

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

John A. Danzilli, Jr., an individual,	:	
Appellant	:	
	:	
v.	:	No. 8 C.D. 2009
	:	Argued: May 5, 2009
Mayor and Council of the	:	
Municipality of Monroeville,	:	
Pennsylvania, a Home Rule Charter	:	
Municipality, Georgianna Woodhall,	:	
an individual, Diane Allison, an	:	
individual, Marilyn Skolnick, an	:	
individual, Barbara Sonafelt, an	:	
individual and Jay Wright, an	:	
individual	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge**  
**HONORABLE RENÉE COHN JUBELIRER, Judge**  
**HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge**

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY**  
**PRESIDENT JUDGE LEADBETTER**

**FILED: August 13, 2009**

Appellant, John A. Danzilli, Jr., appeals the dismissal of his declaratory judgment action challenging the appointment of various individuals to the Redevelopment Authority of Monroeville (RDA) by the Mayor, James Lomeo (Mayor Lomeo). Appellant alleges that the Court of Common Pleas of Allegheny County (common pleas) erred in finding that the RDA was “formed” prior to the issuance of a Certificate of Incorporation (Certificate) by the Secretary of the Commonwealth (Secretary) and, therefore, common pleas erred in holding that

Mayor Lomeo validly appointed members of the RDA prior to issuance of the Certificate. Appellant also asserts that common pleas erred in dismissing his claims under the Pennsylvania Human Relations Act<sup>1</sup> (PHRA) and the Pennsylvania Equal Rights Amendment.<sup>2</sup> We affirm.

On January 8, 2008, pursuant to the Pennsylvania Urban Redevelopment Law<sup>3</sup> (Redevelopment Law), the Council of the Municipality of Monroeville (Council) finally<sup>4</sup> adopted an ordinance acknowledging the need for, and setting out articles of incorporation for, the RDA. At a Council meeting on February 12, 2008, Mayor Lomeo appointed Georgianna Woodhall, Diane Allison, Marilyn Skolnick, Barbara Sonafelt, and Jay Wright (collectively “Appellees”) to the RDA. At the same meeting, Mayor Lomeo submitted his resignation, which was accepted by the Council on that date. A certified copy of the ordinance including the articles of incorporation was filed with the Department of State on March 5, 2008. The Department of State issued the Certificate for the RDA on July 15, 2008.

On April 23, 2008, Appellant filed a declaratory judgment and mandamus action in common pleas. Appellant asserted that the appointment of Appellees violated Article 18 of the Monroeville Home Rule Charter (the Monroeville Charter) which requires, *inter alia*, that vacancies of commissions be publicized in a newspaper at least twenty-five days prior to nominations and that nominations be made at a business meeting of Council along with presentment of

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<sup>1</sup> Act of October 27, 1955, P.L. 744, *as amended*, 43 P.S. §§ 951-963.

<sup>2</sup> Pa. Const., Article I, § 28.

<sup>3</sup> Act of May 24, 1945, P.L. 991, *as amended*, 35 P.S. §§1701 – 1719.2.

<sup>4</sup> The ordinance was first enacted by Council on December 11, 2007, but was vetoed by Mayor Lomeo. On January 8, 2008, Council voted to override the veto and the ordinance was formally entered.

the nominee's qualifications. Appellant also asserted that violation of the procedural requirements of Article 18 deprived him of the due process guarantees of the United States Constitution and the Pennsylvania Constitution. Finally, Appellant asserted that Mayor Lomeo's consideration of gender when he appointed members of the RDA violated the PHRA. Appellees Woodhall, Allison and Skolnick filed preliminary objections. Appellees Sonafelt and Wright filed notice of intention to appear, which stated that they did not intend to contest the lawsuit and that they agreed with Appellant. The Council filed an answer. Thereafter, on July 14, 2008, Appellant filed a motion to deny preliminary objections and to amend his complaint. Appellant's basis for the request to amend his complaint was to add a new count related to the validity of appointments to a redevelopment authority board made prior to its formation.

On September 30, 2008, common pleas issued an order granting Appellees' preliminary objections, denying Appellant's request to amend his complaint and dismissing Appellant's complaint with prejudice. Common pleas rejected the theory that the RDA was not formed until the Certificate was issued by the Secretary and found that issuance of the Certificate was merely a formality. Common pleas found that the RDA was formed when Council adopted the ordinance expressing the need for a redevelopment authority. Finally, common pleas dismissed the constitutional issues by noting that *Serapigalia v. Clairton*, 809 A.2d 1079 (Pa. Cmwlth. 2002), holds that the Redevelopment Law supersedes the Monroeville Home Rule Charter.

On appeal, Appellant asserts that common pleas erred in finding that the RDA was formed prior to issuance of the Certificate and that the appointment of Appellees to the RDA was valid and consequently denying Appellant's request

to amend his complaint. Appellant relies on *Serapigalia*, which concerns the dissolution of a redevelopment authority, to support the premise that the RDA was not formed until issuance of the Certificate by the Secretary.

The formation of a redevelopment authority is statutorily prescribed in Section 4 of the Redevelopment Law, 35 P.S. § 1704. First, the governing body of a municipality must find and declare by proper ordinance or resolution that there is need for a redevelopment authority to function within the territorial limits of the municipality. Section 4(b), 35 P.S. § 1704(b). Next, the governing body is required to file a certified copy of such ordinance or resolution with the Department of State. *Id.* Finally, the Secretary issues a certificate of incorporation. Section 4(c), 35 P.S. § 1704(c). The power to appoint members of the redevelopment authority rests solely with the mayor who may appoint five citizens of the municipality “[u]pon certification of a resolution declaring the need for an Authority....” Section 5, 35 P.S. § 1705. The initial members serve staggered terms of one, two, three, four and five years, respectively, and, thereafter, the term of office is five years. Section 6, 35 P.S. § 1706. A mayor does not have the authority to remove members of the redevelopment authority. *Com. ex rel. Sortino v. Singley*, 481 Pa. 376, 392 A.2d 1337 (1978). The dissolution of a redevelopment authority requires that the governing body of a municipality declare by resolution that there is no longer any need for the redevelopment authority and file a certificate reciting the adoption of such resolution with the Department of State. Section 4.1,<sup>5</sup> 35 P.S. § 1704.1. The redevelopment authority ceases to function upon filing of the certificate. *Id.*

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<sup>5</sup> Section 4.1 was added by the Act of November 16, 1967, P.L. 498.

In *Serapigalia*, the mayor of Clairton sought a declaratory judgment regarding his right to appoint members to the Clairton Redevelopment Authority. In 1953, the Department of State issued a certificate of incorporation for the Clairton Redevelopment Authority. In December 1973, the Clairton City Council accepted a request from the Clairton Redevelopment Authority to terminate the authority's existence. The certificate indicated that the effective date of the authority's termination would be December 29, 1973. However, no evidence was produced demonstrating that the certificate was properly filed with the Department of State in 1973. In addition, the Department of State issued a letter to the mayor in 2001, indicating that the authority was duly incorporated and remained a subsisting corporation so far as the records of the department showed. Noting that termination becomes effective upon filing of the certificate, this court held that because the certificate of dissolution had not been properly filed with the Department of State in 1973, the authority continued in existence. *Serapigalia*, 809 A.2d at 1082.

Common pleas concluded that the RDA was formed when the Council passed the ordinance and that the filing of the ordinance with the Department of State and issuance of the Certificate are mere administrative duties akin to the filing of a deed. Common pleas reasoned that the filing of the ordinance was notice to the world that the RDA had been formed. On the other hand, the *Serapigalia* court concluded that the filing of the certificate of dissolution was not a mere formality and that the Clairton Redevelopment Authority had not been dissolved because the certificate of dissolution was not filed with the Department of State as required by Section 4.1 of the Redevelopment Law. Section 4.1 of the Redevelopment Law, 35 P.S. § 1704.1, specifically states that a redevelopment

authority ceases to function when the certificate of dissolution is filed with the Secretary. Although Section 4 of the Redevelopment Law, 35 P.S. § 1704, does not specifically provide when a redevelopment authority is formed and operative, this court concludes that the processes of formation and dissolution are analogous. Accordingly, just as the Clairton Redevelopment Authority continued to exist because the certificate of dissolution was not filed with the Department of State, the Monroeville RDA did not exist until the certified ordinance was filed with the Department of State.

In support of this conclusion, we note that, pursuant to Section 4(a), 35 P.S. § 1704(a), the RDA is a separate and distinct body corporate and politic from Monroeville. The formation of a redevelopment authority seems most analogous to the formation of a corporation. The RDA is a legal entity separate from its incorporator, Monroeville, just as a corporation is a separate legal entity independent from its incorporator. A corporation does not legally exist until the incorporation papers are filed with the Department of State. *See* 15 Pa. C.S. § 136(c); 15 Pa. C.S. § 1309<sup>6</sup>; *see also Lester Assoc. v. Com.*, 816 A.2d 394, 399 (Pa. Cmwlth. 2003); *Borough of Elizabeth v. Aim Sher Corp.*, 462 A.2d 811, 812 (Pa. Super. 1983). It follows that the RDA did not exist as a separate legal entity from Monroeville until a certified copy of the ordinance was filed with the Department of State.

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<sup>6</sup> Section 1309 provides:

(a) Corporate existence.—Upon the filing of the articles of incorporation in the Department of State or upon the effective date specified in the articles of incorporation, whichever is later, the corporate existence shall begin.

Nonetheless, although common pleas focused on the formation date of the RDA in determining when members of the RDA could have been appointed, the formation date is not dispositive, as a specific statutory section governs the appointment of RDA members. Rather, the time of appointment is specifically governed by Section 5 of the Redevelopment Law, 35 P.S. § 1705.

Section 5 of the Redevelopment Law, 35 P.S. § 1705, states in relevant part:

*Upon certification of a resolution* declaring the need for an Authority to operate in a city or county, the mayor ... shall appoint, as members of the Authority, five citizens who shall be residents of the city ... in which the Authority is to operate.

(Emphasis added). Because the key to determining when a mayor may exercise his appointment powers is the phrase “[u]pon certification of a resolution,” the plain language of the statute provides that a mayor may appoint members of a redevelopment authority when the ordinance has been certified.

In the case at hand, the Council passed the necessary ordinance on January 8, 2008. On this same date, Marshall W. Bond signed a certificate that certified that the attached ordinance was a true and correct copy of the ordinance enacted by Council. We conclude that Bond’s actions constitute certification of the ordinance within the meaning of 35 P.S. § 1705. Mayor Lomeo appointed members of the RDA on February 12, 2008. Thus, we find that the appointment of Appellees to the RDA by Mayor Lomeo is valid and common pleas did not err in denying Appellant’s motion to amend his complaint.

Next, Appellant alleges that the appointment of Jay Wright, the sole male, to RDA violated section 3 and section 5 of the PHRA, 43 P.S. §§ 953, 955. Section 3 of the PHRA, 43 P.S. § 953, states in relevant part:

The opportunity for an individual to obtain employment for which he is qualified ... without discrimination because of ... sex ... is hereby recognized as and declared to be a civil right which shall be enforceable as set forth in this act.

Section 5, 43 P.S. § 955, describes what constitutes an unlawful discriminatory practice under the PHRA. To establish a cause of action under the PHRA, an individual is required to assert that he either had an employment relationship with the employer or sought an employment relationship. *Department of Labor and Industry, Office of Vocational Rehab. v. Pennsylvania Human Relations Comm'n*, 545 A.2d 412, 414 (Pa. Cmwlth. 1988).

Appellant's complaint is deficient for several reasons. First, we note that Appellant never alleged that he was seeking "employment" with the RDA. Next, assuming that Appellant was seeking an employment relationship, it is unclear whether the RDA would constitute an employer under the PHRA and whether a position as a board member would constitute employment. The PHRA does not define "employment;" we must rely upon the common law concept of master-servant. *Id.* As this court explained in *Harmony Volunteer Fire Company and Relief Association v. Pennsylvania Human Relations Commission*, 459 A.2d 439, 442 (Pa. Cmwlth. 1983):

The relation of master and servant exists where the employer has the right to select the employee, the power to remove and discharge him, and the right to direct both what work shall be done, and the way and manner in which it shall be done. The employer's power to control the nature and the parameters of the employee's activities is the key to the relationship. Although the duty to pay a



salary is often coincident with the status of employer, it is not an absolute prerequisite.

*Id.* quoting *McCulligan v. Pennsylvania Railroad Co.*, 214 Pa. 229, 232, 63 A. 792, 793 (1906).

Appellant alleged that Mayor Lomeo violated the PHRA; however, Mayor Lomeo has no relationship to the RDA other than the ability to appoint members as vacancies arise. Following appointment of members, the Mayor has no power to remove a member and does not have any power to direct how or in what manner RDA members execute their duties. We also note that a position as a member of the RDA is unpaid. We conclude that Appellant's pleadings do not allege any of the necessary indicia of a master-servant relationship. Therefore, we find that the appointment of Jay Wright could not have violated the PHRA.<sup>7</sup>

Finally, Appellant asserts that Mayor Lomeo improperly used gender in nominating Jay Wright and, thus, violated his right to equal protection under the Fourteenth Amendment<sup>8</sup> and the Pennsylvania Equal Rights Amendment. Again, Appellant does not allege that he sought an appointment, nor explain in any way how the mayor's appointments violated his rights. Indeed, he does not explain whose equal protection rights he believes were violated. Even assuming, *arguendo*, that Appellant has standing to assert this abstract claim, we find it to be without merit. The Pennsylvania Equal Rights Amendment provides: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Pa. Const., art. I, § 28. In

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<sup>7</sup> We also note that, pursuant to section 9 of the PHRA, 43 P.S. § 959, Appellant should have first filed a complaint with the Pennsylvania Human Rights Commission and exhausted administrative remedies prior to filing a declaratory judgment action.

<sup>8</sup> As Appellant did not brief his claims under the Fourteenth Amendment, those claims are waived. *Cole v. Dep't of Transp.*, 909 A.2d 900, 906 fn. 6 (Pa. Cmwlth. 2006).

order to invoke the Equal Rights Amendment, a plaintiff must assert that the discriminatory conduct at issue was perpetrated by a state or local entity or official “in their formulation, interpretation and enforcement of statutes, regulations, ordinances and other legislation as well as decisional law.” *Dillon v. Homeowner’s Select*, 957 A.2d 772, 778 (Pa. Super. 2008) quoting *Hartford Accident and Indemnity Co. v. Ins. Comm’r*, 505 Pa. 571, 586, 482 A.2d 542, 549 (1984).

The Pennsylvania Supreme Court described the purpose of the Equal Rights Amendment as follows:

The thrust of the Equal Rights Amendment is to insure equality of rights under the law and to eliminate sex as a basis for distinction. The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and responsibilities. The law will not impose different benefits or burdens upon the members of a society based on the fact that they may be man or woman.

*Henderson v. Henderson*, 458 Pa. 97, 101, 327 A.2d 60, 62 (1974). Pennsylvania courts have applied the Equal Rights Amendment in a wide variety of contexts. *See, e.g., Hartford Accident and Indemnity Co.*, (holding that insurance rates based upon sexual classification do not pass constitutional muster); *Simeone v. Simeone*, 525 Pa. 392, 399, 581 A.2d 162, 165 (1990) (rejecting “[p]aternalistic presumptions and protections that arose to shelter women” in the enforcement of prenuptial agreements); *Adoption of Walker*, 468 Pa. 165, 360 A.2d 603 (1976) (holding that Adoption Act violates Equal Rights Amendment by requiring parental consent only from unwed mother); *Commonwealth v. Santiago*, 462 Pa. 216, 340 A.2d 440 (1975) (rejecting presumption that wife who commits crime in presence of husband was coerced by husband); *DiFlorido v. DiFlorido*, 459 Pa.

641, 331 A.2d 174 (1975) (abolishing presumption that husband owns all household goods possessed by both spouses); *Commonwealth v. Butler*, 458 Pa. 289, 328 A.2d 851 (1974) (holding that statutory scheme providing for immediate eligibility of parole for women upon imprisonment, but not for men, was unconstitutional); *Hopkins v. Blanco*, 457 Pa. 90, 320 A.2d 139 (1974) (permitting both husband and wife to recover for loss of consortium).

In past cases, the Equal Rights Amendment has been invoked where one gender has been denied an equal opportunity or where one gender has been burdened by the law, while the other gender has not. In this case, the Redevelopment Law does not offer greater opportunity to one gender or the other and does not burden one gender more than the other. Rather, Appellant alleges that Mayor Lomeo engaged in discriminatory conduct when he considered Jay Wright's gender in appointing Mr. Wright to the RDA. Appellant does not allege how the appointment of a man either denied the female residents of Monroeville some opportunity, benefited one gender greater than the other gender or somehow burdened one gender more than the other. Mayor Lomeo detailed his reasons for appointing the four female members of the RDA, including: "willingness to meet, listen and problem solve," previous relationships with Council and fire companies, and service on the planning commission. With regard to the nomination of Jay Wright, Mayor Lomeo stated: "Last, I pick Jay Wright. Jay is a passionate person with ideas and business background. Plus, I thought since Council had only one female it [sic] only fair for the RDA to have one male." Mayor Lomeo stated non-discriminatory reasons for the appointment of each RDA member. This court does not see how a single off-hand remark regarding Mr. Wright's gender suddenly invalidates the appointments of either the four female members or Mr. Wright's

own appointment. Thus, this court finds that Appellant's claim under the Pennsylvania Equal Rights Amendment is without merit.

For the foregoing reasons, we affirm the dismissal of Appellant's complaint.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

John A. Danzilli, Jr., an individual,	:	
Appellant	:	
	:	
v.	:	No. 8 C.D. 2009
	:	
Mayor and Council of the	:	
Municipality of Monroeville,	:	
Pennsylvania, a Home Rule Charter	:	
Municipality, Georgianna Woodhall,	:	
an individual, Diane Allison, an	:	
individual, Marilyn Skolnick, an	:	
individual, Barbara Sonafelt, an	:	
individual and Jay Wright, an	:	
individual	:	

**ORDER**

AND NOW, this 13th day of August, 2009, the order of the Court of Common Pleas of Allegheny County in the above captioned matter is hereby AFFIRMED.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John A. Danzilli, Jr., an individual, :  
Appellant :  
 :  
v. : No. 8 C.D. 2009  
 : Argued: May 5, 2009  
Mayor and Council of the Municipality :  
of Monroeville, Pennsylvania, a Home :  
Rule Charter Municipality, Georgianna :  
Woodhall, an individual, Diane :  
Allison, an individual, Marilyn :  
Skolnick, an individual, Barbara :  
Sonafelt, an individual and Jay Wright, :  
an individual :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

CONCURRING AND DISSENTING OPINION  
BY SENIOR JUDGE FRIEDMAN FILED: August 13, 2009

Like the majority, I conclude that the Court of Common Pleas of Allegheny County (common pleas) properly dismissed the declaratory judgment action filed by John A. Danzilli, Jr. (Appellant) challenging the appointment of various individuals to the Redevelopment Authority of Monroeville (RDA) by the Mayor, James Lomeo (Mayor Lomeo). I specifically concur in the analysis employed by the majority with respect to Appellant's claims under the Pennsylvania Human Rights Act, 43 P.S. §§951-963, and the Pennsylvania Equal Rights Amendment, Pa. Const., art. I, §28. In addition, I agree with the majority

that Mayor Lomeo validly appointed members of the RDA pursuant to section 5 of the Pennsylvania Urban Redevelopment Law<sup>1</sup> (Redevelopment Law).

However, I respectfully disagree with the majority's conclusion with respect to section 4 of the Redevelopment Law, 35 P.S. §1704. I believe that common pleas properly determined that the RDA was "formed" prior to the issuance of a Certificate of Incorporation (Certificate) by the Secretary of the Commonwealth (Secretary). Regarding the formation of authorities, section 4 of the Redevelopment Law provides, in relevant part, as follows.

(a) There are hereby created separate and distinct bodies corporate and politic, one for each city and one for each county of the Commonwealth, as herein defined. Each such body shall be known as the Redevelopment Authority of the city or the county, as the case may be, but shall in no way be deemed to be an instrumentality of such city or county, or engaged in the performance of a municipal function. Each *such Authority shall transact no business or otherwise become operative until and unless a finding is made as hereinafter provided* in this section.

(b) At any time after passage of this act *the governing body of any city or county may find and declare by proper ordinance or resolution that there is need for an Authority to function* within the territorial limits of said city or county, as the case may be.

(c) The governing body shall cause a certified copy of such ordinance or resolution to be filed with the Department of State and a duplicate thereof with the Department of Community Affairs; upon receipt of the

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<sup>1</sup> Act of May 24, 1945, P.L. 991, *as amended*, 35 P.S. §1705.

said certificate the Secretary of the Commonwealth shall issue a certificate of incorporation.

35 P.S. §1704(a)-(c) (emphasis added).

In my view, the plain language of 35 P.S. §1704(a) establishes that an authority is formed and becomes operative as soon as the governing body of the city or county, pursuant to 35 P.S. §1704(b), finds and declares by ordinance or resolution that there is a need for such an authority. Thus, in the present case, I believe the RDA was formed on January 8, 2008, when the Council of the Municipality of Monroeville (Council) adopted an ordinance acknowledging the need for, and setting out articles of incorporation for, the RDA. I agree with common pleas that Council's subsequent filing of a certified copy of the ordinance with the Department of State and the Department of State's issuance of the Certificate for the RDA, both performed pursuant to 35 P.S. §1704(c), were mere administrative duties designed to provide notice that the RDA had been formed.

The statutory language of 35 P.S. §1704, concerning the formation of redevelopment authorities, differs from that in section 4.1 of the Redevelopment Law, 35 P.S. §1704.1,<sup>2</sup> which relates to the dissolution of city redevelopment authorities. To effect a dissolution of a city redevelopment authority, section 4.1 of the Redevelopment Law requires, in relevant part, that the governing body of a municipality

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<sup>2</sup> Added by section 1 of the Act of November 16, 1968, P.L. 498.



find and declare by proper resolution that ... there is no longer any need for the authority created for such city to function. In such case the governing body shall issue a certificate reciting the adoption of such resolution, and shall cause such certificate to be filed with the Department of State and two duplicates thereof with the Department of Community Affairs. *Upon such filing the city authority shall cease to function*, and title to any assets held by the authority at that time shall pass to the city.

35 P.S. §1704.1 (emphasis added).

As previously discussed, the plain language of section 4 of the Redevelopment Law establishes that an authority becomes operative once the governing body finds the need for such an authority and declares that need in a proper ordinance or resolution. 35 P.S. §1704(a)-(b). Upon receipt of the certified copy of the ordinance marking the formation of the authority, the Secretary simply issues the certificate of incorporation. 35 P.S. §1704(c). Dissolution of an authority similarly requires the governing body to find and declare by resolution that it no longer needs an authority. However, the declaration of that finding in a resolution is not sufficient to dissolve the authority. Rather, the statutory language of section 4.1 of the Redevelopment Law plainly states that the authority shall cease to function only *upon the filing of the certificate* reflecting adoption of that resolution. 35 P.S. §1704.1. Thus, in *Serapiglia v. City of Clairton*, 809 A.2d 1079 (Pa. Cmwlth. 2002), the court properly concluded that the filing of the certificate of dissolution was not a mere formality.

Based on these obvious distinctions, I believe the majority errs when it “concludes that the processes of formation and dissolution are analogous,” (Majority op. at 6), and relies on *Serapiglia*, which concerns the dissolution of a redevelopment authority, to support the holding that the RDA “did not exist until the certified ordinance was filed with the Department of State.”<sup>3</sup> (Majority op. at 6.)

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ROCHELLE S. FRIEDMAN, Senior Judge

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<sup>3</sup> In addition, I disagree with the majority’s conclusion that the formation of a redevelopment authority is analogous to the formation of a corporation. These are different entities governed by distinct statutes; more importantly, the plain language of the Redevelopment Law is sufficient to decide the issue before us so that any such analogy is unwarranted.