

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Petition for Opening of :  
Public Road known as :  
Mountainview Lane in Cass :  
Township, Schuylkill County, :  
Pennsylvania :  
:  
Appeal of: Forino Co., L.P. : No. 955 C.D. 2008

In Re: Petition for Opening of :  
Public Road known as Crystal View :  
Lane in Cass Township, Schuylkill :  
County, Pennsylvania :  
:  
Appeal of: Forino, Co., L.P. : No. 964 C.D. 2008

In Re: Petition for Opening of :  
Public Road known as Mulberry :  
Lane in Cass Township, Schuylkill :  
County, Pennsylvania :  
:  
: No. 965 C.D. 2008  
Appeal of: Forino Co., L.P. : Submitted: October 3, 2008

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE PELLEGRINI

FILED: October 23, 2008

Before this Court are three consolidated appeals filed by Forino Co., L.P. (Forino) from three separate orders of the Court of Common Pleas of Schuylkill County (trial court) denying the three petitions Forino filed requesting

the appointment of a Board of Viewers to open and layout Mountainview Lane, Crystal View Lane and Mulberry Lane in the Mountain View subdivision located in Cass Township (Township) because the trial court determined that those streets had already been laid out and dedicated for public use.

Forino is the owner/developer/builder of property known as Mountain View subdivision a/k/a/ Rockledge subdivision in Cass Township, Schuylkill County. In its petition to the trial court, Forino alleges that on December 23, 2003, he received subdivision approval, without mentioning from what agency he received approval,<sup>1</sup> which was recorded in the Recorder of Deeds of Schuylkill County. According to Forino, all of the lots in the subdivision had been conveyed to third parties by Forino who built homes on the properties. All that remained of the property in Forino's possession were three streets shown on the subdivision plan – Mountainview Lane, Crystal View Lane and Mulberry Lane.<sup>2</sup> Forino alleged that it completed all improvements to each of these streets, and on August

---

<sup>1</sup> The subdivision plan attached to the petition gives no indication that it was approved by either the Township or the county. In his brief, Forino alleges that he received approval from the Township, while the Township says that he only received approval from the county. We note that except in counties with county-wide zoning, approval is first required by the local municipality and then review is performed by the county. *See* Section 513 of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, 53 P.S. §10513(a), which provides, in relevant part: “Whenever such plat approval is required by a municipality, the record 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.”

<sup>2</sup> In the petition, Forino states that Note 19 of the recorded subdivision plan states: “upon completion of the improvements shown herein, the owner will dedicate to Cass Township for public use all road right-of-way...”

17, 2007, submitted the deeds of dedication to the solicitor for Cass Township. On August 30, 2007, the Board of Supervisors of Cass Township (Board) informed Forino that Cass Township would not accept the dedication of these streets. Forino then served Cass Township with its petition to the Board to open and accept these streets for dedication.

When more than 60 days had passed without any action by the Board, Forino filed with the trial court a petition for the appointment of a board of viewers for each street or, in the alternative, to declare each street to be part of Cass Township's road system pursuant to Section 2304 of the Second Class Township Code (Township Code).<sup>3</sup>

By three separate orders dated April 28, 2008, the trial court denied each petition and relying on *Appeal of Kress*, 410 Pa. 565, 189 A.2d 848 (1963),

---

<sup>3</sup> Act of May 1, 1933, P.L. 103, *added* by the Act of November 9, 1995, P.L. 350, 53 P.S. §67304(c). That section provides:

When any petition is presented to the board of supervisors requesting the board of supervisors to open or vacate a specific road in the township and the board of supervisors fails to act on the petition within sixty days, the petitioners may present their petition to the court of common pleas which shall proceed thereon under the act of June 13, 1836 (P.L. 551, No. 169), referred to as the General Road Law. If the board of supervisors acts on the petition but denies the request of the petition, the board of supervisors shall notify the person designated in the petition of its denial. If the request of the petition is denied, the petitioners, or a majority of them, may within thirty days after receipt of the notice petition court of common pleas for the appointment of viewers and proceedings shall be taken thereon under the General Road Law.

found that a petition for the appointment of viewers to lay out the streets under Section 2304 of the Township Code was inapplicable where, as here, the roads in question had already been surveyed, laid out and opened to the public. The trial court further denied Forino's request to declare the streets as Township roads because the acceptance by a second class township of an offer to dedicate a public street was within the Township's discretion. These consolidated appeals from the trial court's decisions are now before the Court for disposition.

Forino contends that the trial court erred by failing to appoint a Board of Viewers in accordance with Section 2304 of the Township Code because it filed and obtained final subdivision approval for its subdivision which was duly recorded, and the streets were constructed and laid out in accordance with the recorded subdivision plan. Forino argues that its only remedy is the remedy set forth under Section 2304 of the Township Code, and it is unfair that it has complied with all of the Township Code requirements, and yet the Township has still refused to accept dedication of the streets without offering notice of any deficiencies in the layout and construction of the streets. In that respect, it argues that there is no redress against the municipality as it can force developers to bear the cost and expense of road maintenance in perpetuity. To that end, it argues that the trial court has abused its discretion and disregarded a duly enacted law of this Commonwealth.

As to procedure under Section 2304 of the Township Code for the appointment of a Board of Viewers, our Supreme Court in *Kress* held that procedure was inapplicable, stating:

We hold that the court below correctly decided that section 1101 of the Code [now Section 2304 of the Township Code] was improperly invoked in this case. That section gives a court of quarter sessions power to appoint a board of viewers to ‘survey, lay out, and open’ roads as public roads where the township supervisors fail to so act. But the roads in question here have already been surveyed, laid out, and opened by the developers of the McNary Plan, and thus there is no reason or basis for the appointment of viewers under section 1101. Appellants’ objection is not to have roads laid out and constructed as public roads, but rather to have roads already constructed maintained at public expense. In such a situation, the proper procedure is to comply with the provisions of the Second Class Township Code dealing with dedication of private roads.

*Id.* 410 Pa. at 568, 189 A.2d at 849.

Ignoring that *Kress* resolves the only issue before us – whether Section 2304 of the Township Code is applicable – as to Forino’s claim that it is “unfair” for the Township not to accept the streets after it has conveyed the lots to the adjoining property owners, what that contention ignores is that nothing requires the Township to accept dedication of streets, even those built to standard, absent some agreement. Section 2316 of the Township Code, 53 P.S. §67316, provides that the township *may* accept land to be dedicated by deed to the township to be used as a street, and the board of supervisors *may* by resolution accept the streets as public roads. Specifically, that section provides the following regarding the acceptance of land for road purposes:

- (a) The board of supervisors *may* by resolution accept any land dedicated by deed to the township to be used as a road, street or alley. A copy of the resolution, together

with a draft or survey of the road, street or alley, showing location and width thereof, shall be filed with the clerk of the court of common pleas.

(b) When plans of dedicated roads, streets or alleys located in townships have been approved and recorded under this article, the board of supervisors *may* by resolution accept any roads, streets or alleys as public roads if shown in the plans as dedicated to that use and if the roads or streets are not less than thirty-three feet in width and the alleys are not less than fifteen feet in width.

(c) Upon the filing with the clerk of court of common pleas of the county a certified and attested copy of the resolution, the roads, streets or alleys become a part of the public road system of the township and shall be so recorded in the court.

(Emphasis added.)

Moreover, in *Hanscom v. Bitler*, 883 A.2d 1111 (Pa. Cmwlth. 2005), where the township refused to accept the dedication of a street as a public road even though the developer complied with the subdivision ordinance, we held that nothing in the township code required a township to accept the dedication of a street, and the plain language of Section 2316 made the acceptance of a proposed dedication discretionary. “It is the act of acceptance of a dedicated parcel of land that makes the dedication complete.” *Id.*, 883 A.2d at 1113. *See also Stivala Investments, Inc. v. South Abington Township Board of Supervisors*, 815 A.2d 1

(Pa. Cmwlth. 2003) (just because subdivision plan marked road as “dedicated” did not make it so as township had not been presented with deed for acceptance).<sup>4</sup>

Because the procedure to lay out public roads by the appointment of viewers set forth in Section 2304 of the Township Code is inapplicable where the roads have been “surveyed, laid out, and opened,” the orders of the trial court are affirmed.

---

DAN PELLEGRINI, JUDGE

---

<sup>4</sup> *See also* Section 503 of the MPC, 53 P.S. §10503, which provides that nothing requires the Township to accept the streets from Forino “for public dedication until the streets meet such additional standards and specifications as the municipality may require for public dedication.”

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Petition for Opening of :  
Public Road known as :  
Mountainview Lane in Cass :  
Township, Schuylkill County, :  
Pennsylvania :  
:  
Appeal of: Forino Co., L.P. : No. 955 C.D. 2008

In Re: Petition for Opening of :  
Public Road known as Crystal View :  
Lane in Cass Township, Schuylkill :  
County, Pennsylvania :  
:  
Appeal of: Forino, Co., L.P. : No. 964 C.D. 2008

In Re: Petition for Opening of :  
Public Road known as Mulberry :  
Lane in Cass Township, Schuylkill :  
County, Pennsylvania :  
:  
: No. 965 C.D. 2008  
Appeal of: Forino Co., L.P. :

**ORDER**

AND NOW, this 23<sup>rd</sup> day of October, 2008, the orders of the Court of Common Plea of Schuylkill County, dated April 28, 2008, in the above-captioned matters, are affirmed.

---

DAN PELLEGRINI, JUDGE