

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania Venture Capital, Inc.,	:	
Appellant	:	
	:	No. 1199 C.D. 2012
v.	:	
	:	Argued: December 12, 2012
The Planning Commission of the City	:	
of Bethlehem and Moravian	:	
Village of Bethlehem, a/k/a	:	
Moravian Village Assisted Living	:	
and Memory Care Facility (Owner)	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: January 23, 2013

Pennsylvania Venture Capital, Inc. (PVC) appeals from the Northampton County Common Pleas Court's (trial court) May 24, 2012 order affirming the Bethlehem City (City) Planning Commission's (Planning Commission) approval of Moravian Village of Bethlehem's (Moravian) subdivision and land development application. The issue before this Court is whether Moravian's Plan complied with the City's Subdivision and Land Development Ordinance (SALDO). We affirm.

Moravian owns the real property located at 626 Stefko Boulevard, Bethlehem (Moravian Property), which is within the Dalton Addition to Bethlehem subdivision (Dalton Subdivision) created in 1915. The 1915 subdivision recording

depicted paper streets.¹ The paper streets also appear in a property plan prepared and recorded in 1925 for John F. Stefko. Thereafter, the City allegedly vacated all of the paper streets within the 1915 and 1925 plans.²

On December 9, 2011, Moravian submitted to the Planning Commission a Land Development and Lot Consolidation Plan (Plan) with sidewalk and street tree waivers in order to construct an assisted living/memory care facility. The Plan did not delineate the paper streets shown in the Dalton Subdivision. The Planning Commission adopted and approved the Plan on February 9, 2012.

On March 6, 2012, PVC entered into an agreement of sale to purchase the real property located at 913 Jennings Street, Bethlehem (PVC Property), which is also within the Dalton Subdivision and in close proximity to the Moravian Property. On March 8, 2012, PVC timely appealed from the Planning Commission's February 9, 2012 Moravian approval to the trial court on the basis that it violated the City's SALDO because it was inconsistent with the existing private rights-of-way (i.e., rights to open and use the paper streets). On May 24, 2012, the trial court denied and dismissed PVC's appeal. PVC appealed to this Court.³

¹ A paper street refers to a street indicated on a planning or zoning map of a municipality or on other publicly recorded documents. "Where such a street has never been opened by the municipality or used by the public, it has no existence except on paper, and is therefore referred to as a paper street."

Bailey v. Zoning Bd. of Adjustment, 780 A.2d 809, 814 n.5 (Pa. Cmwlth. 2001) (quoting *Tobin v. Radnor Twp. Bd. of Comm'rs*, 597 A.2d 1258, 1260 n.1 (Pa. Cmwlth. 1991)).

² Although the City and Moravian aver, and the trial court found, that the City vacated the paper streets at issue, there is no clear evidence in the record before this Court. Moravian refers to Resolution No. 2009-15 dated May 20, 2009. *See* Moravian Br. at 6.

³ "In a land use appeal, where a full and complete record was made before the [municipality] and the trial court took no additional evidence, this Court's scope of review is limited to determining whether the [municipal board] committed an abuse of discretion or an error of law." *Morris v. S. Coventry Twp. Bd. of Supervisors*, 836 A.2d 1015, 1018 n.3 (Pa. Cmwlth. 2003).

PVC argues that the Planning Commission erred by approving the Plan when it did not depict existing easements as required by the City's SALDO. We disagree. Section 501 of the Pennsylvania Municipalities Planning Code (MPC), 53 P.S. § 10501,⁴ provides in pertinent part:

The governing body of each municipality may regulate subdivisions and land development within the municipality by enacting a [SALDO]. . . . All powers granted herein to the governing body or the planning agency shall be exercised in accordance with the provisions of the [SALDO].

Section 1345.04 of the City's SALDO requires that all final development plans be submitted pursuant to Section 1343.02(g)(2)⁵ of the City's SALDO. Section 1343.02(g)(2)P of the City's SALDO requires that a final development plan contain, *inter alia*, "[a]ll existing and/or proposed easements, utilities, and grading." Reproduced Record (R.R.) at 428a. "Easements are defined in Section 1343.02(e) of the [City's] SALDO as "[a] right granted by a property owner to use certain land for a special public or quasi-public purpose not inconsistent with the general property rights of the owner." R.R. at 425a.

Where lots are sold with reference to a plot or plan showing streets, an implication arises that the grantor has dedicated the streets to the public. If the dedication is not accepted by the public, or by the municipality acting on behalf of the public, within 21 years, the Act of 1889 [Section 1 of the Act of May 9, 1889, P.L. 173, as amended, 36 P.S. § 1961] forbids the opening of streets without the permission of the owners of the abutting lots. The purpose of the Act is 'to relieve land upon which streets have been laid out by the owners, but not used, from the servitude imposed.'

⁴ Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. § 10501.

⁵ The reference in the City's SALDO Section 1345.04 says "Section 1343.02(f)(2)." Because Section 1343.02(f) refers to geodetic control rather than plan requirements, and Section 1343.02(g) discusses plan requirements, we will assume that the City's SALDO Section 1345.04 meant to refer to Section 1343.02(g).

Elliott v. H. B. Alexander & Son, Inc., 399 A.2d 1130, 1133 (Pa. Cmwlth. 1979) (citations and footnote omitted).

Where a municipality does not open the street within the twenty-one year period set forth in Section [1 of the Act of 1889], the abutting lot owners acquire the fee in the street to the center line. . . . However, while a public easement or right of use in such roads is lost as a result of the passage of time and lack of use, the purely private rights of easement of individual property owners in the plan of lots to use the road is not extinguished.

Leininger v. Trapizona, 645 A.2d 437, 440 (Pa. Cmwlth. 1994) (citation omitted). Likewise, when a municipality vacates a street, the public's right to use it is terminated, and the property automatically reverts to the abutting landowners. *In re City of Altoona*, 479 Pa. 252, 388 A.2d 313 (1978).

Moreover, the Pennsylvania Supreme Court has held:

[T]he law in this Commonwealth is that enforcement of private rights has no application in a zoning dispute. If such covenants are violated, the remedy is enforcement of the restrictions in a court by the persons entitled to enforcement, not by way of zoning proceedings. Courts, in trying zoning cases, ordinarily exclude evidence of private restrictions and, in trying a private restriction case, will exclude evidence of zoning on grounds of immateriality. Zoning laws are enacted under the police power and interest of public health, safety and welfare; there is no concern whatever with building or use restrictions contained in instruments of title and which are created merely by private contracts.

Gulla v. N. Strabane Twp., 676 A.2d 709, 710-11 (Pa. Cmwlth. 1996) (citations omitted), *aff'd*, 551 Pa. 588, 712 A.2d 281 (1998). Thus, whether by the passage of 21 years or the City's vacation of the paper streets, by the time of this action, the paper streets no longer constituted public or quasi-public easement rights that had to be designated on the Plan under the City's SALDO Section 1343.02(g)(2). Rather,

the paper streets were private rights to be asserted by the landowners in another forum, and could not be considered by the Planning Commission.

“An application for a subdivision plan which conforms to all the technical requirements of relevant ordinances cannot be denied based on deed restrictions.” *Gulla*, 676 A.2d at 711. Accordingly, because the City’s SALDO did not require inclusion of the private rights of individuals, and the Planning Commission was prohibited from considering private rights, the Planning Commission properly approved the Plan.

Based upon the foregoing, the trial court’s order is affirmed.

PATRICIA A. McCULLOUGH, Judge

