

RILEY
RIPER
HOLLIN &
COLAGRECO
.....
ATTORNEYS AT LAW

**Legal Issues in the Development
Plan Approval Process**

Louis J. Colagreco, Jr., Esquire

Alyson M. Zarro, Esquire

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TOPICS FOR DISCUSSION

**A Municipality's Duty to Proceed in Good Faith
in Reviewing and Processing Subdivision and
Land Development Plans**

Municipal Consultant Review Fees

**Presentation of Testimony to a Municipal Body
or Zoning Hearing Board**

A Municipality's Duty to Proceed in Good Faith in Reviewing and Processing Subdivision and Land Development Plans

- A municipality has a duty to proceed in good faith when reviewing and processing subdivision and land development plan applications.
 - Duty was articulated in Raum v. Board of Supervisors of Tredyffrin Township, 29 Pa. Cmwlth. 9, 370 A.2d 777 (1977).
 - Requires that the municipality provide the applicant with the opportunity to revise plans or respond to objections where there is a misunderstanding or difference of opinion between the applicant and the municipality.
 - Duty extends to discussion involving technical requirements and ordinance interpretation with an applicant.
 - Applicant also has a duty to respond in a reasonable and timely manner.

A Municipality's Duty to Proceed in Good Faith in Reviewing and Processing Subdivision and Land Development Plans (cont.)

- Raum v. Board of Supervisors of Tredyffrin Township, 29 Pa. Cmwlt. 9, 370 A.2d 777 (1977).
 - Petition filed by owner and developer of Chesterbrook to enforce judgment previously entered by the Pennsylvania Commonwealth Court upholding the zoning of the tract as a Unified Development Area.
 - The Commonwealth Court held that the Township had acted in bad faith in rejecting developer's Subdivision and Improvement Construction Plans.

A Municipality's Duty to Proceed in Good Faith in Reviewing and Processing Subdivision and Land Development Plans (cont.)

- Raum (cont.)

- The Commonwealth Court articulated the following principle:

A municipality has a legal obligation to proceed in good faith in reviewing and processing land development plans. The duty of good faith includes discussing matters involving technical requirements or ordinance interpretation with an applicant, and providing an applicant a reasonable opportunity to respond to objections or to modify plans where there has been a misunderstanding or difference of opinion.

29 Pa. Cmlwth. 9, 48, 370 A.2d 777, 798 (1977).

A Municipality's Duty to Proceed in Good Faith in Reviewing and Processing Subdivision and Land Development Plans (cont.)

Raum (cont.)

- In this case, the Board of Supervisors:
 - Advertised and considered numerous proposals to rezone Chesterbrook after the Commonwealth Court had determined the Unified Development Area zoning on the property was valid.
 - Enacted a new fee schedule that would have required the developer to pay at least \$338,225.00 in fees to file the applications necessary for the development rather than the approximately \$9,640.00 that would have been required under the old fee schedule.
 - Repudiated Subdivision and Improvement Construction Plans for Sections I and II of the development and building permits after escrow for improvements had been posted for Section I and site work had begun.
 - Rejected other Subdivision and Improvement Construction Plans for the tract without following normal Township practice where an applicant would be permitted to discuss potential problems or objections with the Township and resolve them prior to action by the Board of Supervisors on the Plans.
- The Commonwealth Court held that the Board of Supervisors' conduct demonstrated a lack of good faith when reviewing and processing the Subdivision and Improvement Construction Plans and was "a prime exhibition of bad faith" in its repudiation of prior approvals in contradiction to the Commonwealth Court's previous order in the case.

A Municipality's Duty to Proceed in Good Faith in Reviewing and Processing Subdivision and Land Development Plans (cont.)

- Examples of where a municipality did not act in bad faith in denying a subdivision plan application:
 - Abarbanel v. Solebury Township, 132 Pa. Cmwlth. 326, 572 A.2d 862 (1990).
 - 10/13/87 - Developer submitted 37 lot preliminary subdivision plan for residential development.
 - 11/9/87 - Township Engineer review letter was not available for first Planning Commission meeting following application (less than 1 month after filing).
 - 12/10/87 - Township Engineer issued review letter within 60 days of application date and letter contained 40 “objections” to developer’s plan. The Planning Commission reviewed the plan and review letter on the same day and deferred action on the plan.

A Municipality's Duty to Proceed in Good Faith in Reviewing and Processing Subdivision and Land Development Plans (cont.)

- Examples of where a municipality did not act in bad faith in denying a subdivision plan application (cont.):
 - Abarbanel (cont.)
 - 1/7/88 - The Developer requested a 30-day extension to address the Township Engineer's objections and extension was granted.
 - 2/10/88 - No plan was filed within the 30-days and the Developer requested an additional 60-day extension and stated that any revisions would be considered a supplement to the original plan rather than the submission of a new plan.
 - 2/16/88 - The Board denied the preliminary subdivision plan because no plan had been submitted after the 30 day extension and no indication was given that the revised plan would be promptly submitted.

A Municipality's Duty to Proceed in Good Faith in Reviewing and Processing Subdivision and Land Development Plans (cont.)

- Examples of where a municipality did not act in bad faith in denying a subdivision plan application (cont.):
 - Key difference between Abarbanel and Raum – No revised plans had been submitted to the Board in Abarbanel which the Board then refused to review.
 - “A developer has a reciprocal good faith duty to submit revised plans in a reasonable and timely manner, which will enable a municipality to comply with its duties under § 508 and Raum.”

A Municipality's Duty to Proceed in Good Faith in Reviewing and Processing Subdivision and Land Development Plans (cont.)

- Examples of where a municipality did not act in bad faith in denying a subdivision plan application (cont.):
 - Kassouf v. Township of Scott, 584 Pa. 219, 883 A.2d 463 (2005).
 - Pennsylvania Supreme Court case
 - Developer filed final subdivision plan application for residential development.
 - Township Engineer reviewed plan and issued letter listing 66 items for developer to correct or address.
 - Over the next several months, Developer submitted several revised plans that contained many of the same defects as the original plan submission.
 - Township engineer reviewed these plans and continued to find defects in plans.
 - Board of Commissioner granted extension to act on plans to 11/00 meeting so long as developer submitted a conforming plan by 11/14/00.
 - Developer submitted a new plan which still contained defects.
 - Developer attempted to address defects after Township deadline in a written response.
 - 11/28/00 – Board of Commissioners voted unanimously to reject the final subdivision plan.

A Municipality's Duty to Proceed in Good Faith in Reviewing and Processing Subdivision and Land Development Plans (cont.)

- Examples of where a municipality did not act in bad faith in denying a subdivision plan application (cont.):
 - Kassouf (cont.)
 - Different than Raum because the Township provided the developer with multiple opportunities to revise defects prior to Board of Commissioners' deadline.
 - Developer's revisions caused delays in consideration of the plan.
 - Court held that Township was not required to consider developer's last submission after its November 14th deadline.
 - Court found relevant that certain defects were listed in multiple Township Engineer reviews that Developer had not corrected.
 - "Reciprocal good faith standard cannot simply eliminate the inherent discretionary powers of a municipality in this area."
 - A developer is not entitled to infinite extensions to address and correct defects in a subdivision plan.

A Municipality's Duty to Proceed in Good Faith in Reviewing and Processing Subdivision and Land Development Plans (cont.)

- Examples of where a municipality acted in bad faith in denying a subdivision plan application (cont.):
 - Highway Materials, Inc. v. Board of Supervisors of Whitemarsh Township, 974 A.2d 539 (Pa. Cmwlth. 2009).
 - Developer filed sketch plan for mixed-use development on 54 acres.
 - Township rezoned property multiple times during review process.
 - Township staff memoranda showed evidence of the Township's desire to prevent the development of the property consistent with current zoning, including memorandum from Township Manager to Board of Supervisors indicating desire to prevent development of property in a manner consistent with mixed-use zoning.
 - Township staff, Township Engineer and Township Solicitor refused to provide guidance on sanitary sewer alternatives for site development despite numerous requests from Developer
 - Developer filed a revised plan and again requested input from Township. Input was not provided.
 - Instead, Planning Commission recommended rejection of a preliminary plan and Board of Supervisors voted unanimously to deny the preliminary plan application.

A Municipality's Duty to Proceed in Good Faith in Reviewing and Processing Subdivision and Land Development Plans (cont.)

- Examples of where a municipality acted in bad faith in denying a subdivision plan application (cont.):
 - Highway Materials, Inc. (cont.)
 - Commonwealth Court held that it was an abuse of discretion for the Board of Supervisors to deny the preliminary plan where the Township did not proceed in good faith because it did not provide direction to the developer that would have allowed it to cure defects in its preliminary plan.
 - Different than Kassouf because extension was requested since input had not been received from the Township and extension would have given developer an opportunity to cure defects in the plan.

A Municipality's Duty to Proceed in Good Faith in Reviewing and Processing Subdivision and Land Development Plans (cont.)

- Examples of where a municipality acted in bad faith in denying a subdivision plan application (cont.):
 - Dietrich v. Buffalo Township Planning Commission, 995 A.2d 893 (2010).
 - Applicants filed Preliminary Land Development Plan to build a swine barn on their property.
 - Planning Commission (which had jurisdiction to act on land development plan) did not act in good faith after it issued a decision that required Applicants to accept five conditions of approval within a certain period of time or approval would be nullified.
 - Applicants submitted a written response to the Planning Commission requesting clarification of one of the conditions and stating that they had no objection to the other four conditions.
 - Rather than responding, the Planning Commission voted to deny the application two days before the period expired for the applicants to accept the conditions.
 - The Commonwealth Court determined that it was unreasonable for the Planning Commission to treat the Applicants' response letter as a rejection of all of the conditions of approval.

A Municipality's Duty to Proceed in Good Faith in Reviewing and Processing Subdivision and Land Development Plans (cont.)

- Common Themes
 - Large or controversial development.
 - Property is rezoned after subdivision or land development application is filed that would not allow proposed development under new application post-rezoning.
 - Multiple plan revisions.
 - No duty to infinitely extend time to act where defects not corrected.
 - Technical defects (acted in bad faith) vs. substantive defects (did not act in bad faith).
 - Duty of communication and to provide guidance on technical questions and ordinance interpretation.
 - Whether a deviation occurred from the typical municipal review process.

Municipal Consultant Review Fees

- Subdivision and Land Development Plans
 - Section 503(1) of the Pennsylvania Municipalities Planning Code (“MPC”) specifically provides that a subdivision and land development ordinance may include provisions for the “charging of review fees” as part of the municipality’s processing of subdivision and land development plans. 53 P.S. § 10503(1).
 - Review fees may include “**reasonable and necessary charges** by the municipality’s professional consultants for review and report thereon to the municipality.”
 - The review fees must be based on a schedule established by ordinance or resolution.
 - The review fees must be reasonable and must be **in accordance with ordinary and customary charges for similar services in the community** and cannot exceed the rate or cost charged by the professional consultant for comparable services in the municipality that are not reimbursed or imposed on applicants.

Municipal Consultant Review Fees (cont.)

- Conditional Use Applications
 - The MPC does not contain language permitting municipalities to provide for charging of review fees as part of the conditional use application process.
 - Courts have recently held that a municipality cannot charge consultant review fees incurred during conditional use application proceedings to an applicant.
 - In re: Land Use Appeal of Chester County Public Safety Training Foundation from the October 28, 2008 Decision of the East Fallowfield Township Board of Supervisors, CCCP No. 2008-13198-LU (February 24, 2010) - Judge Nagle held that Township's condition of conditional use approval requiring **reimbursement of all of the Township's reasonable expenses, including legal and professional consultant fees**, for review of the application and expenses associated with implementation of conditions of conditional use approval should be stricken because such fees **are not authorized by the MPC**.
 - HHI Trucking & Supply, Inc. v. Borough Council of the Borough of Oakmont, 990 A.2d 152 (Pa. Cmwlth. 2010) – The Commonwealth Court held **that a condition of conditional use approval requiring the applicant to reimburse the Borough for Township Engineer review fees was unreasonable**. The Court cited Section 617.3(e) of the MPC which provides zoning hearing board fees charged to an applicant may not include legal expenses of the zoning hearing board, or engineering architectural or other technical consultants or expert witness costs. In this case, the court applied the zoning hearing board provisions in the MPC to the conditional use process and determined that the condition of conditional use approval violated Section 617.3(e).

Municipal Consultant Review Fees (cont.)

- Conditional Use Applications (cont.)
 - Pennsylvania House Bill 1831 of the 2009-2010 Session
 - Would permit a municipality to include provisions in its zoning ordinance that would allow the municipality to charge an applicant for reasonable and necessary professional consultant review fees in connection with a conditional use application.
 - HB 1831 was passed in the House on March 6, 2010 and referred to the Senate Local Government Committee.
 - Provides further support for the courts' recent determination that charging municipal consultant review fees to an applicant under a conditional use proceeding is not currently authorized by the MPC.

Presentation of Testimony to a Municipal Body or Zoning Hearing Board

- Public hearing
 - Conditional use application heard by governing body.
 - Appeal of zoning officer determination, special exception application and variance application heard by zoning hearing board.
 - Formal testimony given under oath.
 - Under the MPC, zoning and conditional use hearings are advertised.

Presentation of Testimony to a Municipal Body or Zoning Hearing Board (cont.)

- Public meeting
 - Planning Commission, Historical Commission and other advisory committees or commissions and meetings of the governing body.
 - Formal testimony under oath is not required.

Presentation of Testimony to a Municipal Body or Zoning Hearing Board (cont.)

- Tips for Effective Presentation
 - **Preparation beforehand.**
 - Appearance should be neat and professional.
 - Speak clearly and concisely.
 - If referring to a plan, stand next to the plan to point out information on the plan or if on a power point slide, use a pointer.
 - When identifying information on an exhibit such as a plan, use directional information or other identifying details that can be easily understood in a record of the hearing or in meeting minutes.
 - When referring to an exhibit or a plan, use the exhibit number or identify the date of the exhibit if there is one.

Presentation of Testimony to a Municipal Body or Zoning Hearing Board (cont.)

- Tips for Effective Presentation (cont.)
 - Answer only the question asked.
 - Listen to the entire question before you provide an answer.
 - If you don't know the answer to a question, you can state that you do not know the answer to the question.
 - If you don't understand the question, ask for clarification or that the question be rephrased.
 - Look at the Board, Commission or Committee members to which you are presenting.

Questions and Answers