IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas R. Kerr,	:	
Appellant	:	
	:	
v.	:	
	:	No. 2249 C.D. 2007
City of Bethlehem	:	Submitted: April 18, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge*

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE COLINS **FILED: June 26, 2008**

Thomas R. Kerr, at this Court's Docket No. 2249 C.D. 2007, appeals from the November 8, 2007 order of the Court of Common Pleas of Northampton County (Trial Court) sustaining preliminary objections filed by the City of Bethlehem (City) and dismissing a complaint for declaratory judgment filed by Kerr.[1]

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[*] The decision in this case was reached before the conclusion of Senior Judge Colins' service.

[1] The Trial Court's opinion and order in this matter also addressed identical issues in Hasfeld, Inc. v. City of Bethlehem, which was consolidated at the Trial Court level with Kerr's matter for disposition. Hasfeld, Inc. has also filed an appeal to this Court at Docket No. 2250 C.D. 2007, which appeal is addressed in a separate, companion opinion.

The following facts underlie this appeal. In 1961, the Commonwealth of Pennsylvania (the Commonwealth) passed the Historic District Act (the Act),[2] which allows municipalities to create local historic districts. Pursuant to the Act, locally created historic districts must be certified by the Pennsylvania Historical and Museum Commission (PHMC). Subsequent to such certification, the municipality may appoint a Board of Historical Review (Board) to advise the municipality with regard to issuing a "certificate of appropriateness" to any property owner seeking to erect, demolish, or alter structures on a property within the district.

The City is a municipal corporation organized as a Third Class City pursuant to the laws of the Commonwealth of Pennsylvania. On December 12, 1961, the City designated the Moravian District as an historic district; thereafter, the City designated part of its South Side as a similar district. In May 2007, the City Council enacted an ordinance amending Article 1714 of the codified ordinances entitled, "Historic Conservation District-South Bethlehem," (Ordinance). The Ordinance provides that "any and all changes to buildings, structures or appurtenances visible from a public way are subject to review and approval by City Council." On May 16, 2007, the Ordinance was amended to enlarge the area of the City's Conservation District to include the Mount Airy National Register Historic District.

Kerr's property is situate at 1521 Prospect Avenue, Bethlehem, Pennsylvania, within the Mount Airy Historic District. On June 13, 2007, Kerr filed an action for declaratory judgment against the City seeking: (1) a declaration of his rights and those of the City considered within the ambit of the Federal and

[2] Act of June 13, 1961, P.L. 282, No. 167, *as amended*, 53 P.S.§§8001-8006.

Pennsylvania Constitutions, the Act, and the Pennsylvania Municipalities Planning Code;[3] (2) a declaration that the Ordinance amending Article 1714 was not enacted in compliance with the law of the Commonwealth and therefore does not apply to Kerr's property; and (3) such other relief as the Court may deem appropriate.

On July 16, 2007, the City filed preliminary objections to Kerr's complaint on various grounds, the most significant of which was that the Trial Court lacked subject matter jurisdiction to issue a declaratory judgment because the issues presented were not ripe for adjudication.[4] In support of its preliminary objections, the City argued that the Ordinance only applied when a resident tried to build, reconstruct, or tear down properties within the subject district, and that Kerr's status as a landowner within the district did not, in and of itself, create a case or controversy unless and until Kerr took some action governed by the Ordinance.

The Trial Court agreed with the City's argument that issuing a declaratory judgment in this matter would be premature and tantamount to adjudicating issues before any required application of the Ordinance ever materialized. On November 8, 2007, the Trial Court issued an order sustaining the City's preliminary objection averring lack of subject matter jurisdiction on ripeness

[3] Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§10101-11202.

[4] The other preliminary objections averred by the City were that: (1) the Court did not have subject matter jurisdiction because of Kerr's (and Hasfeld's) failure to exhaust administrative remedies; (2) the Court lacks jurisdiction because of Kerr's (and Hasfeld's) failure to join a necessary and indispensable party; (3) in the alternative, a demurrer and motion to strike Kerr's (and Hasfeld's) claims of a taking; and, (4) in the alternative, a motion for a more specific pleading.

grounds and dismissing the complaints for declaratory judgment filed by Kerr and Hasfeld. This appeal followed.[5]

On appeal, Kerr contends that the Declaratory Judgment Act[6] was intended to provide relief to persons in similar situations to his. He argues that the Ordinance has an immediate, deleterious effect on his property in that it curtails his freedom to develop the property by creating expensive obstacles to overcome before any changes can be made to the visible outside of his property. Kerr further maintains that were he forced to endure the extra "costs and hurdles prior to attaining standing," he would lose his "right as a citizen" to challenge the Ordinance on procedural and substantive grounds. Finally, Kerr avers that the precedent relied upon by the Trial Court does not support dismissal but rather indicates that the court acknowledged immediately cognizable claims that should be substantively addressed, including procedural defects in the enactment of the Ordinance.

Upon review, we find that the Trial Court did not err in sustaining the City's preliminary objections.

> When ruling on preliminary objections, we accept as true all well-pleaded allegations of material fact and all reasonable inferences deducible therefrom. We are not, however, required to accept as true conclusions of law or expressions of opinion. A demurrer, which results in the dismissal of a claim or suit, should be sustained only where it appears with certainty that the law permits no

[5] This Court's standard of review when reviewing a trial court order sustaining preliminary objections in the nature of a demurrer is limited to determining whether the trial court abused its discretion or committed an error of law. *South Middleton Township v. Diehl*, 694 A.2d 11 (Pa. Cmwlth. 1997).

[6] 42 Pa.C.S. §§ 7531-7541.

recovery under the allegations pleaded. . . .

English v. Commonwealth, 845 A.2d 999, 1002 n.7 (Pa. Cmwlth. 2004) (citations omitted.) In the present matter, Kerr is seeking declaratory relief with regard to issues that are not ripe for adjudication. The issue of ripeness was addressed in *Banfield v. Cortes*, 922 A.2d 36, 45 (Pa. Cmwlth. 2007), wherein this Court stated:

> In determining whether the doctrine of ripeness bars a declaratory judgment action, we consider: (1) whether the issues are adequately developed for judicial review, including whether the claim involves uncertain and contingent events that may not occur as anticipated or at all; and (2) what hardship the parties will suffer if review is delayed. Alaica v. Ridge, 784 A.2d 837 (Pa.Cmwlth.2001).

Applying the foregoing guidelines to the present matter, we agree with the Trial Court's determination that a declaratory judgment is an appropriate remedy when presented with antagonistic claims likely to result in imminent and inevitable litigation. The Trial Court properly notes that a declaratory judgment "must not be employed to determine rights in anticipation of events which may never occur, for consideration of moot cases, or as a medium for the rendition of an advisory opinion which may prove to be purely academic. *Gulnac v. South Butler County School District*, 526 Pa. 483, 587 A.2d 699 (1991).

We further concur with the Trial Court's rejection of Kerr's averment that he is being negatively affected by the amendments to the Ordinance notwithstanding that he has not applied for and/or been denied a certificate of appropriateness regarding any alterations or additions to his property. In this

regard, the Trial Court properly notes that in the event that Kerr attempts to develop or add buildings and other appurtenances to his property, he would need approval from the City zoning board, thereby rendering any prior declaratory relief at the common pleas level premature. Similarly, we agree with the Trial Court's refusal to address Kerr's challenge to the constitutionality of the Ordinance in averring that the latter represents an unconstitutional exercise of the City's police powers, considering that the limitations placed on private property as a result of the historic district designation have no substantial relationship to the public good. In this regard, we note that in *Philadelphia Entertainment and Development Partners, L.P. v. City of Philadelphia*, 594 Pa. 468, 937 A.2d 385, 392 (2007), our Supreme Court stated:

> We have applied the ripeness doctrine in this particular context, declining to address claims challenging the constitutionality or validity of a zoning ordinance that has not been enforced or applied. Our rulings in this regard have been premised on policies of sound jurisprudence, namely, that the courts should not give answers to academic questions or render advisory opinions or make decisions based on assertions as to hypothetical events that might occur in the future.

The foregoing rationale reinforces the established principle that the courts will refrain from addressing the validity or constitutionality of an enactment *in vacuo* and will only consider it once it is actually applied to a litigant. Finally, we concur with the Trial Court's observation that, although any later challenge which Kerr may wish to bring, inevitably will fall beyond the thirty-day appeal period, courts have been allowing procedural challenges relating to notice or due process rights, even beyond this thirty-day period, and further, precedent has established that the thirty-day statutory appeal period does not apply to challenges to the substantive

validity of an ordinance. See *Glen-Gary Corp. v. Zoning Hearing Board of Dover Township*, 589 Pa. 135, 139, 907 A.2d 1033, 1034-1035 (2006) and *Holsten v. West Goshen Township*, 424 A.2d 997 (Pa.Cmwlth. 1981).

Based upon the foregoing discussion, we affirm the Trial Court's determination.

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JAMES GARDNER COLINS, Senior Judge

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O R D E R

AND NOW, this 26th day of June 2008, the order of the Northampton County Court of Common Pleas in the above-captioned matter is hereby affirmed.

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JAMES GARDNER COLINS, Senior Judge