IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Baron Gemmer,	:	
	:	
Appellant	:	
v.	:	No. 78 C.D. 2010
	:	Argued: October 12, 2010
Township of Radnor and Norcini Builders, Inc.	:	
	:	
	:	
	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: December 7, 2010

Before this Court is a Notice of Appeal filed by Baron Gemmer (Gemmer) following a December 19, 2009 order of the Court of Common Pleas of Delaware County (trial court) quashing the appeal of a determination of the Radnor Township (Township) Board of Commissioners (Board) to approve the demolition of property owned by Norcini Builders, Inc. (Norcini) and the construction of five new single family homes.[1] We reverse the trial court's order and remand for a determination on the merits of Gemmer's appeal.

[1] Our scope of review in this case is limited to determining whether the trial court abused its discretion or committed an error of law. Tongel v. City of Pittsburgh, 756 A.2d 707 (Pa. Cmwlth. 2000).

Norcini equitably owns two residential properties (Property). Gemmer owns real property within 350 feet of the same. Both properties lie within the South Wayne historical district. In 2007, Norcini filed an application to demolish two existing homes on Property and to build five single family residences. The Board of Historical Architectural Review (HARB) recommended that Norcini's application be denied. Subsequently, the Board voted in favor of the application at a public meeting on May 12, 2008. Township issued a Certificate of Appropriateness on or after June 11, 2008 that was countersigned as accepted by Norcini.

Gemmer filed an appeal with the trial court on July 11, 2008. Both the Township and Norcini moved to quash the appeal on the grounds that it was not timely filed. Gemmer and Township entered into a stipulation that read:

> 3. On May 12, 2008 at its regularly scheduled public meeting, the Commissioners voted in favor of the issuance of a Certificate of Appropriateness to Norcini.
>
> 4. All parties were present and participated along with witnesses in discussion and the presentation of evidence regarding the appropriateness of the issuance of the Certificate prior to the vote of the Board of Commissioners on May 12, 2008 as well as at the public meeting of the Commissioners on April 28, 2008.
>
> 5. Sometime after the decision of the Board of Commissioners, the Township prepared a document titled Certificate of Appropriateness. The Certificate states, "Issued Monday, May 12, 2008."

> 6. The Township did not present the completed document titled Certificate of Appropriateness to Norcini until sometime *on or after June 11, 2008*. Norcini counter-executed the Certificate of Appropriateness at the Township Building between June 11, 2008 and June 20, 2008...

Reproduced Record, 11a-12a. (Emphasis added).

The trial court issued an order on December 17, 2009 wherein it held that it had jurisdiction over this matter consistent with Local Agency Law, 2 Pa.C.S §§551-555, 751-754. It nonetheless quashed the appeal as untimely. In an opinion in support of its order, the trial court indicated that inasmuch as Norcini's application was orally approved by the Board, no written decision needed to be issued. Consequently, it indicated that the date of entry of the Board's decision was May 12, 2008 when it orally approved Norcini's application. The trial court explained Gemmer had thirty days from this date to appeal the Board's determination. It indicated that Gemmer's appeal filed July 11, 2008 was untimely and it quashed the appeal. Gemmer appealed to this Court arguing its appeal with the trial court, filed within thirty days of the issuance of the Certificate of Appropriateness, was timely and that it was error to quash the same.

The issue before this Court is whether the time period Gemmer had to file its appeal began to run from the date the Board orally approved Norcini's application to demolish the current structures on Property and to build five new single family homes or from the date Norcini was supplied with its Certificate of Appropriateness. In order to fully analyze the issue before us, it is necessary to review the statutes and ordinances that govern this appeal.

Section 4 of what is commonly known as the Pennsylvania Historic Districts Act (Historic Districts Act), Act of June 13, 1961, P.L. 282, as amended, 53 P.S. §8004, provides, in pertinent part:

> (a) Any governing body shall have the power and duty to certify to the appropriateness of the erection, reconstruction, alteration, restoration, demolition or razing of any building, in whole or in part, within the historic district or districts within the political subdivision. Any agency charged by law or by local ordinance with the issuance of permits for the erection, demolition or alteration of buildings within the historic district *shall issue no permit for any such building changes until a certificate of appropriateness has been received from the governing body.*
>
> (b) Any governing body in determining whether or not to certify to the appropriateness of the erection, reconstruction, alteration, restoration, demolition or razing of a building, in whole or in part, shall consider the effect which the proposed change will have upon the general historic and architectural nature of the district… *Upon giving approval, the governing body shall issue a certificate of appropriateness* authorizing a permit for the erection, reconstruction, alteration, restoration, demolition or razing of a building, in whole or in part. *Disapproval of the governing body shall be in writing, giving reasons therefore, and a copy thereof shall be given to the applicant, to the agency issuing permits and to the Pennsylvania Historical and Museum Commission.*

53 P.S. §8004. (Emphasis added).

Section 178-4 of the Radnor Township Municipal Code (RTMC) defines the term "Certificate of Appropriateness" as "[t]he *approval* by the Township that certifies to the historical appropriateness of a particular

request for the erection, addition or demolition of all or part of a building within an historic district and authorizes the application for required permits." (Emphasis added). Section 178-5 of the RTMC provides, in relevant part:

> D. No person shall commence any work for the erection, addition or demolition of any principal building, addition or accessory building in whole or in part without obtaining a certificate of appropriateness as provided hereinafter.

Section 178-6 of the RTMC provides, in pertinent part:

> A. Establishment. The Board of Commissioners hereby establishes a Board of Historical Architectural Review (HARB) for the purposes of administering the provisions of this chapter.
>
> …
>
> G. Responsibilities. The HARB shall serve as an advisory body to the Board of Commissioners regarding the issuance of a certificate of appropriateness in accordance with the provisions of this chapter.

Section 178-8 of the RTMC provides as follows:

> F. Report to the Board of Commissioners. Within 30 days following HARB's final review of an application, a report of HARB's recommendations shall be provided to the Board of Commissioners. Such report shall include the name of the applicant, the address of the property, the nature of improvements, and any other information the Board may require.

> G. The Board of Commissioners shall either:
>
> > (1) Approve or deny the certificate of appropriateness consistent with action taken by the HARB in connection with building and/or demolition.
> >
> > (2) Approve the application and authorize a certificate of appropriateness with modifications to the HARB recommendation.
> >
> > (3) Reverse the recommendation of the HARB.
>
> H. Where an application is *modified or denied* by the Board, the applicant shall be notified *in writing* of the reasons for such action and advised of its right of appeal under provisions of this chapter.[2] (Emphasis added).

In support of its contention that its appeal period began to run from the date Norcini was provided with its Certificate of Appropriateness, Gemmer relies upon 42 Pa.C.S. § 5571 that reads, in part:

> (a) GENERAL RULE.-- The time for filing an appeal, a petition for allowance of appeal, a petition for permission to appeal or a petition for review of a quasi-judicial order, in the Supreme Court, the Superior Court or the Commonwealth Court shall be governed by general rules….
>
> (b) OTHER COURTS. -- Except as otherwise provided in subsections (a) and (c) and in section 5571.1 (relating to appeals from ordinances,

[2] The Township and Norcini contend that the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §§ 10101 - 11202, is not applicable to this matter. Appellees' brief, p. 8. Gemmer does not challenge this assertion. Appellant's Reply Brief, p. 2.

> resolutions, maps, etc.), an appeal from a tribunal or other government unit to a court or from a court to an appellate court must be commenced within 30 days after the *entry* of the order from which the appeal is taken, in the case of an interlocutory or final order.

42 Pa.C.S. § 5571.[3] (Emphasis added).

It further cites 42 Pa.C.S. § 5572 that reads:

> The date of service of an order of a government unit, which shall be the *date of mailing if service is by mail*, shall be deemed to be the date of entry of the order for the purposes of this subchapter. The date of entry of an order of a court or magisterial district judge may be specified by general rules.

42 Pa.C.S. § 5572. (Emphasis added).

Gemmer also relies on Berger & Montague, P.C. v. Philadelphia Historical Commission, 898 A.2d 1 (Pa. Cmwlth. 2006). In that case, Berger and Montague, P.C. (Berger) attempted to appeal from a written decision of the Philadelphia Historical Commission approving a final application of Ceebraid-Signal Corp. (Ceebraid) to construct an eight story condominium on Locust Street in Philadelphia. It filed multiple appeals, including a direct appeal with the court of common pleas. The only order subject to this Court's review in Berger was the trial court's order quashing the direct appeal as untimely.

[3] The term "agency" is defined as a government agency. 2 Pa.C.S. §101. Pursuant to the Local Agency Law, any person aggrieved by an adjudication of a local agency who has a direct interest in the adjudication shall have the right to appeal to a court with appropriate jurisdiction pursuant to Title 42. 2 Pa.C.S. §752.

We noted that Berger's appeal of the Philadelphia Historical Commission's decision would be properly brought before the Board of License and Inspection Review. We indicated Berger should not have directly appealed to the common pleas court. We nonetheless found that Berger's appeal to the common pleas court was untimely. This Court determined that although oral approval for the final application was given at public meeting on June 11, 2004, no written decision was issued until June 15, 2004. We held that any appeal with the court of common pleas was to be filed within thirty days of the date the written decision was served via mail to Ceebraid. This Court concluded that Berger was required to file its appeal by July 15, 2004 and that its appeal dated August 26, 2004 was untimely.

Based on the directive in 42 Pa.C.S. § 5571 that an appeal must be taken to the trial court within thirty days of "entry" of the order of the lower tribunal and the statement in 42 Pa.C.S. §5572 that the "date of entry" of the order is the date of mailing if service is made by mail, Gemmer contends that its appeal filed July 11, 2008 was timely. Gemmer argues that the RTMC requires an applicant to receive a Certificate of Appropriateness in order to do demolition and reconstruction in the historical district. It asserts, based on the aforementioned stipulation, that "the first date on which the Township could have issued the certificate and served it upon applicant Norcini" was June 11, 2008. Appellant's brief, p. 6. According to Gemmer, its appeal on July 11, 2008 was filed within thirty days of service of the Certificate of Appropriateness and was timely. Gemmer states that the appeal period did not begin to run when the Board orally approved Norcini's application. Rather, it posits the time period began to run when the

Township memorialized that determination in writing. Per Gemmer, the Certificate of Appropriateness constitutes the written embodiment of the Board's decision.

In further support of its argument, Gemmer cites Narberth Borough v. Lower Merion Township, 590 Pa. 630, 915 A.2d 626 (2007). In that case, Merloc Partners (Merloc) sought municipal approval to subdivide two parcels of land into six lots and four apartment buildings. Narberth Borough, whose border abutted the land to be developed, opposed the project. Lower Merion Township's Board of Supervisors approved, with conditions, Merloc's tentative sketch plan at a public meeting held on March 20, 2002. On March 28, 2002, the Board issued and mailed a written decision in support of its conditional approval of the tentative sketch plan. The decision was mailed to Merloc with a courtesy copy being mailed to Narberth Borough. Narberth Borough filed a land use appeal with the court of common pleas on April 26, 2002. This was more than thirty days after the Lower Merion Township's Board of Supervisors publicly announced its approval of Merloc's tentative sketch plan, but fewer than thirty days after the written decision was mailed to Merloc and Narberth Borough.

Merloc filed a motion to dismiss Narberth Borough's appeal challenging the approval of its tentative sketch plan as untimely. The common pleas court denied this motion. It reversed Lower Merion Township's Board of Supervisors' determination to approve Merloc's sketch plan on the merits based on certain deficiencies. This Court reversed the trial court's determination that Narberth Borough's appeal had been timely filed. We held that the thirty-day appeal period began to run on March 20, 2002

when Lower Merion Township's Board of Supervisors announced its approval of the plan at the public meeting. Accordingly, this Court held that Narberth Borough's appeal filed on April 26, 2002 was untimely because more than thirty days had passed since the oral announcement of the tentative sketch approval. We concluded the trial court was without jurisdiction to entertain Narberth Borough's appeal.

Narberth Borough petitioned the Supreme Court for review. It granted allocatur to determine whether the applicable thirty-day appeal period runs from the verbal announcement of a municipality's decision or a subsequent written communication formalizing that decision. The Supreme Court concluded that the appeal period runs from the date of mailing of the written decision. It noted Narberth Borough filed its appeal within thirty days of the written communication to the applicant. Consequently, it reversed our order and remanded for review of the common pleas court decision on the merits.

In rendering its decision, the Supreme Court reiterated that 42 Pa.C.S. §5572 sets forth the "date of entry" of a decision as "the date of service of an order of a government unit, which shall be the date of mailing if service is by mail." Narberth Borough, 590 Pa. at 642, 915 A.2d at 635. It further emphasized that the MPC *requires* a governing body to memorialize its determination concerning a land use application in writing and to serve that writing within 15 days.[4] Moreover, it stated Section 1002-A of the MPC

[4] Section 508(1) of the MPC reads:

> (1) The decision of the governing body or the planning agency shall be in writing and shall be communicated to the

sets forth that the appeal period should begin to run following the "entry" of a decision, not upon the oral approval of an application.[5] According to the Supreme Court, the MPC, by its terms, required the Lower Merion Township's Board of Supervisors determination to be put in written form, and that service of the writing triggers the thirty-day appeal period.

Gemmer acknowledges that Narberth Borough was decided under the MPC. Nonetheless, it contends that written notification of a decision was required in that matter just as, here; written communication is required in the nature of a Certificate of Appropriateness.

The Township and Norcini counter that neither the RTMC, nor the Historic Districts Act require a written decision upon the grant of an application authorizing the demolition and reconstruction of property in a historic district. They assert that a written decision is only required when an

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> applicant personally or mailed to him at his last known address not later than 15 days following the decision.

53 P.S. §10508(1).

[5] Section 1002-A(a) of the MPC, *added by* the Act of December 21, 1988, reads:

> (a) All appeals from all land use decisions rendered pursuant to Article IX shall be taken to the court of common pleas of the judicial district wherein the land is located and shall be filed within 30 days after *entry of the decision* as provided in 42 Pa.C.S. § 5572 (relating to time of entry of order) or, in the case of a *deemed decision*, within 30 days after the date upon which notice of said deemed decision is given as set forth in section 908(9) of this act…

53 P.S. §11002-A(a). (Emphasis added).

application is modified or denied. Accordingly, they contend that the trial court was correct in concluding Gemmer had thirty days from the date the Board voted to approve Norcini's application to appeal and that Gemmer's appeal was untimely. Township and Norcini further suggest that Gemmer improperly filed a "land use" appeal with the trial court. They suggest that in labeling its appeal as a "land use" appeal, Gemmer implicated the MPC despite the fact that this matter is not governed by the MPC. Consequently, they suggest no proper appeal was ever filed that could possibly be considered timely. The Township and Norcini add that Gemmer never amended its Notice of Appeal filed with the trial court or requested nunc pro tunc relief.

Township and Norcini primarily rely on Peterson v. Amity Township Board of Supervisors, 804 A.2d 723 (Pa. Cmwlth. 2002) for the proposition that the thirty-day appeal period began to run on May 12, 2008, the date the Board voted to approve Norcini's application for demolition. This is so despite the fact that the decision in Peterson is based on an interpretation of the MPC.

In Peterson, the Vanguard Development Corporation (Vanguard) was the equitable owner of a 142.6-acre tract of land. It filed an application for approval of a preliminary subdivision plan, proposing to subdivide the property into 192 lots for single-family residences. The Amity Township Board of Supervisors reviewed the proposed plan at its regular public meeting on June 12, 2000. Peterson was present at this meeting and raised objections to the preliminary plan. The Amity Township Board of Supervisors granted approval of the preliminary plan provided certain

conditions were met. The Amity Township Board of Supervisors *did not issue a written decision*. On July 26, 2000, Peterson filed a notice of land use appeal to the court of common pleas. The appeal was quashed as untimely.

On further appeal to this Court, we explained that Section 1002-A of the MPC governs the time to appeal from a subdivision/land development decision. We concluded that inasmuch as no written decision was issued, no decision was "entered" consistent with Section 1002-A of the MPC. Peterson, 804 A.2d at 728. Moreover, we found that there was no "deemed" decision consistent with that provision because neither the developer, nor the municipality gave public notice of a deemed approval. Id. In Peterson, we stated that these are the only two events that trigger the running of the appeal period contemplated in Section 1002-A of the MPC. Noting the absence of an "entry" of a decision or a "deemed" approval, we determined that the intent of Section 1002-A of the MPC was to begin the appeal period when the municipality's decision process has been finalized with sufficient clarity so that an aggrieved party can evaluate whether to appeal. Id. We found that an oral approval by the Amity Township Board of Supervisors met this standard.

In Peterson, we concluded that the Amity Township Board of Supervisors orally approved, with conditions, Vanguard's application for approval of a preliminary subdivision plan on June 12, 2000. Peterson's appeal, filed with the common pleas court on July 26, 2000, was untimely. That fact, however, did not end our disposition of the matter. We pointed out that Section 508 of the MPC requires a decision in writing for all

requests for a subdivision. This Court added that the municipality failed to comply with its obligation to render one and that Peterson reasonably and in good faith waited for an entry of a decision under Section 508 of the MPC. We indicated that when it became apparent that no decision would be issued, Peterson promptly filed his land use appeal. Because of a breakdown in the administrative process, we granted nunc pro tunc relief. We reversed the common pleas court order and remanded for a determination on the merits.

It should be noted that precedential value of Peterson was limited by Narberth Borough. The Supreme Court distinguished Peterson based on the fact that no written decision had been submitted to the applicant, nor was there a deemed decision. Based on these deficiencies, the Supreme Court explained that this Court had little choice but to interpret the statutory intent of section 1002-A of the MPC and surmise that when no decision is issued, the date of oral approval of an application is when the thirty-day appeal period commences. In Narberth Borough, however, *a written decision was issued consistent with the requirements of the MPC*.

Under 42 Pa.C.S. §5571, an appeal from a governmental unit to a court must be commenced within 30 days after the "entry" of the order subject to appeal. If service of an order of a governmental unit is made by mail, 42 Pa.C.S. §5572 instructs that the date of mailing is the date of the "entry" of the order. In Berger and Narberth Borough, it was held that regardless of oral approval of a final application and a tentative sketch plan, respectively, the appeal period did not begin to run until subsequent written decisions were issued. Even in Peterson, the Amity Township Board of Supervisors was *required* to issue a written decision following its grant of

oral approval of a preliminary plan for a subdivision. The Amity Township Board of Supervisors' *failure to comply with a statute*, Section 508 of the MPC, forced this Court to determine that the intent of the MPC was to begin the appeal period when the municipality's decision process had been finalized with sufficient clarity so that an aggrieved party can evaluate whether to appeal. Absent the "entry" of a decision or a "deemed" decision, we found that an oral approval by the Amity Township Board of Supervisors met this standard.

Section 4 of the Historic Districts Act provides that if a governing body disapproves an application, written notice giving the reasons for the disapproval shall be provided to the applicant. Moreover, Section 178-8 of the RTMC indicates the when an application is *modified* or *denied* by the Board, the applicant shall be notified in writing of the reasons for such action and advised of its right of appeal. That is not to say that written notification is not given when an application is approved. The Historic Districts Act indicates that upon giving approval, the governing body *shall issue* a Certificate of Appropriateness authorizing a permit for the erection, reconstruction, alteration, restoration, demolition or razing of a building, in whole or in part. Indeed, no permit shall be issued for the alteration of property until a Certificate of Appropriateness has been received from the governing body. 53 P.S. §8004(a). Furthermore, under the RTMC, if the Board approves an application, a Certificate of Appropriateness will be issued. No work shall commence until the Certificate of Appropriateness is obtained. Section 178-5 of the RTMC. Ultimately, whether an application is approved or denied, some writing will issue. Under Section 178-4 of the

RTMC, the term "Certificate of Appropriateness" is defined as the "*approval*" of a specific act on property in the historical district.

Just as in Berger and Narberth Borough, when a writing is required to be issued memorializing a determination of a governmental unit, the appeal period begins to run on the date of mailing of the writing. Pursuant to the stipulation entered into by the parties with the trial court, the Township did not deliver the Certificate of Appropriateness to Norcini until sometime on or after June 11, 2008. Consistent with 42 Pa.C.S. § 5571(b), the thirty-day appeal period began to run on this date. Gemmer filed its appeal with the trial court on the thirtieth day, July 11, 2008. Consequently, the appeal was timely.

It must be reiterated that Township and Norcini claim that Gemmer improperly filed its appeal of the Board's order with the trial court as a "land use" appeal and that, therefore, it was invalid as the MPC is not implicated in this case. They add that as there was no properly filed appeal, Gemmer could not possibly be said to have filed a timely appeal.

The trial court held, regardless of Gemmer's terminology in labeling its appeal, that it had jurisdiction to entertain the same consistent with Local Agency Law. Neither Norcini nor the Township appealed this ruling. Consequently, this argument must be rejected. See Sateach v. Beaver Meadows Zoning Board, 676 A.2d 747 (Pa. Cmwtlh. 1996)(holding appellee may not raise issues on appeal not raised by the appellant except by filing a cross-appeal).

In view of the aforementioned, we reverse the order of the trial court quashing Gemmer's appeal of the Township determination. This

matter is remanded to the trial court for it to address Gemmer's arguments on the merits.

JIM FLAHERTY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Baron Gemmer,	:	
	:	
Appellant	:	
v.	:	No. 78 C.D. 2010
	:	
Township of Radnor and Norcini Builders, Inc.	:	
	:	

ORDER

AND NOW, this 7th day of December, 2010, the order of the Court of Common Pleas of Delaware County (trial court) quashing an appeal of Baron Gemmer (Gemmer) from a determination of the Radnor Township Board of Commissioners is reversed. This matter is remanded to the trial court for it to address Gemmer's arguments on the merits.

Jurisdiction relinquished.

JIM FLAHERTY, Senior Judge