties were present and/or represented, and at which all were heard on the issues. During the proceedings, Moravian Village objected to the standing of the Appellants, and by motion of the ZHB the parties' respective standing was confirmed. A motion by an Objector was made for the ZHB to incorporate the transcript from a previous proceeding relating to the Property, and the ZHB took judicial notice of its prior decision, Appeal and Application of Nitschmann, LLC, dated April 9, 2009 (the Nitschmann Decision). An Objector also requested that the ZHB deny Moravian Village the right to appear before the ZHB based on the doctrine of *res judicata* in relation to the Nitschmann Decision, which theory the Board rejected based upon differing parties and theories in regards to the earlier action.

Regarding the validity variance request, the ZHB concluded that the relevant zoning regulations were not confiscatory, and that the Property was not necessarily unusable for light industrial use; hence, the ZHB denied Moravian Village's request for a validity variance.

Regarding Moravian Village's request for a special exception for a change of nonconforming use, the ZHB determined that the standards for such a change to another nonconforming use were not met under Section 1323.07 of the Zoning Ordinance, in that the testimony did not establish that the required units per acre standard of Section 1325.08(*1*) of the Zoning Ordinance would be met. Additionally, the ZHB determined that the Property's 13 parcels were not all nonconforming uses under the testimony presented. As such, the ZHB denied

Moravian Village's request for a special exception to change one lawful nonconforming use to another nonconforming use.

Regarding the use variance request, the ZHB determined that a variance grant would be harmonious with the general purpose and intent of the Zoning Ordinance, would not be injurious to the neighborhood or otherwise detrimental to the public welfare, and that the proposed use was reasonable to encourage the appropriate use of the land without any impact to the adjoining landowners. Additionally, the ZHB determined that the Property was unique in its physical characteristics in regards to development difficulties, and that this uniqueness would cause unnecessary hardship which Moravian Village did not create. The ZHB determined that the use variance was necessary for the reasonable use of the Property, and noted that the area was subject to a potential pending zoning change that would allow by right the assisted living center sought to be developed. The ZHB thusly concluded that Moravian Village met its burden, and approved the use variance.

By order dated August 13, 2009, the ZHB denied Moravian Village's requests for a validity variance and special exception nonconforming use change, and granted the request for a use variance.

Appellants timely appealed the ZHB's order to the Trial Court, and Moravian Village intervened. The Trial Court reviewed the record and the parties' briefs, and did not receive any additional evidence. Following its review, including review of both the standing and *res judicata* issues, the Trial Court

denied Appellants' appeal by order dated March 5, 2010. Appellants now appeal to this Court.

This Court's scope of review in zoning cases where the trial court did not take any additional evidence is limited to determining whether the zoning hearing board committed an error of law or an abuse of discretion. Solebury Township v. Solebury Township Zoning Hearing Board, 914 A.2d 972 (Pa. Cmwlth. 2007).

We will first address Moravian Village's argument that the ZHB erred in concluding that Appellants had standing in this matter.[6] Moravian Village argues that Bethlehem Manor Village, LLC, (Bethlehem Manor) and Silk Mill Partners, LP (Silk Mills) lack standing in this action because neither were owners or lessees of land in close proximity to the Property at the start of the May 28, 2009 ZHB hearing, and because neither have a substantial, direct and immediate interest in the matters *sub judice* beyond the common interests of all citizens in procuring obedience to the law.

As the Trial Court noted in its analysis of this issue, our Courts have held that objectors need not be adjoining or abutting landowners (or, by extension, lessees); standing may nonetheless be retained if the objector's interest is located

[6] Appellants argue that Moravian Village has waived this issue by failing to file a cross appeal to this Court. However, the Note to Pa.R.A.P. 511 explains that an appellee should not be required to file a cross appeal where the court below has ruled against it on an issue, as long as the judgment granted the appellee the relief that it sought. See also Hashagen v. Workers' Compensation Appeal Board (Air Products & Chemicals, Inc.), 758 A.2d 276 (Pa. Cmwlth. 2000). Such is the case here, and Moravian Village has not waived its standing challenge in light of the Trial Court order in its favor in the prior proceedings.

within the municipality of the zoning proceedings, and is within the immediate vicinity of the subject property, or if by reason of proximity in location such that a potential perceivable adverse interest would be at stake. See Esso Standard Oil Co. v. Taylor, 399 Pa. 324, 159 A.2d 692 (1960); Society Created to Reduce Urban Blight (SCRUB) v. Zoning Hearing Board of Adjustment of City of Philadelphia, 951 A.2d 398 (Pa. Cmwlth. 2008). We have acknowledged that standing may exist even where an intervener's interest has been established in the later stages of zoning litigation. SCRUB.

In this matter, however, it is undisputed that Appellant Richard Lee Snyder is a directly adjoining landowner with respect to the Property, as recognized by the Trial Court. Trial Court Opinion at 5. Moravian Village has not challenged Appellant Snyder's standing herein, and as such, we refuse to reverse the Trial Court's order on the basis of standing, as requested by Moravian Village.

Appellants present two generalized challenges for review: (1) whether Moravian Village's Application is barred on the basis of the doctrine of *res judicata*, and; (2) whether the ZHB erred in granting the use variance at issue. We will address these issues seriately.

The doctrine of *res judicata* may bar a zoning application, on the basis of prior legal proceedings thereon, if the concurrence of four elements exist: (1) the identity of the thing sued for; (2) the identity of the cause of action; (3) the identity of the persons and parties to the action, and; (4) the identity of the quality in the persons for or against whom the claim is made. City of Pittsburgh v. Zoning Board of Adjustment of City of Pittsburgh, 522 Pa. 44, 559 A.2d 896 (1989). However,

the doctrine of *res judicata* is applied sparingly in zoning questions, in which arena the need for flexibility outweighs the risk of repetitive litigation. Id. In applying the preclusive effect of the doctrine of *res judicata* to zoning matters, the ultimate and controlling issues must have been decided in a prior proceeding in which the present parties had an opportunity to appeal and assert their rights. Rudolph v. Zoning Hearing Board of College Township, 470 A.2d 1104 (Pa. Cmwlth. 1984).

In the matter *sub judice*, Appellants argue that there was a lapse of only several months between Nitschmann's ZHB application and Moravian Village's appeal to the ZHB, and that Moravian Village has not shown any substantial change in conditions or circumstances relating to the Property itself. Appellants assert that the ZHB's prior Nitschmann Decision satisfies all four elements of the *res judicata* doctrine in relation to the instant matter:

> (1) The issues are identical, in that both parties requested a use variance and the same relief. In essence, both decisions regard the same project on the same properties;
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> (2) The Nitschmann Decision was a final judgment, in that Nitschmann withdrew its appeal from the ZHB's denial of its use variance application;
>
> (3) Moravian Village, as the party against whom estoppel is asserted, was a party in privity to the Nitschmann Decision. Nitschmann was the legal owner of the Property in both proceedings, in that Moravian Village had a letter of intent with respect to the Property at the time of the Nitschmann Decision, and was the equitable owner under an agreement of sale at the time of the Moravian Village Appeal;

(4) Moravian Village had a full and fair opportunity to litigate, and participated in, the Nitschmann Decision.

We disagree, for several independently dispositive reasons.

As the Trial Court sagely noted, there is no identity of the parties to the two actions at issue. Nitschmann was the sole appellant in the prior action, and Moravian Village was not in privity therewith during that action, but was merely a witness in those proceedings. The Trial Court properly applied our holding in Rudd v. Lower Gwynedd Township Zoning Hearing Board, 578 A.2d 59 (Pa. Cmwlth. 1990). Therein, we held that since a mere straw deed would defeat the same argument advanced by Appellants herein in relation to the identity of the parties, that identity would not be found in two legal actions similar to the ones in that precedent:

> Appellant … argues that Rudd's present application is identical to the one filed by the O'Donnells in 1985. As previously mentioned, the Board there denied the variance and the O'Donnells never appealed that order. Because Rudd's purchase of the property is contingent upon his obtaining the necessary variances, the O'Donnells are still the legal owners of the lot. Accordingly, appellant asserts that the four requisite identities are present … and that the doctrine bars the trial court's action in reversing the Board.
>
> We must initially note that the Supreme Court has cautioned that the doctrine of *res judicata* is to be used sparingly in zoning matters. . . While the appellant's argument may be technically correct, we will not apply the principle of res judicata to reverse the trial court in this case. The O'Donnells in this case could make a "straw deed" conveying the property to another and that person could sign a sales agreement identical to the one used here. This would destroy the identity of the parties,

> thereby precluding application of the doctrine. As Rudd's right to the variance is clear, we do not believe that resort to such legerdemain should be required, especially in view of the Supreme Court's mandate that *res judicata* is to be applied sparingly in zoning cases.

Id. at 62 – 63. Rudd is directly on point with the facts herein, and thus Appellants' argument on this issue must fail.

Independently from the foregoing disposition of this issue, we also note that there exists in the two matters no identity of the causes of action, due to the differing relief sought, the differing issues existing, and the differing theories presented. See, e.g. Church of the Saviour v. Zoning Hearing Board of Tredyffrin Township, 568 A.2d 1336 (Pa. Cmwlth. 1989) (*res judicata* does not apply in zoning matters where there is a change in the legal theory presented in support of an application); Harrington v. Zoning Hearing Board of East Vincent Township, 543 A.2d 226 (Pa. Cmwlth. 1988) (first application for special exception did not bar, on *res judicata* grounds, second application where same applicants proceeded under a different theory in second application based upon different provisions of ordinance). Moravian Village's advancement of a different proposed facility design, pursuit of validity variance and special exception theories, and its use of different legal theories and evidence in support of its use variance, differentiate this matter from the Nitschmann Decision. Variance relief is entirely fact-specific, and as such, the issues in each case are different, and the issues herein have not already been litigated.

Next, Appellants argue that the ZHB erred in granting the use variance at issue on multiple bases.[7] First on this issue, Appellants argue that Section 1316.02 of the Zoning Ordinance provides a list of 25 classes of uses permitted by right in an LI Zoning District, in addition to multiple uses allowed therein by special exception, which uses theoretically are all available to any owner of the Property. In light thereof, Appellants assert that the record is devoid of any showing of legal hardship in regards to the Property. The record, however, shows just the opposite, in relation to the requirements for a variance in this matter.

Section 1302.105 of the Zoning Ordinance defines a variance as:

> A modification of the regulations of this Ordinance, granted on grounds of exceptional difficulties or unnecessary hardship, not self-imposed, pursuant to the provision of Article 1325 of this Zoning Ordinance, and the laws of the State of Pennsylvania.

See C.R. Section 1325(c) of the Zoning Ordinance articulates the requirements and standards for a ZHB grant of a variance:

> (1) That the granting of the variance shall be in harmony with the general purpose and intent of this

[7] We note that two of Appellants' issues on this point have been waived. In its brief to this Court, Appellants advance argument that: (1) the ZHB cannot grant a use variance because a property is not adequate for most uses, or due to the difficulty in installing a permitted use due to the Property's shape, and; (2) that the ZHB erred in regards to finding significant expense in relation to improvements. Appellants failed to preserve these issues in its Statement of Issues in support of its Notice of Appeal to the Trial Court, and the Trial Court thusly did not address them in its opinion; therefore, these issues are waived. Carroll Sign Co., Inc. v. Adams County Zoning Hearing Board, 606 A.2d 1250 (Pa. Cmwlth. 1992) (appellant waived issue on appeal to Commonwealth Court by failing to raise arguments in notice of appeal to trial court).

Ordinance, and shall not be injurious to the neighborhood or otherwise detrimental to the public welfare.

(2) That the granting of the variance will not permit the establishment within a District of any use which is not permitted in that District.

(3) There must be proof of unique circumstances: There are special circumstances or conditions, fully described in the findings, applying to the land or buildings for which the variance is sought, which circumstances or conditions are peculiar to such land or building and do not apply generally to land or buildings in the neighborhood, and that said circumstances or conditions are such that the strict application of the provisions of this Ordinance would deprive the applicant of the reasonable use of such land or building.

(4) There must be proof of unnecessary hardship: If the hardship is general, that is, shared by neighboring property, relief can be properly obtained only by legislative action or by court review of an attack on the validity of the Ordinance.

(5) That the granting of the variance is necessary for the reasonable use of the land or building and that the variance as granted by the Board is the minimum variance that will accomplish this purpose. It is not sufficient proof of hardship to show that greater profit would result if the variance were awarded. Furthermore, hardship complained of cannot be self-created; it cannot be claimed by one who purchases with or without knowledge of restrictions, it must result from the application of the Ordinance; it must be suffered directly by the property in question; and evidence of variance granted under similar circumstances shall not be considered.

The Board may prescribe any safeguard that it deems to be necessary to secure substantially the objectives of the regulation or provisions to which the variance applies.

Id.

Unnecessary hardship can be established by showing physical characteristics such that a property cannot be used for the permitted purpose, or that the physical characteristics are such that it could only be used at prohibitive expense, or that the characteristics are such that the lot has either no value or only a distress value for any permitted purpose. Taliaferro v. Darby Township Zoning Hearing Board, 873 A.2d 807 (Pa. Cmwlth.), petition for allowance of appeal denied, 585 Pa. 692, 887 A.2d 1243 (2005). While unnecessary hardship does not solely include mere financial hardship, where a condition renders a property almost valueless without the grant of a variance, unnecessary hardship may be established. Serban v. Zoning Hearing Board of City of Bethlehem, 480 A.2d 362 (Pa. Cmwlth. 1984).

Irregularity, narrowness, shallowness of lot size or shape, or exceptional topography can constitute hardship and may be legally sufficient to support a variance. Snyder v. York City Zoning Hearing Board, 539 A.2d 915 (Pa. Cmwlth. 1988). The record to this matter shows that the entirety of the testimony of Moravian Village's witness, architect Richard Leonori, establishes numerous characteristics of the Property that demonstrate its irregular and exceptional topography. R.R. at 282a-308a. Specifically, Leonori testified, *inter alia*, that the 13 lots comprising the Property are subject to a 17-foot drop-off, contain unsuitable soil fill for the placement of a building foundation, and the existence of a swale conjoining the ravine which separates the individual lots creating a 40-foot drop-off renders portions of the 13 parcels unsuitable for development. Id.

Additionally, Moravian Village presented multiple witnesses who testified to the difficulty of developing the Property in accordance with its zoning classification, and to the difficulties in selling the individual lots that comprise the Property. ZHB Decision at 20-22; R.R. at 203a-216a. The above-cited substantial evidence[8] of record, accepted by the ZHB, renders Appellants' arguments on this issue unpersuasive. The ZHB did not err in concluding that Moravian Village established a legal hardship based upon the physical characteristics of the Property. Taliaferro; Serban.

Next Appellants argue that the ZHB erred in treating the Application as if it related to a single parcel of land, when in fact the Property consists of 13 separately deeded parcels. To support such a variance grant, Appellants argue that the ZHB must find that each of the 13 parcels has an existing separate legal hardship, and that the characteristics in regards to one parcel's unique shape are not applicable to all the parcels.

Without citation to any legal support, Appellants infer that distinct lots coming under common ownership, merged in an effort to utilize undevelopable portions, are not subject to a single variance grant. We are aware of no such authority prohibiting the merger of properties in development efforts for which a use variance in sought. Further, while the merger of abutting properties is not prohibited under any of our zoning precedents, a failure to merge adjoining

[8] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Pennsy Supply, Inc. v. Zoning Hearing Board of Dorrance Township, 987 A.2d 1243 (Pa. Cmwlth. 2009), petition for allowance of appeal denied, *(Continued....)*

developable and undevelopable properties may, under limited circumstances, defeat a variance application. See Berger v. Zoning Hearing Board of Cheltenham Township, 422 A.2d 219 (Pa. Cmwlth. 1980).

Additionally, Appellants' argument that the ZHB's Findings regarding the Property's ravine/swale apply only to one parcel ignore the ZHB's recognition that the ravine/swale impact on one parcel renders the remaining parcels unusually shaped, which remaining unusual shape itself renders the Property undevelopable. R.R. at 560a. Effectively, the ZHB found that the existence of swaled lots in proximity to other lots, to be merged for development, constituted a significant factor in the hardship. Further, the record shows that all 13 parcels either adjoin the ravine, or are directly next to a parcel that adjoins the ravine. R.R. at 284a-285a. The ZHB acknowledged the Property's composition of 13 individual parcels, and further acknowledged the impact of several of those parcels' characteristics upon the Property's development prospects as a whole. R.R. at 284a-286a, 560a. Given those findings – for which the record contains substantial evidence in support – and the conclusions drawn therefrom, the ZHB did not err in failing to find 13 specific hardships in relation to the 13 separate parcels. Accordingly, the ZHB did not err in granting Moravian Village's use variance request based on a consideration of the 13 parcels as aggregated for purposes of Moravian Village's proposed use.

___Pa.__, 4 A.3d 1056 (2010).

Appellants next argue that the ZHB erred in relying on its beliefs that Bethlehem's proposed zoning amendments will be enacted. Appellants assert that any such enactment possibility is merely speculative, is irrelevant to a legal hardship determination, and is actually an argument against the finding of a legal hardship.

Appellants flatly misstate the ZHB's reference to the pending potential zoning amendments; nothing within the ZHB's decision indicates that this factor was used as sole, or even primary, support for its hardship finding and concomitant grant of the requested use variance. To the contrary, the ZHB's plain language makes clear that the potential rezoning was seen as mere evidence that the proposed use would not substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to public welfare. The ZHB stated:

> [T]he area [of the proposed use] is subject to a zoning change to a neighborhood commercial district that would permit by right assisted living centers. Invariably, the fact that the City of Bethlehem believes that assisted living centers are reasonable within this part of the City of Bethlehem **speaks to the appropriateness of this specific plan being proposed** by [Moravian Village].

ZHB Decision at 21 (emphasis added). Bethlehem's consideration of the potential rezoning is probative to the inquiry of the appropriateness of Moravian Village's proposed use, and inasmuch as it did not form the sole basis for the ZHB's grant, it was not error.

Appellants next argue that the ZHB erred in granting the variance despite the ZHB's findings regarding "a question as to the passive recreation features" required under the Zoning Ordinance, despite the number of units to be supported on the Property's acreage, and despite the Zoning Ordinance's permitted density of units per acre. Appellants, however, misapprehend Moravian Village's Application, misapprehend the nature of the Zoning Ordinance's requirements for a special exception as opposed to a use variance, and misapprehend the ZHB's disposition of the multiple requests made in this case.

Section 1325.08(*l*) of the Zoning Ordinance articulates the special conditions and safeguards required for a grant of a special exception, and it is this Section that contains the requirements cited above by Appellants in regards to passive recreation features, number of units, and density of units per acre. See C.R. While Moravian Village did apply for a special exception under the Zoning Ordinance, that portion of the Application was denied by the ZHB, in part because of the factors cited by Appellants in its argument on this issue. ZHB Decision at 12-17. Those factors, however, are not part of the Zoning Ordinance criteria for a grant of a use variance pursuant to Section 1325.06. See C.R. As noted above, Moravian Village applied for a validity variance, a special exception to change one nonconforming use to another, and a use variance, each of which was advanced as an alternative theory and each of which is governed by a different section of the Zoning Ordinance. The factors cited by Appellants on this issue are not factors governing the grant of a use variance, and as such, Appellants' arguments on this issue are without merit.

Finally, Appellants argue that the ZHB erred in failing to apply the findings and conclusions it reached in the prior Nitschmann Decision, including a finding therein stating that no hardship would prohibit the use of the Property in an LI Industrial District. R.R. at 146a, 149a, 150a. However, as noted above in our discussion of Appellants' *res judicata* argument, the Nitschmann Decision has no preclusive effect upon Moravian Village's Application, and the proceedings thereon, notwithstanding the fact that the ZHB took judicial notice of its prior decision. As there is no identity of the parties, the causes of action in regards to the theories advanced, and the two proposed plans at issue in the two proceedings, the ZHB did not err in failing to apply any findings or conclusion from the Nitschmann Decision. Rudd; Church of the Saviour.

Accordingly, the ZHB did not err in granting Moravian Village's request for a use variance. We affirm.

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JAMES R. KELLEY, Senior Judge

Judge Simpson did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bethlehem Manor Village, LLC, Silk Mill Partners, LP and Richard Lee Snyder, Appellants	:	
v.	:	No. 501 C.D. 2010
The Zoning Hearing Board of the City of the Bethlehem and Moravian Village of Bethlehem	:	

O R D E R

AND NOW, this 17th day of March, 2011, the order of the Court of Common Pleas of Northampton County dated March 5, 2010, at C-48-CV-9681, is affirmed.

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JAMES R. KELLEY, Senior Judge