

Adams County **Legal Journal**

Vol. 53

December 30, 2011

No. 33, pp. 225-233

IN THIS ISSUE

CACO THREE ET AL VS. HUNTINGTON TWP.

**Our Trust department
makes a business of caring
for other people's property.**

*Karen Arthur
Trust Officer*



**Trust and investment services from
a bank with a long history of trust.**

For more information or a free
consultation, please call 717.339.5062.

Member FDIC



ADAMS COUNTY LEGAL JOURNAL (USPS 542-600)

Designated for the Publication of Court and other Legal Notices. Published weekly by Adams County Bar Association, John W. Phillips, Esq., Editor and Business Manager.

Business Office – 117 BALTIMORE ST RM 305 GETTYSBURG PA 17325-2313. Telephone: (717) 334-1553

Copyright© 1959 by Wm. W. Gaunt & Sons, Inc., for Adams County Bar Association, Gettysburg, PA 17325.

All rights reserved.

IN THE COURT OF COMMON
PLEAS OF THE 39TH JUDICIAL
DISTRICT OF PENNSYLVANIA –
FRANKLIN COUNTY BRANCH

IN RE: ADOPTION of Romeo Diaz
Mendes, Orphan's Court Division,
Adoption Docket Number: 77-ADOPT-
2011

NOTICE TO: Margarito Mendes

A petition has been filed asking the Court to put an end to all rights you have to your child, Romeo Diaz Mendes. The Court has set a hearing to consider ending your rights to your child. The hearing will be held in the Franklin County Court House, Chambersburg, Franklin County, Pennsylvania, on Tuesday, the 10th day of January 2012, at 9:00 a.m. If you do not appear at this hearing, the Court may decide that you are not interested in retaining your rights to your child, and your failure to appear may affect the Court's decision on whether to end your rights to your child. You are warned that even if you fail to appear at the scheduled hearing, the hearing will go on without you and the Court may end your rights to your child without you being present. You have a right to be represented at the hearing by a lawyer. You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, telephone the office set forth below to find out where you can get legal help.

Franklin County Court Administrator
Franklin County Courthouse, 3rd Floor
157 Lincoln Way East
Chambersburg, PA 17202
Telephone: 717-261-3848

The Court of Common Pleas of Franklin County is required by law to comply with the Americans With Disabilities Act of 1990. For information about accessible facilities and reasonable accommodations available to disabled individuals having business before the Court, please contact the Office of the Court Administrator. All arrangements must be made at least 72 hours prior to a hearing or business before the Court. You must attend the scheduled hearing.

Under Act 101 of 2010, there may be an option to enter into a voluntary enforceable post-adoption contact agreement.

12/22 & 30

NOTICE BY THE ADAMS COUNTY
CLERK OF COURTS

NOTICE IS HEREBY GIVEN to all heirs, legatees and other persons concerned that the following accounts with statements of proposed distribution filed therewith have been filed in the Office of the Adams County Clerk of Courts and will be presented to the Court of Common Pleas of Adams County—Orphan's Court, Gettysburg, Pennsylvania, for confirmation of accounts entering decrees of distribution on Friday, January 6, 2012, at 8:30 a.m.

VAN ALMEN—Orphan's Court Action Number OC-124-2011. The First and Final Account of Barbara J. Wilson, Executrix of Mary D. Van Almen Estate deceased, late of Cumberland Township, Adams County, Pennsylvania.

Kelly A. Lawver
Clerk of Courts

12/22 & 30

DISSOLUTION NOTICE

NOTICE IS HEREBY GIVEN that the Shareholders and Directors of MARSH-HILL DEVELOPMENT CO., INC., most recently conducting business through offices at 914 Fairfield Road, Gettysburg, Pennsylvania 17325, has approved a proposal that the Corporation voluntarily dissolve, and that the Board of Directors engage in winding up and settling the affairs of the Corporation. This Notice of the dissolution proceedings is given pursuant to Section 1975 of the Pennsylvania Business Corporation Law of 1988, as amended.

Robert E. Campbell, Esq.
Campbell & White, P.C.
112 Baltimore Street, Suite 1
Gettysburg, PA 17325
Attorneys for the Corporation

12/30

CACO THREE ET AL VS. HUNTINGTON TWP.

1. The Court is given the discretion to allow or refuse intervention only where the petitioner falls within one of the classes enumerated in Rule 2327 **and** one of the grounds under Rule 2329 is present which authorizes the refusal of intervention.

2. The test for determining whether a municipality's denial complies with the standards of Section 508(2) is solely whether the reasons for the denial are contained within the four corners of the written decision.

3. The reasoning contained within the Township's written denial is the sole source from which this Court may make its determination; no additional documentation or reasoning not contained within the written decision may be used to supplement the Township's written decision in order to satisfy the requirements of Section 508(2) of the MPC.

4. A mere prima facie basis for intervention [under rule 2327(4)] is not enough and a petition for intervention may be denied if the interest of the petitioner is already adequately represented in the matter.

5. The Township must base its rejection of a land development plan solely on the requirements set forth in legally enforceable ordinances and statutes and not general concerns of the public.

In the Court of Common Pleas of Adams County, Pennsylvania,
Civil, No. 2010-S-603, CACO THREE, INC. AND MANN REALTY
ASSOCIATES, INC. VS. HUNTINGTON TOWNSHIP.

Charles M. Suhr, Esq., for Appellants
Robert E. Campbell, Esq., for Appellee
Nathan C. Wolf, Esq., for Intervenors
Kuhn, P.J., July 19, 2011

OPINION

Before the Court for disposition is Petitioners' Petition for Intervention in the above-captioned matter.¹ For the reasons set forth herein, said petition is DENIED and Petitioners are hereby not accepted as third-party Objectors to the above-captioned land use appeal.

The factual background of the extremely protracted litigation underlying the instant Petition for Intervention is largely undisputed.

¹ Due to the length of the list of persons seeking to be joined as third-party Objectors in this matter, the Court will refer to this group collectively as "Petitioners." For identification purposes, the following persons make up the composition of said group: Kay and Jeffrey King, Edward and Marlea Williams, Kay and Chalmer Helm, Jr., James Lott, Amy Worden, Marlin Ensor, Cindy and Donald Sowers, Thomas R. Jr. and Shelly Hart, Greg and Tami Harbold, Barbara A. Mowery.

On April 9, 2010, Appellants CACO Three, Inc. and Mann Realty Associates, Inc.² filed a land use appeal (the “Appeal”) from a decision, dated March 11, 2010, issued by the Huntington Township Board of Supervisors³ denying approval of a final land development plan (the “Plan”) submitted by Appellants for Peakview Mobile Home Park. Due in large part to the detailed and complex nature of the myriad statutory ordinances and other requirements at issue in the underlying matter, the Appeal sets forth Appellants’ reasoning with much greater length and specificity than is necessary for the purpose of the instant matter. For the purpose of the disposition of the instant Petition for Intervention, it is sufficient to generalize Appellants’ position in the Appeal as being that the Township’s March 11, 2010 decision fails to set forth grounds sufficient to support the denial of the Plan.

On April 28, 2010, Petitioners filed the instant Petition for Intervention. Petitioners have not filed a separate appeal from the Township’s March 11, 2010 denial of the Plan. On May 24, 2010, Appellants filed a Response to Petition for Intervention. This Court conducted a hearing on the instant Petition for Intervention on July 26, 2010, during which Jeffrey L. King, Marlea Williams, Chalmer E. Helm, Jr., Amy Worden, Cindy L. Sowers, Gregory L. Harbold, and Barbara A. Mowery testified on behalf of the Petitioners. (Transcript of July 26, 2010 Hearing at 2).⁴ On September 2, 2010, Petitioners filed a Supplemental Memorandum of Law in Support of Petition for Intervention. In response, Appellants filed a Brief in Opposition to Petition for Intervention on September 14, 2010.

Petitions to Intervene are controlled by Pennsylvania Rules of Civil Procedure 2326-2350. Pa. R.C.P. 2327 specifies four particular categories of persons who may intervene in an action, “including any person who has ‘any legally enforceable interest’ that may be

² CACO Three, Inc. and Mann Realty Associates, Inc. are hereinafter referred to collectively as “Appellants” for the purpose of identification in this Opinion, as they are the Appellants in the underlying Appeal that is sought to be joined by Petitioners in the matter instantly before the Court. Additionally, although CACO Three, Inc. remains named as a party, Mann Realty Associates, Inc. is the only party that is actively participating due to CACO Three, Inc. declaring bankruptcy and Mann Realty taking over the development of Peakview Mobile Home Park.

³ Hereinafter referred to as the “Township.”

⁴ Hereinafter referred to as “N.T.”

affected by a judgment in the action.” *Larock v. Sugarloaf Tp. Zoning Hearing Board*, 740 A.2d 308, 312 (Pa. Commw. Ct. 1999) [quoting Pa. R.C.P. 2327(4)].

Rule 2329 requires the Court to enter orders allowing intervention if the claims of the petitioner have been established. Pa. R.C.P. 2329. However, Rule 2329 also provides the Court with the discretion to refuse a petition to intervene, even though the petitioner has already established a qualification under Rule 2327, if:

- 1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or
- 2) the interest of the petitioner is already adequately represented; or
- 3) the petitioner has unduly delayed in making an application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

Pa. R.C.P. 2329(1-3).

Thus, Rules 2327 and 2329 combine to form a system where the Court’s allowance of intervention is mandatory when the petitioner is a person shown to be within the particular classes described in Rule 2327, unless one of the grounds for refusal under Rule 2329 is present. *Larock*, 740 A.2d at 313. Therefore, “the Court is given the discretion to allow or refuse intervention only where the petitioner falls within one of the classes enumerated in Rule 2327 *and* one of the grounds under Rule 2329 is present which authorizes the refusal of intervention.” *Id.* (emphasis original).

In the instant matter, Petitioners, as being comprised primarily of owners of property adjacent to and in the immediate vicinity of the proposed development, have adequately demonstrated that they fall within the class of persons having legally enforceable interests as described in Rule 2327(4). See e.g. *Atticks v. Lancaster Township Zoning Hearing Board*, 915 A.2d 713, 718 (Pa. Commw. Ct. 2007); *Township of Radnor v. Radnor Recreational, LLC*, 859 A.2d 1, 5 (Pa. Commw. Ct. 2004); *Vartan v. Zoning Hearing Board of the City of Harrisburg*, 636 A.2d 310, 313 (Pa. Commw. Ct. 1994). Thus, the primary issue in the instant matter then becomes whether any of the

grounds under Rule 2329 are present and this Court may exercise discretion to allow or refuse the intervention.

Though Rule 2329 contains three grounds upon which a court may base a denial of a petition for intervention, the instant matter will focus primarily on the first two listed in Rule 2329: (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; (2) or the interest of the petitioner is already adequately represented.

With regard to Rule 2329(1), Petitioners contend that their claims will be subordinate to and in recognition of the Appeal because they are seeking an affirmation of the Township's March 11, 2010 denial of the Plan, albeit on separate and additional grounds than those upon which the Township based its decision.⁵ However, Petitioners' argument ultimately fails because of a fundamental misunderstanding of both the nature of the underlying Appeal and the scope of this Court's review in that matter.

With regard to the nature of the underlying Appeal into which Petitioners seek to intervene, Appellants' argument challenges the adequacy and sufficiency of the Township's March 11, 2010 written denial of the Plan under Section 508 of the Municipalities Planning Code. 53 P.S. § 10508(1)-(3). Pursuant to Section 508(2), the Township's written denial of the Plan must "specify the defects found in the application and describe the requirements which have not been met and shall, in each case, cite the provisions of the statute or ordinance relied upon." *Id.* at § 10508(2). The test for determining whether a municipality's denial complies with the standards of Section 508(2) is solely "whether the reasons for the denial are contained within the four corners of the written decision." *Lease v. Hamilton Township*, 885 A.2d 684, 690 (Pa. Commw. Ct. 2005). If the decision is found to be deficient, Section 508(3) provides that the Plan shall be deemed approved as written. *Id.* at § 10508(3).

There has been no request to this Court by the parties to the underlying Appeal to introduce additional evidence, therefore, the scope of this Court's review of the Township's denial of the Plan, the matter into which Petitioners seek to intervene, "is limited to a determination

⁵ By raising additional grounds, Petitioners are essentially attempting to fill the quiver with more legal arrows than the Township believed was required and thereby surreptitiously enhance their ability to slay the developer's Plan.

of whether or not the Board of Supervisors has committed an abuse of discretion or an error of law” in its decision to deny the Plan. *Pace Resources, Inc. v. Shrewsbury Township Planning Commission*, 492 A.2d 818, 820 (Pa. Commw. Ct. 1985) [citing *Ridgeview Associates v. The Board of Supervisors of Lower Paxton Township*, 333 A.2d 249 (Pa. Commw. Ct. 1979)].

Simply, this Court’s scope of review in the underlying Appeal is limited to determining whether the reasons written in the Township’s March 11, 2010 denial of the Plan constitute an error of law or an abuse of discretion. The reasoning contained within the Township’s written denial is the sole source from which this Court may make its determination; no additional documentation or reasoning not contained within the written decision may be used to supplement the Township’s written decision in order to satisfy the requirements of Section 508(2) of the MPC. *Lease*, 885 A.2d at 688.

Accordingly, Petitioners’ arguments, seeking to uphold the Township’s denial of the Plan on new grounds not set forth by the Township in its written decision, are not within the scope of this Court’s review and are ultimately irrelevant in this Court’s determination of the Appeal.

Therefore, as Petitioners’ claims are both irrelevant to the determination of the underlying matter and outside of this Court’s scope of review in that matter, it cannot be said that they are subordinate to and in recognition of the propriety of the Appeal as is required by Rule 2329(1).

Although Petitioners’ failure to comply with the requirements of Rule 2329(1) is, alone, sufficient to warrant a dismissal of the Petition to Intervene, this Court will further address the issue concerning the applicability of Rule 2329(2).

With regard to Rule 2329(2), Petitioners assert that their interests are not adequately represented by the Township and thus, they should be permitted to intervene in the Appeal.

Under Rule 2329(2), “a mere prima facie basis for intervention [under Rule 2327(4)] is not enough and a petition for intervention may be denied if the interest of the petitioner is already adequately represented in the matter.” *Larock v. Sugarloaf Township Zoning Hearing Board*, 740 A.2d 308, 314 (Pa. Commw. Ct. 1999) [citing *Keener v. Zoning Hearing Board of Millcreek Township*, 714 A.2d 1120 (Pa. Commw. Ct. 1990)].

Petitioners first argue that their interests are not adequately represented in the Appeal as a result of the Township's failure to set forth various alternative grounds⁶ for the denial of the Plan in its March 11, 2010 written decision. Petitioners seek to present those additional grounds before the Court in an effort to uphold the Township's denial of the Plan.

As previously discussed, pursuant to Section 508(2) of the MPC and *Lease*, this Court's determination of the sufficiency of the Township's denial of the Plan may only result from an examination of the reasons "contained within the four corners of the written decision." *Lease*, 885 A.2d 684, 690. The Township's written decision consists of 17 numbered paragraphs which specifically articulate the reasons for its denial of the Plan and cite to the corresponding sections of the statutes or ordinances relied upon for the denial, as required by Section 508(2) of the MPC.

Moreover, the possibility that alternative grounds for the Township's denial of the Plan might exist is irrelevant to this Court's determination of the Appeal. Petitioners assert that their interests are distinct from those of the Township as a whole because of their close proximity to the proposed development. However, Petitioners' claims of the alleged unique negative impact that the Peakview Mobile Home Park would have on the traffic volume, water sources, taxes, property values and historical structures in their area would not support a denial of the Plan because the Township must base its rejection of a land development plan solely on the requirements set forth in legally enforceable ordinances and statutes and not general concerns of the public. See *Schluffer v. Plymouth Township*, 379 A.2d 1060 (Pa. Commw. Ct. 1977); *Swinehart v. Upper Pottsgrove Township*, 351 A.2d 702, 704-05 (Pa. Commw. Ct. 1976); *Harrisburg Fore Associates v. Board of Supervisors of Lower Paxton Township*, 344 A.2d 277, 280-81 (Pa. Commw. Ct. 1975).

Furthermore, Petitioners' grounds for the alleged inadequate representation of their interests are extremely similar to the arguments

⁶ Specifically, Petitioners refer to: (1) a failure by the Township to recognize and act upon the alleged bad faith on the part of the Appellants in the Appeal, (2) a failure by the Township to deny the Plan on alternate grounds of the Pending Ordinance Doctrine and (3) a failure by the Township to recognize and act upon the fact that the Plan is injurious to the public interest.

rejected by the Commonwealth Court in *Cherry Valley Associates v. Stroud Township Board of Supervisors*, 530 A.2d 1039 (Pa. Commw. Ct. 1987). In *Cherry Valley*, a group of residents and landowners in the immediate vicinity of a proposed planned unit development filed a petition to intervene in an appeal by the developer of the PUD from a denial by the Township of the developer's conditional use permit. *Id.* In their petition to intervene, the group alleged that the proposed development would create the following hazards: cause harm to the aesthetic nature of the scenery of the area; increase traffic on the surrounding roadways; create ecological and environmental damage in the surrounding areas; pollute a local water source; an increase in taxes and tax assessments; and harm the general health, welfare and safety of all persons similarly situated as the group. *Id.* at 1040.

The group alleged that their interests were not adequately represented in the matter because they suffered from an individualized "private harm which is unrelated to the Board's public responsibilities." *Id.* at 1041. The Commonwealth Court rejected the group's argument, stating that the group's "reliance on the distinction between private and public interests [was] misplaced." *Id.* The court further stated that due to fact that the scope of review of the trial court was limited to whether the Township's decision constituted an abuse of discretion or an error of, that the appeal was "not the proper forum" for the group to "assert their private interests." *Id.* at 1041.

Similar to *Cherry Valley*, the adverse effects alleged by Petitioners are private interests that would not serve as sufficient grounds for the Township's denial of the Plan, the reasoning of which is the basis of the underlying Appeal. Petitioners' claims cannot provide any support to the position the Township will be defending in the Appeal, specifically, the legal and factual sufficiency of the reasons contained in the March 11, 2010 written denial. Therefore, Petitioners' claims are irrelevant in the Appeal, and their interests, if any, in the Appeal are adequately represented by the Township.

Petitioners argue that *Cherry Valley* is inapplicable in this case based upon language in the Commonwealth Court's opinion in *Atticks v. Lancaster Township Zoning Hearing Board*, 915 A.2d 713 (Pa. Commw. Ct. 2007). In *Atticks*, the court held that the trial court erred when it denied a petition to intervene even though it found the intervenors had demonstrated a legally enforceable interest and their

interests were not adequately represented by the Lancaster Township Zoning Hearing Board in the appeal. *Id.* at 719.

Petitioners argue that *Atticks* stands for the proposition that *Cherry Valley* is inapplicable in cases where the intervenor demonstrates a legally enforceable interest. That is not the case, in fact, the court in *Atticks* states that *Cherry Valley* is easily distinguishable from *Atticks* because the trial court determined that the intervenors in *Cherry Valley*, in contrast to those in *Atticks*, were not found to have legally enforceable interests, and that even if they were to have a legally enforceable interest, that interest was adequately represented in the appeal by the township. Furthermore, unlike *Atticks*, the Township in the underlying Appeal in this matter would have the standing to appeal from any unfavorable decision by this Court because the Township is a named party in the action. *See Atticks*, 915 A.2d at 718 [citing *Zoning Hearing Board of the City of Erie v. Burrows*, 584 A.2d 1072 (Pa. Commw. Ct. 1990)].

Petitioners' second argument with regard to inadequate representation is that they will not be adequately represented should the Township choose to settle the Appeal. This argument is pure speculation as there has been no indication from the parties throughout the entire course of this near decade-length litigation that settlement will even be sought, let alone reached. Petitioners even admit that there are no settlement negotiations taking place at this time. Petitioners' Supplemental Memorandum in Support of Petition for Intervention, at 13.

Petitioners argue that this stage of the litigation is the proper time for intervention based upon the Commonwealth Court's decision in *Township of Radnor v. Radnor Recreational, LLC*, 859 A.2d 1 (Pa. Commw. Ct. 2004). In *Radnor*, the court denied intervention on the basis that the petitioners had unreasonably delayed in filing their petition until after a settlement between the parties had been approved. *Id.* at 4-6. The court found that petitioners "had allowed the settlement process to proceed towards its conclusion without attempting to intervene during that process, and now desire to upset the efforts of the parties to litigation to end their acrimonious dispute." *Id.* at 5.

It is difficult for this Court to see any similarities between the circumstances in *Radnor* and those present in the underlying Appeal

in the instant matter. In the instant matter, there have been no settlement negotiations, nor has any party given any indication that any will take place in the future.

Therefore, this Court finds that Petitioners' interests that may be affected by the outcome of the underlying Appeal are adequately represented by the Township and thus the Petition for Intervention may be denied under Rule 2329(2).

For the reasons set forth herein, the attached Order DENIES Petitioners' Petition for Intervention in Appellants', CACO Three, Inc. and Mann Realty Associates, Inc., appeal of Huntington Township's Board of Supervisors denial of Appellants' final land development plan for the construction of Peakview Mobile Home Park.

ORDER

AND NOW, this 19th day of July 2011, upon consideration of Petitioners', Kay and Jeffrey King, et al, Petition for Intervention in the above-captioned matter and Appellants' Response thereto, it is HEREBY ORDERED that Petitioners' Petition for Intervention is DENIED for the reasons set forth in the attached Opinion.

ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of administration, to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

FIRST PUBLICATION

ESTATE OF PATRICK J. CANAVAN, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executrix: Kandie J. Canavan, c/o James T. Yingst, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street, Hanover, PA 17331

Attorney: James T. Yingst, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street, Hanover, PA 17331

SECOND PUBLICATION

ESTATE OF PEARL E. MOREHEAD a/k/a PEARL ETHEL MOREHEAD, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executrix: Peggy Ann Morehead Weems, 34215 Woodcrest Road, Millsboro, DE 19966

Attorney: Stonesifer and Kelley, P.C., 209 Broadway, Hanover, PA 17331

THIRD PUBLICATION

ESTATE OF WILMA H. BELKNAP, DEC'D

Late of Franklin Township, Adams County, Pennsylvania

Executrix: Linda B. Lenz, c/o Jared S. Childers, Esq., R. Thomas Murphy & Assoc., P.C., 2005 East Main Street, Waynesboro, PA 17268

Attorney: Jared S. Childers, Esq., R. Thomas Murphy & Assoc., P.C., 2005 East Main Street, Waynesboro, PA 17268

ESTATE OF BEATRICE G. CAREY, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Dean E. Carey, Jr., 845 Church Road, Orrtanna, PA 17353; Peggy Ann Diehl, 1708 Coon Road, Aspers, PA 17304

Attorney: David K. James, III, Esq., 234 Baltimore St., Gettysburg, PA 17325

ESTATE OF SONIA M. CRAWN, DEC'D

Late of Hamilton Township, Adams County, Pennsylvania

Administrator: Lora R. Staub, 416 Company Farm Road, Aspers, PA 17304

Attorney: Puhl, Eastman & Thrasher, 220 Baltimore Street, Gettysburg, PA 17325

ESTATE OF LILLIAN S. JACKSON, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

Executrices: Sheryl Lee Jackson, 90 Red Oak Lane, Gettysburg, PA 17325; Sally Jackson Schultz, 958 Mummasburg Road, Gettysburg, PA 17325

Attorney: Chester G. Schultz, Esq., 145 Baltimore Street, Gettysburg, PA 17325

