by counsel that all matters to be considered by the court were of record.

This opinion is filed in support of our order made October 10, 1979.

IN RE: APPEAL OF LOWE, C.P. C.D. Franklin County Branch, Misc. Doc. Vol. X, Page 300

Pa. Municipalities Planning Code - 53 P.S. Sec. 10508 - Denial of Subdivision - Notice to landowner

1. Where a municipality fails to give a landowner written notice of disapproval of a subdivision plan within the time limits established in Municipalities Planning Code, 53 P.S. Sec. 10508, an appeal may be taken to the Court of Common Pleas under 53 P.S. Sec. 11006 of the Municipalities Planning Code.

Robert S. Bennett, Jr., Esq., Counsel for Appellant

Frederic G. Antoun, Jr., Esq., Counsel for Intervenors

OPINION AND ORDER

KELLER, J., January 25, 1980

Appellant, William E. Lowe, Jr., filed his Application for Development Review dated April 25, 1979 as the Developer/Agent presumably with Beverly J. Bobb, secretary to the Letterkenny Township Board of Supervisors. The secretary to the Supervisors received it on April 26, 1979. The Franklin County Planning Commission reviewed the application and proposed subdivision plan for a mobile home park at its regularly scheduled meeting on May 10, 1979, returned the same with comments, presumably to the Board of Supervisors. On June 26, 1979 the "Plan Revision Module" was denied by the Board of Supervisors "due to the fifteen comments of Franklin County Planning Commission and deficiencies recorded by William Brindle..."

On July 19, 1979 Robert S. Bennett, Jr., attorney for the appellant filed his Zoning Appeal Notice pursuant to Section 1006 of the Pennsylvania Municipalities Planning Code in the Office of the Prothonotary of Franklin County. The appeal notice alleges as grounds for relief:

> "5. As of the date of this Appeal, July 17, 1979, the Board of Supervisors of Letterkenny Township has failed to communicate its written decision to Appellant in violation of Sec. 508 (1) of the Pennsylvania Municipalities Planning Code.
>
> "6. As of the date of this Appeal, July 17, 1979, the Board of Supervisors of Letterkenny Township has failed to specify the defects found in Appellant's subdivision application in violation of Sec. 508 (2) of the Pennsylvania Municipalities Planning Code.
>
> "7. No written extension of time was granted by Appellant to the Board of Supervisors of Letterkenny Township.
>
> "8. The decision of the Board of Supervisors of Letterkenny Township is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law."

The prayer of the appeal notice provides:

> "WHEREFORE, Appellant files this Zoning Appeal Notice and requests the Prothonotary of Franklin County to send notice of this Zoning Appeal to the Board of Supervisors of Letterkenny Township directing it to certify to the Court the record before it. THEREAFTER, Appellant requests your Honorable Court, in conformity with Sec. 508 (3) of the Pennsylvania Municipalities Planning Code, to decree Appellant's plan approved and to order the Board of Supervisors to sign said plan."

Pursuant to the appeal notice a writ of certiorari was issued to the Board of Supervisors of Letterkenny Township, and service was accepted by the solicitor for the Board on July 27, 1979.

On August 16, 1979 the secretary for the Board of Supervisors filed a certified copy of the record in the office of the Prothonotary.

On August 16, 1979 Frederic G. Antoun, Jr., and DeEtta A. Antoun, his wife, filed their Notice of Intervention and certified copies of the notice were served on all interested parties. On September 26, 1979 the intervenors filed their Motion to Quash Appeal, and certified to the service of copies of the motion on all interested parties or their counsel.

The matter was placed on the December Argument Court List and heard on December 6, 1979. It is ripe for disposition.

Section 1006 of the Pennsylvania Municipalities Planning Code, 6 Pa. M.P.C., 53 P.S. Sec. 11006, as amended, provides inter alia:

> "(1) A landowner who desires to file a zoning application or to secure review or correction of a decision or order of the governing body or of any officer or agency of the municipality which prohibits or restricts the use or development of land in which he has an interest on the grounds that such decision or order is not authorized by or is contrary to the provisions of an ordinance or map shall proceed as follows:
>
> "(a) From a decision of the governing body or planning agency under a subdivision or land development ordinance the landowner may appeal directly to court or to the zoning hearing board under section 913.1 in cases where that section is applicable. If the municipality provides a procedure, formal or informal, for the submission of preliminary or tentative plans an adverse decision thereon shall, at the landowner's election, be treated as final and appealable.
>
> "(b) From the decision of the governing body or planning agency denying tentative approval of a development plan under section 709 (3) or, if tentative approval has been granted, from any adverse decision on an application for final approval, the landowner may appeal directly to court or to the zoning hearing board under section 913.1 in cases where that section is applicable."

Section 508 of Pa. M.P.C., 53 P.S. 10508, as amended, provides inter alia:

> "All applications for approval of a plat (other than those governed by Article VII, whether preliminary or final, shall be acted upon by the governing body or the planning agency within such time limits as may be fixed in the subdivision and land development ordinance but the governing body or the planning agency shall render its decision and communicate it to the applicant not later than ninety days following the date of the regular meeting of the governing body or the planning agency (whichever first reviews the application) next following the date the application is filed, provided that should the said next regular meeting occur more than thirty days following the filing of the application, the said ninety-day period shall be measured from the thirtieth day following the day the application has been filed.
>
> "(1) The decision of the governing body or the planning agency shall be in writing and shall be communicated to the

> applicant personally or mailed to him at his last known address not later than fifteen days following the decision.
>
> "(2) When the application is not approved in terms as filed the decision shall specify the defects found in the application and describe the requirements which have not been met and shall, in each case, cite to the provisions of the statute or ordinance relied upon;
>
> "(3) Failure of the governing body or agency to render a decision and communicate it to the applicant within the time and in the manner required herein shall be deemed an approval of the application in terms as presented unless the applicant has agreed in writing to an extension of time or change in the prescribed manner of presentation of communication of the decision, in which case, failure to meet the extended time or change in manner of presentation of communication shall have like effect."

In *Rosanelle v. Quakertown Borough Council,* Pa. Cmwlth. , 402 A. 2d 1115 (1979), the defendant Council rejected the plaintiff's subdivision and land development plan and notified the plaintiff of the reasons for the rejection without citing the provisions of the statute or ordinance relied upon as required by Section 508 (2) of the Pa. M.P.C., supra. The plaintiff took an *appeal* to the Court of Common Pleas of Bucks County (italics ours). That court found the councilmanic decision failed to conform to the requirements of Section 508 (2), supra, but concluded that the non-compliance did not result in the approval of the application under Section 508 (3) of the Pa. M.P.C., supra. The Commonwealth Court reversed the trial court, ordered the subdivision and land development plans submitted "be deemed approved pursuant to Section 508 (3) . . .," and held:

> "The language of subsection (2), however, is clearly mandatory and requires citation to the specific provisions of the ordiance relied upon when an application is not approved. V. C. Finisdore, Inc. v. Township of Lower Merion, 27 Pa. Cmwlth. 598, 367 A. 2d 412 (1976); Harrisburg Fore Associates v. Board of Supervisors of Lower Paxton Township, 21 Pa. Cmwlth. 137, 344 A. 2d 277 (1975). In this case, Council obviously failed to comply with this mandate. It follows that, pursuant to the requirements of subsection (3), the subdivision and land development plans must be deemed approved." (P.P. 1116)

The intervenors' sole contention is that the instant appeal must be quashed because, accepting as true paragraphs

5, 6, 7 and 8 of appellant's Zoning Appeal Notice, their sole remedy is by an action of mandanus and is not permitted under Section 1006 of the Pa. M.P.C.

The decision of the Commonwealth Court in Rosanelle, supra., and the language of Section 1006 (3) (a) of the Pa. M.P.C., supra., leads us to conclude the procedure followed by appellant was proper; this Court does have jurisdiction in the case at bar; and intervenors' motion must be dismissed.

ORDER OF COURT

NOW, this 25th day of January, 1980, the Motion to Quash is dismissed.

Exceptions are granted the intervenors.

COMMONWEALTH v. ROACH, C.P. Cr.D. Franklin County Branch, No. 405 of 1978

Sentencing - Double Jeopardy, State Correctional Institution Suspended Sentence - 3 Judge Superior Court Panel - Precedent Appeal to Supreme Court

1. The Court's practice of imposing a sentence of imprisonment at a state correctional institution, suspending that sentence and as a condition of probation ordering a flat term in the county prison does not constitute double jeopardy under the Fifth Amendment of the U.S. Constitution in that if the defendant's probation is revoked, credit is given the defendant for time spent in the county prison.

2. *Commonwealth v. Johnson*, decided August 30, 1979 (Superior Ct. No. 525 March Term, 1977) by a three judge panel of the Superior Court containing only one active Superior Court judge held the Court's SCI Suspended Sentence practice as placing a defendant in double jeopardy.

3. The decision of a three judge panel of the Superior Court with only one judge on the panel an active judge of that Court, does not constitute precedent for a lower court in that the Superior Court is a constitutionally mandated seven member court.

4. In that the District Attorney has petitioned the Supreme Court for allowance of appeal to the Superior Court's decision in *Commonwealth v. Johnson*, the constitutional question remains open until the appeal is decided.

John F. Nelson, Esq., Assistant District Attorney for the Commonwealth

Timothy W. Misner, Esq., Counsel for the Petitioner

OPINION AND ORDER

KELLER, J., October 25, 1979:

Roy Robert Roach was serving a sentence in the Franklin County Prison in September and October 1978, and had been granted work release privileges while so incarcerated. Without any permission or authorization from the Court or prison authorities, he did in September 1978 leave the Clever Machine Shop in Mercersburg, Pennsylvania, his work release employer, and go to Hagerstown, Maryland to be married. Presumably, he returned to the county prison on time and no action was taken for this violation of work release rules. On October 19, 1978 he left the Franklin County Prison to go to his place of employment in Mercersburg. He surrendered himself to either the Pennsylvania State Police or the local police department in McConnellsburg, Fulton County, Pennsylvania on October 28, 1978, and was returned to the Franklin County Prison. According to the petitioner he woke up at 6:00 A.M. on October 20, 1978 in Danville, North Carolina and he recalled driving his own car and cashing his paycheck on the way to finance his trip. (It is the recollection of this Court that the Assistant District Attorney advised the Court at the time Mr. Roach entered his plea of guilty that he was on his honeymoon during this period.)

Mr. Roach was charged with escape, a felony of the third degree. On November 8, 1978, he waived arraignment and entered a plea of guilty to the escape charge after a full and complete guilty plea colloquy was conducted.

On December 20, 1978 Mr. Roach appeared before the Court for sentencing and was represented by Assistant Public Defender Douglas W. Herman. The Pre-Sentence Report filed in the case indicated the petitioner had a long-standing alcohol abuse problem which was reflected in a substantial number of criminal charges involving driving under the influence. The report also indicated that he had some rather substantial skills as a machinist, but an extremely poor work record which undoubtedly contributed to his involvement with the Court on non-support charges, and accumulated arrearages. The defense counsel made an impassioned plea to the Court not to impose a State Correctional Institution sentence upon the defendant, and inter alia argued that the