

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Atul K. Amin Family	:	
Limited Partnership II,	:	
	:	
Appellant	:	
	:	
v.	:	No. 921 C.D. 2010
	:	Argued: October 12, 2010
Bethlehem Township	:	
Zoning Hearing Board and	:	
The Township of Bethlehem	:	
	:	

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 10, 2010

The Atul K. Amin Family Limited Partnership II (Amin) appeals from an order of the Court of Common Pleas of Northampton County (trial court) which vacated the decision of the Bethlehem Township Zoning Hearing Board (Board), concluding that the Board did not have jurisdiction to hear an appeal from a preliminary opinion issued by the Bethlehem Township (Township) zoning officer, Howard Kutzler (Kutzler), wherein Kutzler concluded that some of the proposed uses requested by Amin did not comply with the Bethlehem Township Zoning Ordinance (Ordinance). We reverse and remand.

Amin is the owner of property at 4401 William Penn Highway, in Easton, Pennsylvania. The property is located in the Rural Residential District (RRD) and the Neighborhood Enhancement Overlay District (NEOD). On June 9, 2009, Amin sent a letter to Kutzler requesting a preliminary opinion pursuant to Section 117 of the Ordinance, regarding the use of the property as an “integrated healthcare facility/medical spa with a separate bank facility.” (R.R. at 13a.) Such use would also include a restaurant, three detached cottages for lodging, and a separate two story overnight guest facility with 56 rooms.

On June 24, 2009, Kutzler sent his preliminary opinion to Amin. In the preliminary opinion, Kutzler indicated that, although some of the proposed uses met the requirements of the Ordinance, several of the proposed uses and the proposed project as a whole did not comply with the Ordinance text and map for three specified reasons.<sup>1</sup> The letter also stated that, “[p]ursuant to the requirements of the Zoning Ordinance Section 111.F.1. you have the right to appeal this determination to the Bethlehem Township Zoning Hearing Board.” (R.R. at 19a.)

On July 24, 2009, Amin filed an application for appeal to the Board. In the application, Amin noted that the reason for the hearing was an “appeal from interpretation of zoning map regarding interpretation and

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<sup>1</sup> The zoning officer concluded that the overnight guest facility and cottages were classified as hotels. The teaching/conference center was an accessory use to the hotel, specifically prohibited by the Ordinance. Additionally, the project involved four separate uses and only two are allowed per property pursuant to the Ordinance. Finally, the zoning officer concluded that the overnight guest facilities and cottages were located more than 500 feet from the center line of William Penn Highway which is contrary to the Ordinance requirements.

application of zoning map ....” (R.R. at 24a.) In the alternative, Amin sought a variance.

A hearing was conducted before the Board, at which Amin testified. Amin also presented the testimony of a civil engineer. During the course of the hearing, Amin withdrew his request for a variance. Kutzler testified along with other individuals. The Board thereafter issued a decision denying the remedies sought by Amin.

Amin appealed to the trial court. The trial court determined that the Board lacked jurisdiction to hear the appeal of the preliminary opinion of June 24, 2009. Specifically, the trial court concluded that the Board would have had jurisdiction if Amin had not withdrawn his request for a variance. Having withdrawn the variance request, however, the Board was left with a request for an interpretation of the Ordinance. The trial court concluded that Amin purported to appeal from a non-binding preliminary opinion, a matter over which the Board did not have jurisdiction and is not specifically provided for in the Ordinance. The trial court vacated the decision of the Board. This appeal followed.<sup>2</sup>

The issue before this court is whether the trial court erred in concluding that the Board lacked jurisdiction to decide Amin’s appeal of the zoning officer’s preliminary opinion.

In seeking a preliminary opinion from the zoning officer, which Amin did in this case, Section 117 of the Ordinance provides:

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<sup>2</sup> Where, as here, the trial court does not take additional evidence, this court’s review is limited to determining whether the board abused its discretion or committed an error of law. Great Valley School District v. Zoning Hearing Board of East Whiteland Township, 863 A.2d 74 (Pa. Cmwlth. 2004), petition for allowance of appeal denied, 583 Pa. 675, 876 A.2d 398 (2005).

117. PROCEDURE TO OBTAIN PRELIMINARY OPINION. In order not to unreasonably delay the time when a landowner may secure assurance that the ordinance or map under which he/she proposed to build is free from challenge, and recognizing that the procedure for preliminary approval of his/her development may be too cumbersome or may be unavailable, the landowner may advance the date from which time for any challenge to the ordinance or map will run under Section 914.1 of the Municipalities Planning Code<sup>3</sup>] by the following procedure:

117.A. The landowner may submit plans and other material describing his/her proposed use or development to the zoning officer for a preliminary opinion as to their compliance with the applicable ordinances and maps. Such plans and other materials shall not be required to meet the standards prescribed for preliminary, tentative or final approval or for the issuance of a building permit so long as they provide reasonable notice of the proposed use or development and a sufficient basis for a preliminary opinion as to its compliance.

117.B. If the Zoning Officer's preliminary opinion is that the use or development complies with the ordinance or map, notice thereof shall be published once each week for two successive weeks in a newspaper of general circulation in the Township. Such notice shall include a general description of the proposed use or development and its location ... and the place and times where the plans and other materials may be examined by the public. The favorable preliminary approval under section 914.1 and the time therein specified for commencing a proceeding with the board shall run

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<sup>3</sup> (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §§10101-11202.

from the time when the second notice thereof had been published.

Here, the trial court observed that Section 117 of the Ordinance is similar to Section 916.2 of the MPC, 53 P.S. § 10916.2.<sup>4</sup> Section 914.1(a) of the MPC, 53 P.S. § 10914.1(a),<sup>5</sup> referenced in both Section 117 of the Ordinance and Section 916.2 of the MPC, provides an avenue by which “anyone other than the landowner” may appeal “from an adverse decision by a zoning officer on a challenge to the validity of an ordinance or map pursuant to section 916.2 ....” According to the trial court, however, both Section 117 of the Ordinance and Section 916.2 of the MPC are silent as to the procedure where, as here, the preliminary opinion of the zoning officer is that the proposed use only partially or fully fails to comply with the Ordinance or map.

We agree with Amin, however, that Section 111.F.1.a. of the Ordinance confers jurisdiction on the Board to review a preliminary opinion of the zoning officer issued pursuant to Section 117 of the Ordinance, which is adverse to the landowner. Section 111.F.1.a. of the Ordinance, provides:

The Zoning Hearing Board shall hear and decide appeals where it is alleged by the appellant (the landowner affected, any office or agency of the Township, or any person aggrieved) that the Zoning Officer has failed to follow prescribed procedures, or has misinterpreted or misapplied any valid provision of this Ordinance or any valid rule or regulation governing the action of the Zoning Officer.

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<sup>4</sup> This Section was added by the Act of December 21, 1988, P.L. 1329.

<sup>5</sup> This Section was added by the Act of December 21, 1988, P.L. 1329.

(Emphasis added.)

Here, Amin proceeded to obtain a preliminary opinion from the zoning officer as provided for in Section 117 of the Ordinance. The zoning officer, in his preliminary opinion, concluded that several of the proposed uses and the proposed project as a whole, did not comply with the Ordinance text and map. Amin, believing that the zoning officer misinterpreted and misapplied the Ordinance, then appealed to the Board, as is provided for in Section 111.F.1.a. of the Ordinance.

The trial court, nonetheless, concluded that the Board did not have jurisdiction to hear Amin's appeal based on the trial court's interpretation of Section 909.1(a) of the MPC, 53 P.S. § 10909.1(a)<sup>6</sup> and Section 111.E of the Ordinance. Both provide for different categories of applications and appeals over which the Board has jurisdiction. Although both are substantially similar to each other, according to the trial court, a discrepancy exists. Section 909.1(a)(8) of the MPC, lists "[a]ppeals from the zoning officer's determination under section 916.2" as a matter over which the Board has exclusive jurisdiction. Section 916.2 of the MPC addresses the procedures to obtain a preliminary opinion and is essentially identical to Section 117 of the Ordinance. Whereas Section 909.1(a)(8) of the MPC, specifically refers to Section 916.2 of the MPC, Section 111.E.8 of the Ordinance does not specifically refer to Section 117 of the Ordinance. Instead, Section 111.E.8 of the Ordinance states that the Board shall have jurisdiction from "[a]ppeals from the zoning officer's determination under Section 111.F.1."

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<sup>6</sup> This Section was added by the Act of December 21, 1988. P.L. 1329.

According to the trial court and the Board, the Board of Commissioners in adopting the Ordinance, specifically deviated from language contained in Section 909.1 of the MPC. The Board of Commissioners had the opportunity to specifically include preliminary opinions pursuant to Section 117 of the Ordinance as a matter over which the Board would have exclusive jurisdiction, but chose not to do so. Where certain things are specifically designated in a statute, all omissions should be considered as exclusions. Latella v. Unemployment Compensation Board of Review, 459 A.2d 464 (Pa. Cmwlth. 1983).

Amin argues that Section 111.E. of the Ordinance is not the only section which defines the jurisdiction of the Board. We agree with Amin that the trial court erred in ignoring the language of Section 111.F.1.a which, as previously stated, confers jurisdiction on the Board to hear appeals from decisions of the zoning officer where it is alleged that the zoning officer has “misinterpreted or misapplied any valid provision of this Ordinance.” Where the language of a statute is plain and unambiguous, there is no reason to resort to the rules of statutory construction, and thus, no reason to be concerned with legislative intent. Latella. Moreover, the preliminary opinion issued by the zoning officer specifically informed Amin that, pursuant to “Section 111.F.1. [of the Ordinance] you have the right to appeal the determination to the ... Board.”

Amin relies on this court’s decision in North Codorus Township v. North Codorus Township Zoning Hearing Board, 873 A.2d 845 (Pa. Cmwlth. 2005). In that case, the developer submitted a subdivision plan to a municipality subsequent to the amendment of the applicable zoning

ordinance, but after its stated effective date. To determine whether the subdivision plan was subject to the original ordinance or the amended ordinance, the developer requested a determination from the zoning officer as to which ordinance applied. The zoning officer orally responded that the amended ordinance applied and the developer appealed to the board. The board determined that it had jurisdiction over the appeal and that the subdivision was not subject to the amended ordinance. The trial court affirmed. On appeal this court stated:

In addressing the ZHB's jurisdiction, the trial court noted the definition of 'determination' and the broad language, 'including but not limited to' in section 909.1(a)(3) of the MPC .... [G]iven the broad language of section 909.1(a)(3) and Gervais' admission that he reviewed the plans, the ZHB did not err ... in concluding that Gervais' statement was a determination by the Zoning Officer over which it has jurisdiction.

Id. at 847-848.

Here, Amin notes that the Board, in its decision, specifically stated that "the appeal is properly before the Board, which maintains jurisdiction." (Board's decision at p. 9.)

The Board responds that the zoning officer's June 24, 2009 preliminary opinion was a non-binding determination from which no appeal could be taken. The Board observes that in accordance with Section 117.B., when the zoning officer preliminarily approves a plan, notice shall be provided in a newspaper for two consecutive weeks. Further, the thirty day appeal period for residents opposing the plan begins to run from the second date of publication of such notice. Section 117.B. of the Ordinance. The

Board claims that where, as here, a plan does not comply with the Ordinance, as determined by the zoning officer, publication of such determination is not required, the determination is not binding and it is therefore, unappealable.

The Board's argument, however, ignores the language of Section 111.F.1.a. which provides an avenue for the landowner to appeal to the Board from a determination of the zoning officer wherein it is claimed, as it is here, that the zoning officer misinterpreted the Ordinance.

The Board further argues that it lacked jurisdiction to hear Amin's appeal. In accordance with Section 909.1(a)(3) of the MPC, the Board has jurisdiction to consider an appeal arising from a determination by the zoning officer, including "the granting or denial of any permit, or failure to act on an application thereof, the issuance of any cease and desist order, or the registration or refusal to register a non-conforming use or structure." Section 107(b) of the MPC, 53 P.S. § 10107(b), defines a determination as a "final action by an officer, body or agency charged with the admission of any land use ordinance ...." Furthermore, in accordance with Section 909.1(a)(9) zoning hearing boards are empowered to hear "[a]ppeals from the determination of the zoning officer ... in the administration of any land use ordinance ...."

Here, as acknowledged by the Board in its brief, a broad reading of Section 909.1 of the MPC and Section 111.F.1 of the Ordinance "might initially suggest that the Board had jurisdiction to consider the Appellant's [Amin's] appeal." (Board's brief at 18.) We conclude that the

language in fact confers jurisdiction on the Board from a preliminary opinion issued by the zoning officer which is adverse to the landowner.

Finally, the cases relied upon by the trial court in characterizing the zoning officer's determination in this case as an advisory opinion, are distinguishable. In Joe Darrah, Inc. v. Zoning Hearing Board of Spring Garden Township, 928 A.2d 443 (Pa. Cmwlth. 2007), the operator of a junkyard sought to have the land use reclassified from a "junkyard" to a "processing establishment," which the zoning officer denied. Thereafter, the operator petitioned the board for the reclassification. At the time of the hearing, counsel for the operator advised the board that his client only sought an interpretation of the ordinance and not a change in the ordinance. The board declined to reclassify the junkyard based on the definitions in the ordinance and the trial court affirmed.

On appeal, this court determined that the board could not interpret the ordinance in the absence of an application for some kind of zoning permit or a challenge to the validity of the ordinance and that it did not have jurisdiction to issue an advisory opinion.

Unlike the facts in Joe Darrah, Amin was not seeking an advisory opinion or abstract relief. Here, Amin sought remedies specifically provided for in the Ordinance. Initially, Amin sought a preliminary opinion which is provided for in Section 117 of the Ordinance. Amin then appealed that determination, as authorized by Section 111.F of the Ordinance, which states that the Board shall decide appeals where it is alleged that the zoning officer "misinterpreted" the Ordinance.

The Board counters that Amin's original application sought variances, over which the Board had jurisdiction. At the Board hearing, however, counsel for Amin withdrew the request for a variance. As such, the remaining application before the Board was merely a request to interpret the Ordinance. The Board's argument, however, ignores the provisions of the Ordinance which authorize an individual to seek preliminary approval and, thereafter, appeal such determination if the zoning officer has misinterpreted the Ordinance.

In Hopkins v. North Hopewell Township Zoning Hearing Board, 623 A.2d 938 (Pa. Cmwlth. 2005), the landowners filed a "request for interpretation" with the board, presenting ten questions. This court determined that the board lacked the authority under the MPC to grant the landowner's request, i.e., an interpretation of the zoning ordinance.

In Hopkins the landowner was not appealing any determination or decision of the zoning officer. Here, the zoning officer issued a determination, which Amin properly appealed to the Board.

In accordance with the above, the order of the trial court is reversed and the case is remanded for a determination on the merits.

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JIM FLAHERTY, Senior Judge

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

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Bethlehem Township	:	
Zoning Hearing Board and	:	
The Township of Bethlehem	:	
	:	

**ORDER**

Now, December 10, 2010, the order of the Court of Common Pleas of Northampton County, in the above-captioned matter, is reversed. The case is remanded for a determination on the merits.

Jurisdiction is relinquished.

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JIM FLAHERTY, Senior Judge