# IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Pine Run, Inc., F. Saleta Stewart, Appellants | : | |
| v. | : | No. 245 C.D. 2008 |
| | : | SUBMITTED: June 27, 2008 |
| Ronald E. Balutis and Board of Supervisors of Hamilton Township | : | |

**BEFORE:** **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
**HONORABLE ROBERT SIMPSON,** Judge
**HONORABLE JAMES R. KELLEY,** Senior Judge

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY**
**PRESIDENT JUDGE LEADBETTER** **FILED:** August 28, 2008

Pine Run, Inc. and F. Saleta Stewart appeal from an order of the Court of Common Pleas of Adams County (common pleas) which, after considering preliminary objections to their complaint, dismissed Counts I, II, and III with prejudice and dismissed Count IV without prejudice and with leave to file an amended complaint.[1] Currently, the only issues before us involve the dismissal of Counts I and II of the complaint with prejudice.[2]

[1] Appellants never filed such an amended pleading. Instead, they filed a "Praecipe for Judgment on Court Order" on January 14, 2008, and judgment was entered in favor of Appellees on that date. Appellants then filed a Notice of Appeal to this Court on February 7, 2008.

[2] For purposes of completeness, we note that Count III sought an order by common pleas declaring that the March 5, 2006, Stop Work Order issued by Ronald Balutis, Hamilton Township's Zoning and Building Code Officer, was issued without authority and is consequently
**(Footnote continued on next page…)**

F. Saleta Stewart is the sole shareholder and president of Pine Run, Inc. (Pine Run). She owns more than forty acres of real property in Hamilton Township, Adams County, which are part of a multi-phase development plan known as the Pine Run Retirement Community. Appellants allege that, at an April 6, 1999 Board of Supervisors meeting, the Board approved a land development plan for phase two of the property, with contingencies. Appellants admit that the plan was not recorded. Nevertheless, they relied on the purported approval and proceeded with development of the property. Appellants received thirty-nine building permits from Hamilton Township and spent more than a million dollars in development. However, the Township's zoning and building code officer eventually issued a Stop Work Order, and Appellants thereafter filed a civil action in equity and law. The first Count of the complaint sought a declaratory judgment that phase two of the community is an approved subdivision plan; the second Count, sounding in mandamus, demanded entry of judgment against the Board, directing it to sign and record the plan.

Appellees filed seven preliminary objections to the complaint, the first three of which related to Counts I and II. In their first preliminary objection, Appellees averred that a copy of the alleged plan was not attached to the complaint and that, without such an attachment, they could not respond to the complaint's first two Counts. In their second preliminary objection in the nature of a demurrer, Appellees averred that, because Pine Run admittedly failed to record the alleged plan within ninety days of the Board's alleged approval pursuant to Section 513(a)

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**(continued…)**

void. Count IV demanded an entry of judgment against Balutis for damages arising from malicious prosecution.

of the Pennsylvania Municipalities Planning Code (MPC),[3] 53 P.S. § 10513(a), and because Pine Run is not able to produce a plan showing official approval for phase two of the property, any such plan, if it existed, is void *ab initio*. Therefore, they requested that Count I of the complaint be dismissed in its entirety, with prejudice. In their third preliminary objection in the nature of a demurrer, Appellees again averred that Section 513(a) of the MPC requires Pine Run to be responsible for recording any approved plan within ninety days, and because the plan was not recorded, it is void *ab initio*. Accordingly, Appellees also requested that Count II of the complaint be dismissed in its entirety, with prejudice.[4] Appellants filed a response to the preliminary objections averring, *inter alia*, that the plan has been in the Board's possession since 1999, and it has not been returned to Appellants for recording.

After consideration of the pleadings, common pleas sustained Appellees' first preliminary objection because Appellants neither attached a copy of the allegedly approved plan to the complaint, nor explained that the plan was unavailable and why. Common pleas also sustained Appellees' second and third preliminary objections because the developer, not the Board, had the duty to record the plan,[5] and common pleas refused to require the Board to record the plan in contravention of the relevant statute.

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[3] Act of July 31, 1968, P.L. 805, *as amended*.

[4] Appellees' fourth and fifth preliminary objections related to the failure to exercise or exhaust statutory remedies with respect to Counts III and IV, respectively; Appellees' sixth preliminary objection related to the lack of jurisdiction over the subject matter of Counts III and IV; and their seventh preliminary objection averred insufficient specificity of the pleading with respect to Count IV.

[5] Section 107 of the MPC, 53 P.S. § 10107 defines "developer" as "any landowner, agent of such landowner, or tenant with the permission of such landowner, who makes or causes to be made a subdivision of land or a land development."

Appellants are now here, arguing that common pleas erred by: (1) requiring them to attach a copy of the land development plan to their complaint; (2) holding that they were required by Section 513(a) of the MPC to record the plan within ninety days of its approval, because the Board never signed the plan; and (3) dismissing Counts I and II of the complaint with prejudice. We note that our review of common pleas' order sustaining preliminary objections is limited to a determination of whether common pleas erred as a matter of law. *See Mikkilineni v. Amwest Surety Ins. Co.*, 919 A.2d 306, 314, n.8 (Pa. Cmwlth.), *appeal denied*, 594 Pa. 682, 932 A.2d 1290 (2007).

Appellants first argue that they were not required to attach a copy of the land development plan to their complaint because, at least with respect to Count II, which sounds in mandamus, the "cause of action is not based upon the plan, it is based upon the Board's approval of the plan and the subsequent failure of the Board members to sign the plan so that it could be recorded." Appellants' brief at 7. Pennsylvania Rule of Civil Procedure No. 1019(i) specifically provides:

> When any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.

Clearly, despite Appellants' contention to the contrary, their claims in both Count I and Count II are centered on the land development plan that they aver was approved with contingencies. Therefore, Appellants should have attached a copy of this purported plan to their complaint, or stated that they could not do so, and then explained why, complete with a pertinent summary of the writing. Despite this failure, we do not believe that Appellants' defective pleading should

automatically be considered fatal. First, Appellants aver that they submitted the land development plan to the Board for approval, which conduct would presumably negate the need for attachment. *See* Goodrich-Amram 2d Procedural Rules Service with Forms Rules 1001-1027 § 1019(i):8 (2001) [providing in part: "Writings that are in the possession of an opposing party need not be attached to a pleading, because in such instances, the reason for this subdivision of the Rule is not present." (Footnotes omitted)].[6] Second, although a complaint should normally be stricken if an essential document is not attached, here, the defect could be otherwise cured, whether by supplying the omitted document by amendment or affidavit, *see id.* at § 1019(i):9, or by explaining why the document is unavailable, and setting forth the contents of the writing. *See id.* at § 1019(i):8.

Next, Appellants argue that common pleas erred in dismissing the first two Counts of the complaint with prejudice due to Pine Run's failure to record the plan, because it would have been impossible for Pine Run to record an unsigned

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[6] Appellants specifically averred in paragraph 7 of Count I of the complaint:

> At the April 6, 1999, meeting of the Board, plaintiff's subdivision plan for Phase 2 of the Community (the "Plan") was approved, contingent upon:
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> a. payment of all bills;
> b. approval of a bond;
> c. storm water management plans; and
> d. PennDOT permits.

Appellees specifically denied the existence of a "Board-approved plan" but did not specifically deny that the Board received a copy of phase two of the plan for its approval. In their response to the preliminary objections, Appellants attached minutes from the April 6, 1999, meeting of the Hamilton Township Board of Supervisors purporting to approve phase two of the plan with contingencies, but, unfortunately, Appellants did not attach a copy of these minutes to their complaint.

plan and, therefore, the time for recording has not run. Section 513(a) of the MPC provides:

> Upon the approval of a final plat, the developer shall within 90 days of such final approval or 90 days after the date of delivery of an approved plat signed by the governing body following completion of conditions imposed for such approval, whichever is later, record such plat in the office of the recorder of deeds of the county in which the municipality is located. Whenever such plat approval is required by a municipality, the recorder of deeds of the county shall not accept any plat for recording, unless such plat officially notes the approval of the governing body and review by the county planning agency, if one exists.

Saliently, in paragraph 15 of Count II of the complaint, Appellants specifically aver that they "requested that the Board *execute* and record the Plan, which it has failed and refused to do." (Emphasis added). Given this averment, which states that the Board has not yet signed the plan that it provisionally approved, it is clear that Count I, requesting a declaratory judgment that phase two is an approved subdivision plan, automatically fails, regardless of which entity has the duty eventually to record the plan.

However, where Count II demands an entry of judgment against Appellees, directing them in part to sign the plan, we believe that the complaint should not be dismissed without leave to amend. Pursuant to the statute, the developer must record the plan within ninety days of its final approval, or ninety days after the delivery date of an approved plan signed by the governing body once conditions imposed for its approval were completed, whichever is later. Here, Appellants aver that the Board did not sign the plan even though Appellants

eventually met the conditions necessary for its approval. If true, without such a signature, and delivery of the plan, the developer could not record the plan within the ninety-day time frame allotted by statute; for this reason, we agree with Appellants that the time period for recording has not yet begun. This is true notwithstanding Appellants' incorrect averment that the Board should also be directed to record the plan.

"A writ of mandamus is an extraordinary remedy that compels an official's performance of a ministerial act or mandatory duty where there exists a clear legal right in the plaintiff and a corresponding duty in the defendant and where there is no other adequate remedy at law." *LVGC Partners, LP v. Jackson Twp. Bd. of Supervisors*, 948 A.2d 235, 237 (Pa. Cmwlth. 2008). Accepting as true, for purposes of these pleadings, Appellant's allegations that they have met the conditions for approval of phase two of their land development plan, Appellants would have a clear legal right to signature and delivery of the plan and Appellees would have a corresponding duty to sign and return it. Accordingly, we hold that common pleas erred inasmuch as it failed to permit Appellants to amend Count II of their complaint to request a writ of mandamus directing the Board to execute and return the plan for recording by Appellants in the event that all of the conditions for approval of phase two of the land development plan have been met.

**BONNIE BRIGANCE LEADBETTER,**
President Judge

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**O R D E R**

AND NOW, this 28th day of August, 2008, the Order of the Court of Common Pleas of Adams County in the above captioned matter is hereby AFFIRMED IN PART, REVERSED IN PART, AND THE CASE IS REMANDED FOR FURTHER PROCEEDINGS. To the extent that Count II of the complaint was dismissed with prejudice, the Order is REVERSED and the case is REMANDED. Appellants may re-file Count II of the complaint within twenty days from the date of this order, after an amendment of that Count consistent with this opinion. The Order is AFFIRMED in all other respects.

Jurisdiction relinquished.

**BONNIE BRIGANCE LEADBETTER,**
President Judge