[J-22-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, JJ.

PHILOMENO & SALAMONE,	:	No. 105 MAP 2006
	:	
Appellant	:	Appeal from the Order of Commonwealth
	:	Court entered 08-25-2005 at No. 337 CD
v.	:	2005 reversing the Order of Montgomery
	:	County Court of Common Pleas, Civil
	:	Division, entered 01-27-2005 at No. 04-
BOARD OF SUPERVISORS OF UPPER	:	21660.
MERION TOWNSHIP AND UPPER	:	
MERION TOWNSHIP,	:	
	:	
Appellees	:	ARGUED: March 5, 2008

OPINION

MR. JUSTICE EAKIN **DECIDED: MARCH 18, 2009**

On June 5, 2003, appellant, equitable owner of 18.67 acres in Upper Merion Township, Montgomery County, submitted an application to the township's Board of Supervisors to subdivide the property into two parcels, and to further subdivide one of those parcels into 17 residential lots. The Board twice requested extensions of time to make a decision; § 508 of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. § 10508, provides a municipality must take action on an application within 90 days of the next meeting of its governing body or

planning agency, or such application will be "deemed an approval."[1] Appellant agreed to both extensions; the new deadline for this plan was December 24, 2003.

Prior to that date, appellant filed a distinct conditional use application for the property. This plan reflected suggestions from the Township Planning Commission, and would have allowed development of 28 townhouse units on a 4.89-acre parcel, with a 8.65-acre open space parcel and a 4.38-acre recreational use parcel. On June 23, 2004, the Board denied this conditional use application, a decision the trial court and Commonwealth Court affirmed on appeal.

Six days after denial of the conditional use application, appellant filed an action for mandamus and peremptory judgment, asserting the initial subdivision application should be deemed approved under § 508 because the Board did not act upon it by the December 24 deadline. Mandamus is the appropriate mechanism to obtain recognition of a deemed approval of a proposed land development plan, see Lehigh Asphalt Paving and Construction Company v. East Penn Township, 830 A.2d 1063, 1070 (Pa. Cmwlth. 2003), and a peremptory judgment may be entered where no genuine issue of material fact exists and the case is free and clear from doubt. See id.; Pa.R.C.P. 1098. The trial court, finding no genuine issue of material fact existed, granted appellant peremptory judgment.

The court determined the conditional use application did not supersede the subdivision application, which was therefore deemed approved under § 508. The court distinguished the two applications, explaining a conditional use "addresses the use of the land, while a subdivision plan addresses how the land is to be developed. A conditional use application seeks approval for new and potential uses for the land that, if granted, would then require a later submitted subdivision plan to be filed." Trial Court Opinion,

[1] If the next meeting is over 30 days after filing, the 90-day period begins to run 30 days after filing, giving the body up to 120 days to render a decision. See 53 P.S. § 10508.

3/18/05, at 5; see also 2 Robert M. Anderson, Law of Zoning in Pennsylvania § 22.20 (1982) ("While the governing body of a municipality has broad discretion in adopting standards for the approval of subdivision and land development plans, it cannot include provisions relating to the use of land. Regulation of use is a matter appropriate for control through a zoning ordinance.").

Because of this distinction, the trial court found inapplicable cases holding that a revised subdivision application causes the time for decision to run from the filing of the revised plan. See Wiggs v. Northampton County Hanover Township Board of Supervisors, 441 A.2d 1361, 1363 (Pa. Cmwlth. 1982); DePaul Realty Company v. Borough of Quakertown, 324 A.2d 832, 835 (Pa. Cmwlth. 1974). The court distinguished cases holding § 508 is inoperative where an applicant creates confusion by submitting two inconsistent plans for the same tract. See Morris v. Northampton County Hanover Township Board of Supervisors, 395 A.2d 697, 699 (Pa. Cmwlth. 1978). The court also noted Appeal of David Fiori, Realtor, Inc., 422 A.2d 1207, 1208 (Pa. Cmwlth. 1980), held two subdivision plans could run simultaneously, and an untimely rejection of the first plan resulted in its being deemed approved. The court expressly noted it did not rely on Fiori, as that case involved two subdivision plans, but found its logic supports the conclusion the law did not preclude simultaneous consideration of a subdivision plan and conditional use application.

The Commonwealth Court reversed, holding that by filing the conditional use application, appellant abandoned the subdivision plan application. See Philomeno & Salamone v. Board of Supervisors of Upper Merion Township, 882 A.2d 1044, 1048 (Pa. Cmwlth. 2005). Although the court acknowledged the difference between the two types of applications and found each application was made pursuant to separate ordinances, it determined the Board was not required to rule on each application. Emphasizing that the purpose of the mandatory time period under § 508 is to protect an applicant from dilatory

conduct of the Board, see Shelbourne Square Associates, L.P. v. Board of Supervisors of Township of Exeter, Berks County, 794 A.2d 946, 950 (Pa. Cmwlth. 2002), the court found the Board's failure to rule on appellant's subdivision application did not result from such conduct, but rather from the "confusion and protracted proceedings" caused by appellant filing a separate and inconsistent conditional use application. See Philomeno, at 1048-49.

We granted allowance of appeal to determine whether filing a subsequent conditional use application effectively withdraws a pending inconsistent subdivision application for the same tract of land, or whether § 508 of the MPC "deems approved" all applications not acted upon in a timely manner. See Philomeno & Salamone v. Board of Supervisors of Upper Merion Township, 906 A.2d 1197 (Pa. 2006) (Table). As the rule is codified at 53 P.S. § 10508, this is a question of statutory interpretation, and as such, is a pure question of law. See e.g., Commonwealth v. Bortz, 909 A.2d 1221, 1223 (Pa. 2006). Questions of law are subject to de novo review, and our scope of review is plenary. Craley v. State Farm Fire and Casualty Company, 895 A.2d 530, 539 n.14 (Pa. 2006). Coretsky v. Board of Commissioners of Butler Township, 555 A.2d 72, 74 (Pa. 1989), held § 508's requirements are mandatory, and Kassouf v. Township of Scott, 883 A.2d 463, 471 (Pa. 2005), upheld Coretsky's finding § 508 is mandatory because the statutory language clearly sets forth the time frame for decisions on land use applications.

Our courts have long permitted landowners to file inconsistent subdivision or land development applications, and they are entitled to action on all applications. See Fiori, at 1208; Bobiak v. Richland Township Planning Commission, 412 A.2d 202, 205 (Pa. Cmwlth. 1980); Capital Investment Development Corporation v. Jayes, 373 A.2d 785, 788 (Pa. Cmwlth. 1977). Nevertheless, the Board claims submission of a new plan relieved it of the obligation to review the original plan. It cites Raum v. Board of Supervisors of Tredyffrin Township, 370 A.2d 777 (Pa. Cmwlth. 1977), and Abarbanel v. Solebury Township, 572 A.2d 862 (Pa. Cmwlth. 1990), regarding good faith requirements in submitting land use

proposals, stating § 508 "does not cover every possible interaction between developer and municipality." Appellees' Brief, at 7. The Board then discusses cases where revisions of original land use applications were submitted, which extended the time for decision under § 508. Id., at 7-10 (citing DePaul, Morris, and Wiggs).

It is clear that revising a land use application extends § 508's 90-day decision period, see Wiggs, at 1363; see also DePaul, at 835. However, it must be a voluntary revision, and contain substantial changes. Id., at 835 ("The obvious effect of filing the revised plans was to void the original plans and substitute therefor the revised plans."). Appellant's conditional use application was not intended to revise the land use application as it dealt with zoning issues as opposed to the original subdivision application, which addressed land use. See 53 P.S. § 10107(a) ("'Conditional use,' a use permitted in a particular zoning district …. 'Subdivision,' the division or redivision of a lot, tract or parcel of land by any means into two or more lots, tracts, parcels or other divisions of land ….").

In Capital Inv. Dev. Corp., two mutually-exclusive subdivision plans were submitted to the township, and when the township failed to act on either application, the lower court found both plans were deemed approved under § 508, and the developer had the option to pursue either. Capital Inv. Dev. Corp., at 788. In Bobiak, where the township never formally acted on a preliminary subdivision plan, and the developers did not seek "deemed approval" for two and a half years after the time period expired, the delay did not abrogate the right to relief under § 508. Bobiak, at 204-05. Similarly, in Fiori, the developer submitted a land development plan for a shopping center, followed by an alternate proposal for a restaurant on the same site. As the developer did not withdraw his original application, although the township's board of supervisors denied both applications on the same day, "the Board's rejection of [the original] application was untimely and not properly made and communicated under [§] 508[,]" Fiori, at 1208; thus, it was deemed approved.

Here, the Commonwealth Court did not address Capital Inv. Dev. Corp., Bobiak, or Fiori, though it did acknowledge that § 508 does not prohibit submitting inconsistent land use applications for the same tract of land. Nevertheless, it found the second application "effectively abandoned the subdivision plan application"; later the court stated the second plan caused "confusion and protracted proceedings" which resulted in the failure to rule on the first plan. See Philomeno, at 1048-49. We find no evidence of record supporting either conclusion.

Wiggs and DePaul hold revisions of previously submitted subdivision plans restart the 90-day approval period, but as noted, we are not dealing with revision of an existing subdivision application. Neither case addresses a conditional use application filed in addition to a subdivision plan. Alternate plans are different from revisions of existing plans, especially when, as here, they are filed under different ordinances and involve different requests. The original plan here was not withdrawn, and the record shows no acts consistent with abandonment save the conditional use application. Offering an alternative plan does not make the original submission disappear.

Likewise, we find no evidence of confusion on the part of the Board, or protracted proceedings beyond the Board's requests for continuances. Morris holds an applicant creating confusion by submitting two inconsistent subdivision plans renders § 508's 90-day protection inapplicable. While the Commonwealth Court properly reiterated the differences between subdivision plans and conditional use plans, the court did not explain how appellant's actions confused the Board such that it was exempt from adhering to § 508's mandatory time frame. Finding nothing in the record to support this conclusion, we must deem it erroneous.

Because the Board did not act on the initial subdivision plan within the mandatory time period under § 508, the learned trial court correctly deemed it approved. A clear reading of § 508 requires the township to act on land use applications within 90 days, and

the Commonwealth Court's order is reversed. Additionally, appellant's Application for Substitution of Legal Owner of the Property Pursuant to Pa.R.A.P. 502(b) is granted.[2]

Order reversed. Jurisdiction relinquished.

Mr. Chief Justice Castille, Mr. Justice Baer, Madame Justice Todd and Mr. Justice McCaffery join the opinion.

Mr. Justice Saylor files a concurring opinion.

[2] As legal owner of the property, and assignee of the subdivision plan at issue in this appeal, Sabertooth, LLC has been adversely affected in a substantial, immediate, and direct manner. See Hydropress Environmental Services, Inc. v. Township of Upper Mount Bethel, County of Northampton, 836 A.2d 912, 916 (Pa. 2003). As such, Sabertooth has an interest in this appeal's outcome and is an aggrieved party. See id.; Pa.R.A.P. 501 (party aggrieved by appealable order may appeal therefrom); thus, appellant's Application for Substitution of Legal Owner of the Property Pursuant to Pa.R.A.P. 502(b) is granted.