Court: Pending Ordinance Doctrine Does Not Apply to Land Development Applications

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(By **Harley Stone** and **Anna Jewart**)

Enacting and amending zoning regulations is a time-consuming matter. In fact, months often pass from the inception of an idea to the implementation of a zoning scheme and its actual effective date. This is due in large part to the stringent adoption requirements set forth by the Pennsylvania Municipalities Planning Code, 53 P.S. Section 10101 et seq. (MPC). These MPC mandated procedures require municipalities to obtain recommendations from their local planning bodies, submit proposed zoning ordinances and amendments to the relevant county planning agency, and to hold public hearings to solicit public comment.

Consequently, municipalities frequently must consider what to do with land use applications received during the period in which an ordinance is "pending," but has not yet become effective. The "pending ordinance doctrine," was created by the courts prior to adoption of the MPC. The doctrine was designed to protect municipalities from instances where an applicant proposes a use which conforms to the existing zoning scheme but would not be permitted under zoning changes being considered by the municipality and for which it has advertised its intent to hold public hearings. When the pending ordinance doctrine applies, a land use applicant may be required to conform to proposed zoning regulations which have not yet been adopted.

However, the doctrine does not always apply. In fact, the MPC includes certain statutory exceptions to the pending ordinance doctrine which are intended to protect landowners and applicants. Section 508(4)(i) of the MPC, and its counterpart in Section 917 modify the applicability of the pending ordinance doctrine to protect duly filed land development applications from changes or amendments in the relevant zoning ordinance. Section 508(4)(i) states applicants for approval of a plat "shall be entitled to a decision in accordance with the provisions of the governing ordinances … as they stood at the time the application was duly filed." The Commonwealth Court's recent reported opinion in *In re Jaindl Land*, No. 776 C.D. 2021, No. 1187 C.D. 2021, 2022 WL 14965490 (Pa. Cmwlth. 2022), issued a reminder to municipalities and applicants alike that under the MPC the pending ordinance doctrine does not apply to applications for subdivision or land development.

In *In re Jaindl Land*, the developer, Jaindl, was the equitable owner of 87 acres of property in Green Township, Franklin County. The property was split zoned with a portion located in the township's LI Light Industrial District and another located in its HC Highway Commercial District. In 2018 Jaindl entered into a contract for the sale of the property with its legal owners. As of the date of the agreement the township zoning ordinance permitted industrial warehouses and distribution centers as a use by right in the LI District. In 2018 and 2019 representatives of Jaindl met with township representatives, including its zoning officer and engineer to discuss plans to develop the property with industrial uses. In October 2019, the township planner proposed several amendments to the township zoning map that included a recommendation that a portion of the property be rezoned from the LI District to the Transitional Commercial District in which warehousing is not a permitted use. In November 2019, the township mailed notices of the proposed amendments to affected and adjoining property owners, including notice of a public hearing scheduled for Jan. 14, 2020, which was received by the legal owners of the property. On Dec. 1, 2019, the township published its first advertisement of its intent to amend the zoning map in a newspaper of general circulation in the municipality. The public hearing was held as advertised on Jan. 14, 2020, but adoption of the amendment was tabled. The same day, Jaindl submitted a preliminary land development application for the construction of an industrial warehouse on the property. The ordinance was eventually adopted on Jan. 28, 2020.

On Feb. 5, 2020, the township zoning officer issued a written determination that Jaindl's land development application was subject to the pending ordinance doctrine, which would mean the township would get the benefit of the more restrictive newly enacted 2020 ordinance. The zoning officer denied the application, and Jaindl appealed to

the Township Zoning Hearing Board which held hearings in May and June 2020. The ZHB affirmed the denial in July 2020. During that time Jaindl also filed a challenge to the substantive validity of the 2020 ordinance, arguing it was arbitrary, irrational, discriminatory and constituted special legislation. That challenge was also denied by the ZHB following a separate hearing in September 2020. Jaindl appealed both decisions to the Franklin County Common Pleas Court, which consolidated, and then denied, both appeals. The lower court held that because the township had "advertised" the 2020 ordinance prior to submission of the application it, rather than the prior ordinance, applied to the application. On July 7, 2021, Jaindl appealed to the Commonwealth Court.

On appeal Jaindl raised two issues, that the lower court erred in finding the pending ordinance applied to their preliminary land development application; and that it erred in finding the ordinance was not invalid special legislation specifically targeted to prevent their development of the property. Tackling the pending ordinance issue at the forefront, the court detailed the history of the pending ordinance doctrine, relevant sections of the MPC, and several notable prior judicial interpretations of Section 508(4). Quoting its 1973 opinion in *Monumental Properties v. Board of Commissioners of Whitehall Township*, 173 A.2d 725, 727 (Pa. Cmwlth. 1973), the court emphasized:

"The Legislature could not have more clearly stated that a preliminary land development plan may not be disapproved on the basis of subsequently enacted zoning changes. The section makes no mention whatsoever of public advertisement of proposed zoning changes or of the time of such advertisement vis-à-vis the time of filing an application."

The court consequently found that the pending ordinance did not apply to Jaindl's application and that the 2020 ordinance, enacted after it was filed, had no effect on the plan, and was not proper grounds for disapproval.

An intriguing interpretation to the application of the doctrine was brushed upon by the court but not fully addressed, perhaps due to our Supreme Court's recent consideration of the issue in *In re Board of Commissioners of Cheltenham Township,* 211 A.3d 845 (Pa. 2019). In *Cheltenham* the court took a look at not only Section 508(4), but its counterpart in Section 917 of the MPC, 53 P.S. Section 10917. At issue was the application of the pending ordinance doctrine to zoning relief needed for purposes of land development plan approval. The court noted that Section 917 of the MPC largely mirrors Section 508(4)(i) and provides that while an application for a special exception related to a land development is pending, the applicant is entitled to a decision in accordance with the provisions of the ordinances as they stood at the time the application was filed. In other words, the MPC's protection of land development applications from the pending ordinance doctrine applies not only to the land development approval, but to any zoning approvals required to effectuate the development.

Although the court's decision in *Jaindl* is essentially a reminder of the express terms of the MPC, the breadth of case law on this issue indicates that it was a well-warranted one. While timing of advertisement and other factors must be considered when pure zoning relief is sought, *Jaindl* reminds us that the MPC is clear: land development applications (and zoning relief necessary for their approval) are always subject to the ordinance as it stands at the time the application is filed.

Harley S. Stone *is a shareholder in Babst Calland Clements and Zomnir's public sector group. Stone provides a wide range of services to municipal governments, authorities and private developers, with an emphasis on municipal permitting, planning, land use and zoning. Please contact him at 412-394-5410 or hstone@babstcalland.com.*

Anna S. Jewart *is an associate in the firm's public sector group. Jewart focuses her practice on zoning, subdivision, land development, and general municipal matters. Please contact her at 412-253-8806 or ajewart@babstcalland.com .*

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