showing the absence of all "possible" flooding and/or wetness problems. Given the right combination of natural occurrences water problems are conceivable anywhere. Hurricane Agnes teaches us that and in the testimony in this case there was talk of the 100-year's floods.

So we believe that the word "potential" as used here is not to be taken in its absolute or literal sense, but rather as having the practical meaning which the law ordinarily ascribes to such abstract terms. Cf. *Dauphin Deposit Trust Company v. Lumberman's Mutual Casualty Company*, 171 Pa. Super. 86, 87, 88; 90 A.2d 349 350 (1952). Quoting from *Frame v. Prudential Ins. Co.*, 358 Pa. 103, 106, 56 A.2d 76 (1948) in the *Dauphin* case where plaintiff had to exclude possible pre-existent infirmities as a contributing factor in causing death, the court said: "The right to recover on the policy was barred only if there was *in fact* such a contributing factor, not if, as a mere matter of speculation, there might have been" (italics in the original). Given this kind of practical treatment, "potential hazards due to flooding chronic wetness or pollution" as used in the ordinance describes an uncontrollable water situation likely to occur with such freqency as to make residential living on the tract dangerous and hazardous to the occupant and those in the area. The fact of presence of water on the lot in an Agnes or a 100-year's flood with a design or plan to overcome the problem in not such a situation.

Adopting this definition we find no abuse of discretion in the board's finding that the Rocks met their burden of proof. The board relied on the expert testimony of Brindle who stated that the boundary of the flood plain lay between the Rocks' proposed house and the West Branch of the Little Antietam Creek so that the proposed house would not be in a flood plain; that the high water mark of the 100 year storm would be between the proposed house and the stream; and that, in his opinion, the proposed construction of the Rock house would not create a flood hazard to the Geesamans. Believing this testimony the board concluded that the Rocks had shown the site to contain no potential hazards due to flooding, chronic wetness or pollution.

The board accepted the Brindle testimony and the other evidence as meeting the Rocks' burden of proof and then held that the Geesamans did not come forth with proof to show that potential hazards existed on the Rock property. The Geesamans called Soil Consultant Richard S. Long, but the board concluded that his testimony was indefinite and that he did not give an opinion as to whether a potential hazard due to flooding, chronic wetness or pollution would be present on the

Rock site if construction proceeded.

Aside from Mr. Long the Geesamans' witnesses testified primarily to seeing the Rock property (or portions of it) water covered at various times. The Board based its conclusions on Brindle's more factual, definite testimony and the other evidence. We find no error or abuse of discretion in doing so.

Since we did not take testimony, our task is to determine whether the board is chargeable with an abuse of discretion. *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970).

> An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overriden or misapplied, or the judgment is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record, discretion is abused. When the court has come to a cnclusion by the exercise of its discretion, the party complaining of it on appeal has a heavy burden; it is not sufficient to persuade the appellate court that it might have reached a different conclusion if, in the first place, charged with the duty imposed on the court below; it is necessary to go further and show an abuse of the discretionary power.

Commonwealth ex rel. McQuiddy v. McQuiddy, 238 Pa. Super. 390, 393-94, 358 A.2d 102, 104 (1976) (citations omitted). We find no such abuse.

The Geesamans have also charged the board with error in several of its findings of fact. We see no need to discuss these challenges separately because some already have been dealth with; the remainder are based on findings occasioned by the board's acceptance of Brindle's testimony, which we have upheld.

ORDER OF COURT

April 7, 1981, the appeal of David B. Geesaman and Irene B. Geesaman from the decision of the Zoning Hearing Board of the Borough of Waynesboro is dismissed and the decision of the board is sustained. The parties shall each pay their own costs.

BATHGATE v. CENTRE COUNTY PLANNING COMMISSION, ET AL., C.P. Centre County, No. 80 - 2443

Equity - Municipalities Planning Code - Security for Improvements.

1. Where Plaintiffs seek to compel a developer to construct roads and storm sewers, equity is an appropriate remedy in that there is no complete and adequate remedy at law.

2. A county and township planning commission are not governing bodies for purposes of the Municipalities Planning Code and may not be held liable for failure to post bond or other security to insure completion of planned improvements.

3. Section 509 of the Municipalities Planning Code requires a governing body to require security or the completion of improvements prior to subdivision approval.

James N. Bryant, Esq., Attorney for Plaintiffs

David A. Flood, Esq., Attorney for Ruby Mills

John W. Blasko, Esq., Solicitor

John R. Miller, Jr., Esq., Solicitor

OPINION AND ORDER

EPPINGER, GEORGE C., P.J., May 19, 1981:

The Bathgates are joined by a number of other owners of lots in a subdivision laid out by Ruby Mills in this equity action to compel Mills to construct roads and storm sewers in the development. In the second count, the Centre County Planning Commission, Marion Township Planning Commission and Marion Township Supervisors are defendants and the court is urged to compel them to construct the improvements.

The second count is based on the allegation that none of the defendants secured a bond or other acceptable security from Mills to ensure the completion of the improvements, as required by the Municipalities Planning Code (MPC), Act of 1968, July 31, P. L. 805 Sec. 509, 53 P.S. Sec. 10509.

According to the complaint, the plan for the development showed paved roads and storm sewers. It was approved by the County and Township Planning Commissions and the Township and recorded September 25, 1973. Mills promised each plaintiff, some during negotiations and others after the purchase of lots, that the improvements would be installed. Relying on these promises they bought lots and built homes on them. Despite repeated requests, Mills has not completed them.

The preliminary objections filed by the defendants include one that this case is not properly in equity. They argue that an action for damages or statutory remedies, referring specifically to the Second Class Township Code, Act of 1933, May 1, P.L. 103, 53 P.S. Sec. 65101 et seq. and MPC, would provide a complete and adequate remedy. In our opinion there is no adequate and complete remedy at law and this view is supported by the Commonwealth Court's decision in *Safford v. Board of Commissioners, Annville Township*, 35 Pa. Cmwlth. 631, 387 A.2d 177 (1978). In that case plaintiff owners were granted specific performance to compel the defendant township to install storm sewers and complete two roads in the development. Though not factually identical to our case, *Safford* sets forth principles upon which we are justified in retaining equity jurisdiction in this case.

A lower court case, *Caldwell v. Holliday*, 11 Chester 315 (1963), did deny equitable relief to lot owners where roads were built but did not comply with township specifications. The owners alleged it would cost $11,646.83 to bring them up to specifications. The court noted that the owners knew and set forth in their complaint what was needed to make the roads comply and the cost of the work required. An award of damages in that amount would permit them to employ a builder to complete the work. *Caldwell* is distinguishable on two grounds: The Bathgates and other owners here apparently do not know nor have they alleged a sum certain which will alleviate their problem and in this case there are municipal defendants, at least one of which has responsibilities under the MPC. We note that when *Caldwell* was decided the MPC had not been passed. The Court's equity jurisdiction in *Safford*, which was an MPC Sec. 509-based action, was not questioned.

Defendant Mills contends that one of several remedies offered under the Second Class Township Code, supra, provides an adequate remedy at law. Sections 1101, 1102 and 1147, 53 P.S. Sec's. 66101, 66102 and 66147, provide for township supervisors to take over roads and set forth the means by which interested parties can attempt to accomplish that. But for interested parties that is what is involved, an attempt, because the supervisors do not have to take over the roads. In addition, the supervisors may require that work done on dedicated roads conform to the subdivision plan before accepting them for public maintenance. *Appeal of Chryst*, 81 D & C 533 (Q.S., Mont., 1951). If that happened here, the owners would be in exactly the same position they are now - what they want is roads conforming with those shown on the approved subdivision plan and promised by the developer. So this is not an adequate remedy at law.

LEGAL NOTICES, cont.

IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF FRANKLIN COUNTY, PENNSYLVANIA — ORPHANS' COURT DIVISION

The following list of Executors, Administrators and Guardian Accounts, Proposed Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: July 2, 1981.

BRIGGS First and final account, statement of proposed distribution and notice to the creditors of Edith G. Spangler, administratrix of the estate of John F. Briggs, late of Peters Township, Franklin County, Pennsylvania, deceased.

BUCKINGHAM First and final account, statement of proposed distribution and notice to the creditors of the Valley Bank and Trust Company, executors of the Last Will and Testament of Myrtle E. Buckingham, late of Guilford Township, Franklin County, Pennsylvania, deceased.

DOUGHERTY First and final account, statement of proposed distribution and notice to the creditors of Eleanor E. Millaer and Millard A. Ullman, executors of the estate of Faye Dougherty, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

HOUSTON First and final account, statement of proposed distribution and notice to the creditors of Christopher C. Houston and the Farmers and Merchants Trust Company of Chambersburg, executors for the estate of Samuel C. Houston, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

KEMPLE First and final account, statement of proposed distribution and notice to the creditors of John L. Kemple, executor of the estate of George C. Kemple, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

SCHEIBLE First and final account, statement of proposed distribution and notice to the creditors of the Valley Bank and Trust Company, executors under the Will of Edmund M. Scheible, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

STALEY First and final account, statement of proposed distribution and notice to the creditors of Gifford A. Rook, executor of the estate of Addie Staley, late of Mont Alto, Franklin County, Pennsylvania, deceased.

GLENN E. SHADLE
Clerk of Orphans' Court of Franklin County, Pennsylvania

(6-12, 6-19, 6-26, 7-3)

The contention of the municipal defendants in a demurrer that the relief the owners ask for is unduly burdensome on a court of equity is meritless. It may be that equitable action as that requested in *Pittsburgh v. Pittsburgh*, 234 Pa. 193 (1912), to compel specific performance of a road repair contract is inappropriate, for it would require the court's supervision over the matter for an indefinite period. If this case resulted in an order requiring the defendants to complete the roads and storm sewers, supervision of such an order by the court would not be unduly burdensome. We believe *Safford* has disposed of this objection.

Both the Centre County and Marion Township Planning Commissions have demurred to the Complaint on the grounds that they are not governing bodies for the purposes of the MPC and, therefore, may not be held liable for failing to require Mills to post bond or other security to insure completion of the planning improvements. We accept this argument and will sustain their demurrers and dismiss the complaint as to them. MPC Sec. 509, 53 P.S. Sec. 10509 provides for the posting of a security acceptable to the "governing body" with the "municipality." As defined in the act these include the Board of Supervisors of and Townships of the Second Class; they do not include planning commissions. MPC Sec. 107(10)(13), 53 P.S. Sec.10107(10)(13).

The Marion Township Supervisors demurred to the complaint on the grounds that MPC Sec. 509, supra, is discretionary, not mandatory. The statute permits the municipality through its ordinances to give the developer a choice of either completing the improvements required before approval of the plot or posting bond or other acceptable security to insure the completion later. It is in this context that the municipality has a choice and thus the act provides that the municipality *may* require one or the other. But it must require one. The township is not free to impose a bond requirement or not as it wishes on a particular developer who has not completed improvements required for final approval. See *Safford*, supra, as supporting our interpretation that Sec. 509 is mandatory in this case.

Ruby Mills has two other objections. One is that paragraphs 7, 8, 9, 10 and 12 allege various times but do not precisely plead time and place. We will grant this motion for more specific complaint as to these paragraphs. See Pa. R.C.P. 1019(f). And since this will require amendment, we will also require the plaintiffs to allege whether the representations, promises, and contracts allegedly made by Mills are written or oral. Even though it is our understanding that when a complaint does not specify whether an alleged contract or agree-

ment was written or oral, the inference is that it is oral, *Havery Probber, Inc. v. Kauffman*, 181 Pa. Super, 281, 124 A.2d 699 (1956); Goodrich-Amram 2d 1019 (h):1, we think nevertheless that the plaintiffs should attach any written contracts or material upon which they rely, if they rely on anything in writing.

ORDER OF COURT

May 19, 1981, it is ordered:

(1) that the defendants' motions to dismiss the complaint in equity on the ground that there is an adequate remedy at law are denied;

(2) that the motions to certify the case to the law side of the court are denied;

(3) that the demurrers to the complaint on the grounds that the relief sought would be unduly burdensome on the court are denied;

(4) that the township's demurrer to the complaint on the grounds that the act of requiring a bond is discretionary is denied.

(5) that the defendant Mills' motion for a more specific complaint as to paragraphs 7, 8, 9, 10, 12 and 13 is granted;

(6) that the demurrers of the Planning Commissions on the grounds that they are not governing bodies under the Municipal Planning Code are granted and as to each of them the case is dismissed.

It is further ordered that the plaintiffs are given twenty (20) days from this date to file an amended complaint.

FLOHR POOLS, INC. v. MILLER AND WIFE, C.P. Franklin County Branch, No. D.S.B. 1980 - 1098

Mechanics Lien - Counterclaim - Pa. R.C.P. 1658 - Claim for Counsel Fees

1. Pa. R.C.P. 1658 clearly bars a counterclaim in a mechanics lien action, but does provide for a setoff.

2. A claim for counsel fees based on 42 Pa. C.S.A. 2503(9) due to an

alleged wrongful filing of a mechanics lien action did not arise out of the construction of a swimming pool and does not meet the test of a setoff.

3. Notice of a claim for counsel fees under 42 Pa. C.S.A. 2053(9) may be included in the ad damnum clause.

4. The inclusion or exclusion of counsel fees must be determined by the procedure for taxing costs and is not a subject for determination by the trier of fact.

George S. Glen, Esq., Counsel for Plaintiff

Kenneth F. Lee, Esq., Counsel for Defendant, Peggy D. Miller

OPINION AND ORDER

KELLER, J., May 22, 1981:

The plaintiff entered a mechanic's lien in the amount of $6,006.26 against the defendants on August 26, 1980 by filing its claim in the Office of the Prothonotary of Franklin County, Pennsylvania. The defendant, Peggy E. Miller, accepted service of the claim on September 25, 1980. On petition of the defendants under Section 1510 of the Mechanic's Lien Law to discharge the said lien from the real estate upon the payment of $7,000.00 into court to secure said claim, the Court on October 15, 1980 entered an order directing the Prothonotary to discharge the lien pursuant to the prayer of the petition. On November 6, 1980 the plaintiff filed its complaint in the action upon mechanic's lien and true copies were served upon the defendants. Preliminary objections to the plaintiff's complaint filed November 25, 1980 on behalf of the defendant, Peggy D. Miller, were dismissed on the request of the said defendant and with the consent of the plaintiff on February 6, 1981.

On February 25, 1981 the defendant, Peggy D. Miller, filed an answer containing new matter and a counterclaim "against defendant, Paul E. Miller." On March 6, 1981 defendant, Peggy D. Miller, filed an answer containing new matter and an amended counterclaim "against plaintiff." On March 20, 1981 the plaintiff filed preliminary objections to the answer containing new matter and amended counterclaim of the defendant, Peggy D. Miller, in the nature of a motion to strike and a demurrer.

Argument on the preliminary objections of the plaintiff was heard on May 7, 1981, and the matter is ripe for disposition.