IN THE COURT OF COMMON PLEAS OF
LYCOMING COUNTY, PA

MAPLE STREET A.M.E. ZION CHURCH, Appellant	:	NO: 08-00921
vs.	:	
CITY OF WILLIAMSPORT and CITY COUNCIL OF THE CITY OF WILLIAMSPORT, Appellees	:	CIVIL ACTION

O P I N I O N A N D O R D E R

This matter comes before the Court pursuant to a land use appeal filed by Maple Street A.M.E. Zion Church. The facts of this case are as follows:

1. On July 27, 2007 Maple Street A.M.E. Zion Church (hereinafter "Church") entered into a Sales Agreement for the purchase of real estate located in the City of Williamsport with an address of 962 Memorial Avenue, a/k/a 600 Fifth Avenue (hereinafter "Subject Property").
2. On February 11, 2008, Appellants submitted a request for variance and zoning interpretation regarding the off-street parking requirements as applied to the Subject Property.
3. On February 21, 2008 a hearing was held on Appellant's request for interpretation of the zoning ordinance/variance from the off-street parking requirements set forth in the City of Williamsport Zoning Ordinances.

4. On February 21, 2008, the Zoning Hearing Board orally announced their decision that no variance was required from the off-street parking requirement.
5. Specifically, the Board orally concluded that if the proposed use of Maple Street A.M.E. Zion Church required less off-street parking than the prior nonconforming use which was allowed, there was no need for a variance, and the Church could go to Williamsport City Council to have its parking issues considered. (N.T. 2/21/08, p. 14-16).
6. A written decision was never issued by the Zoning Hearing Board.
7. Pursuant to the Board's failure to issue a written decision, Public Notice of a deemed approval was advertised in the Williamsport Sun-Gazette on December 9 and December 16, 2008.
8. No appeal from the deemed approval notice was filed.
9. Proof of publication of the deemed approval was presented and accepted as part of the record by City Council during its meeting of January 29, 2009.
10. On December 28, 2007 Appellant submitted a request to Williamsport City Council for a conditional use approval regarding the Subject Property.
11. On February 28, 2008 a hearing was held by Williamsport City Council on Appellant's request for a conditional use approval.
12. On April 3, 2008 the City Council approved the Church's request for a conditional use. The conditional use was granted, subject to three conditions.
13. The first condition required that the Church "secure and maintain off-street parking by a written license" granted by nearby property owners for 8 spaces.

14. On May 5, 2008, the Church filed an appeal of the April 3, 2008 decision, specifically appealing the imposition of the condition set forth above.
15. Appellant's Notice of Appeal filed May 5, 2008 included Appellant's claim that a deemed approval had occurred.
16. On October 29, 2008 this Court remanded this matter to City Council to make further findings of fact and conclusions of law. City Council was specifically directed to determine whether the parking requirements imposed on the Church were subject to the law of nonconforming use, and if so, whether Council had the authority to place conditions on parking under its conditional use power that could "override or nullify any preexisting nonconforming parking."
17. On January 29, 2009 the remand hearing was held before City Council.
18. A resolution accepting and authorizing the filing of the adjudication regarding the Church's conditional use was approved by Council at its meeting held on April 2, 2009.
19. On April 28, 2009 the Church filed an appeal of Council's adjudication approved on April 2, 2009 which concluded that the Church did not have a right to non-conforming parking.
20. Appellant specifically argues that the condition which requires a license for 8 off-street parking spaces should be stricken because the Church had a right to prior non-conforming parking.

21. Appellant alternatively argues that the condition requiring a license should be stricken because the Church obtained a variance from the parking requirements via deemed approval.

O P I N I O N

The first issue raised on appeal relates to Council's conditional use approval. On December 28, 2007, the Church filed a conditional use application to use the property located at 962 Memorial Avenue in Williamsport, for a church use. Previously, the property operated as a non-conforming Laundromat use in the R-2 Zoning District. The Church's proposed use involved up to 75 people, which required a total of 8 off-street parking spaces pursuant to the parking regulations in the City Zoning Ordinance.

After a hearing on the Church's conditional use application held on February 28, 2008, City Council approved the Church's conditional use by written decision dated April 3, 2008, with the condition, among others, that the Church secure 8 off-street parking spaces for its occupancy of 75 people, and otherwise at least 1 parking space for every 10 members, with a written lease for such parking to be filed with the City Code's Department. On May 5, 2008 the Church filed an appeal of the April 3rd decision of City Council, and in particular the imposition of the condition stated above. The Court granted the Church's appeal and on October 29, 2008 remanded this matter to City Council to make further findings of fact and conclusions of law. In its Order of October 29, 2008, this Court specifically directed that City Council determine the following:

a. Whether the parking requirements imposed on Appellants by way of Williamsport Zoning Ordinance Article 13, Section 1345.1 are subject to the law of non-conforming use; and if so:

b. Whether the Council has the authority to place conditions on parking under its conditional use power that may override or nullify any pre-existing non-conforming parking.

Pursuant to the Court's October 29, 2008 Order, City Council held a hearing on January 29, 2009. Council heard evidence on the Laundromat's operation from 1980 to 2007 when the property was purchased by the Church. There was no dispute that the Property was no longer being used for a Laundromat, and had been used as a church pursuant to the approved conditional use since September 2008. (N.T. 1/29/09 p. 34-5). Before the close of the hearing it was agreed that the record would be left open to allow the submission of briefs and/or a stipulation by counsel.

At its meeting held on April 2, 2009, City Council voted to approve an Adjudication based upon the evidence presented at the January 29, 2008 hearing and accepted by the City on February 12, 2009. In its Adjudication, the City found that the Church's use created a change in use from the prior Laundromat use, and since the previous non-conforming Laundromat use no longer existed, the Church did not have a claim to nonconforming parking related to that use. Specific factual findings relevant to this issue were as follows:

1. The Applicant's request for a conditional use of this property, as well as its actual use since it assumed ownership, creates a change in use from the prior use of this property as a Laundromat, since the use as requested by the Applicant and implemented has been as a church use.

2. If there was a pre-existing non-conforming use with respect to parking arising out of the operation of the premises as a Laundromat, that use is no longer in effect, since terminated by the change in use.

3. The Applicant has knowledge that the use has changed, and the property is no longer being used as a Laundromat.

4. The present use constitutes a change in use from any prior use, thus negating any contention that the absence of prior parking restrictions should not apply here.

(4/2/09 Adjudication, Findings of Fact).

Pursuant to these Findings of Fact, Council concluded that any non-conforming use did not extend to the Church, since the use of the property as a church constituted a change in use. Council specifically concluded that "Under 1323.04 of the City's Zoning Ordinance, and under the provisions of prevailing municipal law, such a change in use negates any argument that the non-conforming use previously established continues." (4/2/09 Adjudication, Conclusion of Law No. 5).

Section 1323.04 of the City's Zoning Ordinance provides:

> 1323.04 CHANGES
> Once changed to a conforming use, no structure or land shall be permitted to revert to a nonconforming use.

Council found that the existence of non-conforming parking for the Laundromat use was not relevant to Council's analysis because any non-conforming use did not extend to the Church since its use of the property as a church constituted a new use. Council did not include any discussion of the deemed approval issue in its adjudication of April 2, 2009.

On April 28, 2009, the Church appealed the City's Adjudication to the Court of Common Please and on June 3, 2009 filed a Motion for the Court to take additional evidence. By Order dated July 29, 2009 this Court denied the Church's Motion for Additional Evidence.

Section 1005-A of the MPC provides:

> If the record below includes findings of fact made by the governing body, board or agency whose decision or action is brought up for review and the court does not take additional evidence or appoint a referee to take additional evidence, the findings of the governing body, board or agency shall not be disturbed by the court if supported by substantial evidence.
> 53 P.S. § 11005-A.

Therefore, where the Court has not held a hearing or taken additional evidence, the scope of review in a land use appeal is limited to a determination of whether the Board has committed an error of law or a manifest abuse of discretion. Allegheny West Civic Council, Inc. v. Zoning Bd. of Adjustment of the City of Pittsburgh, 689 A.2d 225, 227 (Pa. 1997). In determining whether the Board committed an error of law or an abuse of discretion, the "court must give great weight and deference to the Board's determination." Snyder v. Zoning Hearing Bd. of Warminster Twp., 782 A.2d 1088, 1089 (Pa.Cmwlth. 2001)(citing *Smith v. Zoning Hearing Bd. of Huntingdon Borough*, 734 A.2d 55 (Pa.Cmwlth. 1999). "Abuse of discretion may not be found merely because the appellate court might have reached a different conclusion, but requires a showing of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support to be clearly erroneous." Paden v. Baker Concrete Construction, Inc., 658 A.2d 341, 343 (Pa. 1995). Judicial discretion may not be substituted for administrative decision-making, even if the reviewing court might reach a different conclusion. Williams v. Commonwealth, State Civil Service, 327 A.2d 70, 71 (Pa. 1974).

Following a review of this matter, this Court finds that City Council did not abuse its discretion in concluding that the Church does not have a right to non-conforming parking. Factual findings were made regarding this issue, which were supported by the testimony presented. Moreover, in granting a conditional use, the

governing body may attach such reasonable conditions and safeguards, in addition to those expressed in the zoning ordinance, as it may deem necessary to implement the purposes of the MPC in the zoning ordinance. 53 P.S. § 10603(c)(2); Levin v. Bd of Supervisors of Benner Twp., 669 A.2d 1063, 1073 (Pa.Cmwlth. 1995). The Condition at issue merely required that the Church secure and maintain 8 off street parking spaces. This is consistent with Section 1345.01 of the Zoning Ordinance which requires eight off-street parking spaces for church use. As City Council did not abuse its discretion in reaching this determination, Appellant's request to strike this condition on this basis is DENIED. Were it not for the variance issue as discussed below, this appeal would be dismissed.

The second issue raised by the Appellant in its appeal relates to whether City Council's condition requiring a written license for eight (8) off street parking spaces should be stricken when the Church has obtained a variance from parking requirements via deemed approval. Section 10908 of the Municipalities Planning Code sets forth municipal procedural requirements.

The introductory language to Section 10908 provides, "The board **shall** conduct hearings and make decisions in accordance with the following requirements." (Emphasis added).

Section 10908(9) specifically provides:

> **The board or the hearing officer, as the case may be, shall render a written decision or, when no decision is called for, make written findings on the application within 45 days after the last hearing before the board or hearing officer.** Where the application is contested or denied, each decision shall be accompanied by findings of fact and conclusions based thereon together with the reasons therefor[e]. Conclusions based on any provisions of this act or any ordinance, rule or regulation shall contain a reference to the provision relied on and the reasons why the conclusion is deemed appropriate in the light of the facts

> found. If the hearing is conducted by a hearing officer, and there has been no stipulation that his decision or findings are final, the board shall make his report and recommendations available to the parties within 45 days and the parties shall be entitled to make written representations thereon to the board prior to final decision or entry of findings, and the board's decision shall be entered no later than 30 days after the report of the hearing officer. **Where the board fails to render the decision within the period required by this subsection,** or fails to hold the required hearing within 60 days from the applicant's request for a hearing, **the decision shall be deemed to have been rendered in favor of the applicant** unless the applicant has agreed in writing or on the record to an extension of time. When a decision has been rendered in favor of the applicant because of the failure of the board to meet or render a decision as hereinabove provided, the board shall give public notice of said decision within ten days from the last day it could have met to render a decision in the same manner as provided in subsection (1) of this section. If the board shall fail to provide such notice, the applicant may do so. Nothing in this subsection shall prejudice the right of any party opposing the application to appeal the decision to a court of competent jurisdiction. (Emphasis added).

Appellant filed a request for a variance from the Williamsport Zoning parking requirements on February 11, 2008. A hearing was conducted on February 21, 2008. The Zoning Hearing Board failed to issue a written decision. Pursuant to the clear mandates of 53 P.S. 10908(9) Appellant is entitled to a variance of Williamsport Zoning Ordinance parking requirements because a deemed approval has occurred. Notice of the deemed approval was appropriately published by the Appellant in the Sun Gazette on December 9, 2008 and December 16, 2008. Proof of publication of the deemed approval was presented and accepted by City Council during its meeting of January 29, 2009. No appeal to the deemed approval was filed.

Although Appellees argue that this Court cannot grant a deemed approval because the issue has not been properly raised before the Court, and "most importantly" should be the subject of an action in mandamus, this Court finds the

issue was properly raised and the procedures of the Municipalities Planning Code are an appropriate vehicle for dealing with Appellant's claims.

The General Assembly set forth the purpose of the Municipalities Planning Code in Section 10105 of the Act. This section provides:

> It is the intent, purpose and scope of this act to protect and promote safety, health and morals; **to accomplish coordinated development; to provide for** the general welfare by guiding and protecting amenity, convenience, future governmental economic, practical, and social and cultural facilities, development and growth, as well as **the improvement of governmental processes and functions**; to guide uses of land and structures, type and location of streets, public grounds and other facilities; to promote the conservation of energy through the use of planning practices and promote the effective utilization of renewable energy sources; and to permit municipalities to minimize such problems as may presently exist or which may be foreseen.

Pennsylvania courts have interpreted the purpose of this Act as the Legislature's mandate for unified regulation of land use and development. Reihart v. Township of Carroll, 409 A.2d 1167 (Pa. 1979).

The Appellees' cite Wecare Organics, LLC v. Schuylkill County Zoning Hearing Bd., 954 A.2d 684, 691 (Pa.Cmwlth. 2008), Riverside Associates v. Zoning Hearing Bd. of Springettsbury Twp., 465 A.2d 120, 121 (Pa.Cmwlth. 1983) and Bucks County Housing Development Corp. v. Zoning Hearing Board of Plumstead Twp., 406 A.2d 832 (Pa.Cmwlth. 1979), for the proposition that "the proper procedure for enforcing a deemed approval is by instituting an action in mandamus." Notably, none of the cases cited by Appellees state that an action must be brought in mandamus, only that an action in mandamus is permissible.

In WeCare, *supra*, the Commonwealth Court held,

> The final issue before this Court is whether WeCare **may** seek enforcement of the deemed approval of its application by the ZHB through an action in mandamus. The ZHB's first argument on this issue is that WeCare has an

> adequate remedy at law, and that, therefore, mandamus is not appropriate. '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.' *Lamar Advertising Co. v. Zoning Hearing Board of Monroeville*, 939 A.2d 994, 999 (Pa.Cmwlth. 2007). We have already determined above that WeCare has a clear legal right to the granting of a deemed approval of its application and that the ZHB has a duty to approve the application. WeCare has appealed the ZHB's decision, and this appeal is still pending in the Court of Common Pleas of Schuylkill County. The ZHB argues that WeCare's pending appeal is an adequate remedy at law. We disagree. This Court has held that, even when a party has a pending land use appeal, such an appeal is not an adequate remedy at law, and the party **may** still seek recognition of a deemed approval through an action in mandamus. Id. at 691.

Similarly in Bucks County Housing Development Corp., *supra*, the Court noted that mandamus is "an" available remedy "for the effectuation of relief under the 45 day rule." Id. at 835.[1]

In Riverside, *supra*, the Commonwealth Court affirmed the trial court's holding that the issue of deemed approval was not properly before it as Riverside, the landowner, "did not seek relief **as it might have done**, by instituting an action in mandamus." Id. at 121. Notably, in Riverside, *supra*, the first time that Riverside raised the issue of its entitlement to a "deemed decision" before the trial court was in its brief in support of its zoning appeal which had been brought based upon the merits of the Board's decision. In holding that the trial court correctly concluded the issue was not properly raised, the Commonwealth Court specifically stated, "The trial court held that, inasmuch as Riverside had not instituted an action in mandamus, **or even raised the issue through amendment in its notice of appeal**, it could not raise the issue by way of a brief." The cases do not hold, or even suggest that mandamus is an

[1] Moreover, the Pennsylvania Supreme Court has noted that, "Commentators view the Municipalities Planning Code's procedures for challenging local land use regulations as a significant advance over prior methods." Reihart, *supra*, at 1170.

exclusive remedy. In the case at bar, the deemed approval issue was clearly raised in the Zoning Appeals filed by Maple Street A.M.E. Zion Church on May 5, 2008 and April 28, 2009. The policy favoring judicial economy supports having the deemed approval as part of the overall zoning appeal when, as here, it is properly raised and preserved.

As this Court finds that the Church is entitled to a variance of Williamsport Zoning Ordinance parking requirements because a deemed approval has occurred, the condition imposed upon the Church which requires the Church to obtain a license for eight (8) off-street parking spaces constitutes an error of law and shall be stricken.

O R D E R

AND NOW, this 16th day of October 2009, following argument on the appeal filed by the Maple Street A.M.E. Zion Church, and after careful review of all of the evidence presented, it is hereby ORDERED that the condition requiring a written license for eight (8) off-street parking spaces shall be STRICKEN as the Appellant, Maple Street A.M.E. Zion Church, obtained a variance from the parking requirements via deemed approval of the Zoning Hearing Board. In other respects, the conditional approval is affirmed.

BY THE COURT,

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Richard A. Gray, J.

cc: Christopher M. Williams, Esquire

J. David Smith, Esquire

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