for their counsel's mistake, especially when counsel has reasonably explained his mistake.

Once again, the only prejudice to the defendants is that they now have to defend against this cause of action. We would only be redundant and no good purpose would be served if we were to discuss that argument again.

On balance, we find that the great weight of the prejudices would befall the plaintiffs if the previous dismissal were to be reinstated. We hold, that based upon the above discussion, plaintiffs have shown good cause why the action was properly reinstated after it had been previously dismissed for want of prosecution.

We now turn to the second issue of whether plaintiff has shown good cause to enable us to grant the second application for extension.

Plaintiffs allege as their reason for seeking a second extension of time for filing a certificate of readiness, that plaintiff, Leon Deardorff, Sr., sustained injuries in the accident which have not yet healed to the point where his damages are ascertainable. This is precisely the same reason offered in the first application for extension that was granted.

We are satisfied that plaintiffs have offered sufficient additional medical evidence in the interim verifying a continuation of the reason for the granting of the first unopposed application for extension. We, therefore, conclude that plaintiffs have shown good cause for this Court to grant the second application for extension and the second application is granted, extending the time for filing a certificate of readiness to October 1, 1987, as to all defendants.

In summary, we note that the main issue in this matter has been the proper interpretation and application of Local Rule 39-1801 *et seq.* These specific rules were promulgated primarily to serve as a prod to move along what has been termed "active cases". The primary intent was not to give the rules a static, rigid, inflexing meaning. As mentioned in *Byard F. Brogan v. Holmes Elec. Prot. Co. of Phila.,* 501 Pa. at 239, 460 A.2d at 1096, "almost four decades ago (the Supreme Court of Pennsylvania), speaking through Justice Horace Stern, said: 'procedural Rules are not ends in themselves but means whereby justice, as expressed in legal principles, is administered. They are not to be exalted to the status of substantive objectives . . .' *McKay v. Beatty,* 348 Pa. 286, 35 A.2d 264 (1944).

Parenthetically, we find it appropriate to note that the rationale presented for opening judgments of non pros and default judgments is equally applicable in the case at bar.

ORDER OF COURT

NOW, this 26th day of August, 1987:

The application of plaintiffs to extend the time for filing a certificate of readiness to October 1, 1987 as to defendants George Transfer and Rigging Company, Inc. and Michael Ray Shew to reinstate the order dismissing the above-captioned action is denied.

The motion of defendants George Transfer and Rigging Company, Inc. and Michael Ray Shew to reinstate the order dismissing the above-captioned action is denied.

Exceptions are granted the said defendants.

VALLEY QUARRIES, INC. V. BOARD OF SUPERVISORS OF GREENE TOWNSHIP, C.P. Franklin County Branch, Misc. Doc. Vol. Y, Page 569

Zoning Appeal - Conditional Use Permit - Vested Rights

1. The rules governing statutory construction are applicable to statutes and ordinances alike.

2. The obtaining of an option on real estate, expenditure of funds, acquisition of title and the knowledge of the Township of intended use prior to amendment of the zoning ordinance does not establish vested rights.

3. A mere "sketch plan" is insufficient to bar the effectiveness of a subsequent zoning amendment.

4. Subdivision approval and acknowledgement of intended use are analogous to a "sketch plan" and not a preliminary plan.

Philip S. Davis, Esq., Counsel for Appellant
Richard W. Davis, Esq., Counsel for Appellant
Robert E. Graham, Esq., Counsel for Appellant
Paul F. Mower, Esq., Counsel for Appellee
Welton J. Fischer, Esq., Counsel for Appellee
David C. Cleaver, Esq., Counsel for Intervenors

KELLER, P.J., July 7, 1987:

On January 16, 1986, Valley Quarries, Inc., hereafter Appellant, filed an application with Greene Township for a conditional use permit seeking approval to surface mine sand in an R-1 Zoning District (Low Density Residential). Appellant's land is bounded by Woodstock Road, Brindle Road, Walker Road, and privately owned agricultural lands. Three-fourths of Appellant's land lies in a flood hazard district.

On February 12, 1986, and March 10, 1986, hearings were held before the Greene Township Planning Commission. Following the hearings, the Planning Commission recommended to the Greene Township Board of Supervisors, hereafter Appellee, that the Appellant's request for a conditional use permit be denied due to traffic safety and a conflict in the Zoning Ordinance which required different fence heights in a flood hazard district in which the surface mining is proposed and around mining operations.

On March 18, 1986, the Greene Township Board of Supervisors met in a regular session and after hearing from Appellant denied the Appellant's request for a conditional use permit.

On April 12, 1986, Appellant filed a notice of zoning appeal appealing the denial by the Greene Township Board of Supervisors to this Court.

On May 8, 1987, certain citizens of Greene Township, hereafter Intervenors, filed a notice of intervention. On June 6, 1986, Appellant filed a petition to strike the notice of intervention. On September 6, 1986, Appellant and Intervenors filed a stipulation identifying a class of persons who would be permitted to intervene.

The matter was listed for trial and a pre-trial conference was held on February 23, 1987. It was established at the pre-trial conference that no on-the-record hearing on the application of Appellant was held by the Appellee and no decision of the Board with specific reasons for the decision was issued. The Court concluded that the matter must be remanded to the Greene Township Board of Supervisors for appropriate action leading to a full on-the-record hearing which will permit the Appellant to properly introduce all evidence and exhibits which it might have in support of its application, permit the introduction of all evidence and exhibits of the Intervenors in opposition to the application, permit the reception of all evidence of interested

citizens, and permit the preparation and filing of a decision with reasons for the same.

To facilitate the handling of the remanded hearing above referred to, counsel for the parties have identified the following legal issues which this Court has agreed to decide:

(a) Is surface mining a use which is allowed in an R-1 zoning district with a flood hazard district overlay?

(b) Whether the amendment to the zoning ordinance effective May 29, 1984 is binding upon the appellants who acquired the real estate in question by deed dated October 12, 1983 under an option agreement dated January 11, 1983; the Appellant having expended funds in testing the property and preparing for the subdivision application procedure, and having engaged in communications concerning the proposed use with the engineer for the township supervisors, and where the Appellant's application for conditional use permit was filed on or about January 16, 1986?

DISCUSSION

The Appellant and Appellee are in agreement that surface mining is a conditional use permitted in an R-1 district with a flood hazard district overlay. Both parties request the Court to answer the first issue in the affirmative. To the contrary, the Intervenors contend that surface mining is not a permitted use in such a district and the Court's answer must be in the negative.

Section 2.4E of the Greene Township Zoning Ordinace provides:

> Any use not permitted by This Ordinace shall be deemed to be prohibited. Any list of prohibited uses contained in any section of This Ordinance shall not be deemed to be an exhaustive list but has been included for the purpose of clarity and emphasis, and to illustrate, by example, some of the uses frequently proposed that are deemed undesirable and incompatible and thus prohibited.

Section 3.7 FLOOD HAZARD DISTRICT (FH) of the ordinance provides inter alia:

K. Permitted Uses:

1. Cultivation and crop harvesting.
2. Pasture, grazing land.
3. Outdoor plant nursery; orchard.
4. Outdoor recreational uses.
5. Parking facilities provided the natural surface is not rendered impervious.
6. Unenclosed, roofed shelter such as picnic pavillions provided all structural anchoring is approved by the Township.

7. Any other use similar to the above and not contrary to the purpose and objectives of the Flood Hazard District including essential services.

L. Conditional Uses:
1. Out door storage of materials subject to the requirements of Subsection N.
2. Individual mobile homes subject to the requirements of Subsection N.
3. Principal or accessory buildings incidental to Subsection K and subject to the requirements of Subsection N.

M. Prohibited Uses:
1. Nursing Homes
2. Jails
3. Hospitals
4. Mobilehome Parks
5. Junk Yards

Relying upon the foregoing sections of the ordinance, the Intervenors urge a "plain logical reading" compels the conclusion that surface mining is a prohibited use.

The appeal of the Intervenors' contention lies in the facts that the ordinance sections they rely upon appear to support their position and it provides a simple solution to an otherwise difficult problem. However, our responsibility to all of the parties requires a more in-depth analysis of all the applicable sections of the Greene Township Zoning Ordinance and a careful consideration of the positions of Appellant and Appellee.

Section 1.1 OBJECTIVES - The ordinance provides inter alia:
A. To guide and regulate the orderly growth, development, and redevelopment of the Township, in accordance with a comprehensive plan of long-term objectives, principles, and standards deemed beneficial to the interests and welfare of the people.

B. To protect the established character and the social and economic well-being of both private and public property.

C. To promote, in the public interest, the utilization of land for the purposes for which it is most appropiate, and to provide maximum protection of residential areas.

H. To conserve the value of buildings and to enhance the value of land throughout the Township.

Section 3.2 (R-1) LOW DENSITY RESIDENTIAL DISTRICT-

NOTICE IS HEREBY GIVEN of the intention to deliver forthwith for filing with the Department of Banking of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, Articles of Incorporation for the purpose of incorporating THE MONT ALTO STATE INTERIM BANK, a corporation to be organized under the provisions of the Banking Code of 1965. The purpose of the proposed institution is to merge with and into THE MONT ALTO STATE BANK, Mont Alto, PA., which will continue as the surviving institution with all its powers, purposes and objects continuing unimpaired, namely its purposes of receiving deposits, making loans, and transacting generally any and all business permitted to a bank, as defined in the Banking Code of 1965, as amended, and under any present of future laws of the Commonwealth of Pennsylvania. The names and addresses of the incorporators and the initial Board of Directors as they appear in the Articles of Incorporation are as follows (all of the following are Directors and Messrs. Zullinger, Bender and Elliott are the incorporators):

Name — Address

Robert G. Zullinger
761 Broad Street
Chambersburg, PA 17201

Charles S. Bender, II
634 S. Coldbrook Avenue
Chambersburg, PA 17201

Frank S. Elliott
256 Briar Lane
Chambersburg, PA 17201

Jay L. Benedict, Jr.
688 Bowman Road
Chambersburg, PA 17201

Martha B. Walker
2003 Philadelphia Ave.
2003 Philadelphia Ave.
Chambersburg, PA 17201

WOLF, BLOCK, SCHORR AND SOLIS-COHEN
Solicitors
12th Floor Packard Building
Philadelphia, PA 19102

11/13/87

NOTICE OF FILING OF
ARTICLES OF INCORPORATION

Notice is hereby given that Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on the 20th day of October, 1987, for the purpose of obtaining a certificate of incorporation.

The name of the proposed corporation organized under the Commonwealth of Pennsylvania Business Corporation Law approved May 5, 1933, P.L. 364, as amended, is Marshall Apparel Consultants, Incorporated - A Close Corporation.

The purpose for which the corporation has been organized is to engage in and to do any lawful acts concerning any or all lawful business for which corporations may be incorporated under the Business Corporation Law of the Commonwealth of Pennsylvania.

LAW OFFICES OF WELTON J. FISCHER
550 Cleveland Avenue
Chambersburg, PA 17201

11/13/87

NOTICE IS HEREBY GIVEN THAT Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, PA, on the 7th day of October, 1987 for the purpose of incorporating a nonprofit corporation under the Pennsylvania Nonprofit Corporation Law of 1972. The name of the corporation is Mont Alto Bible Baptist Church. The purposes for which it has been organized are: The administration of two ordinances, the Lord's Table and water baptism by immersion, the spiritual growth of its members, evangelization of the community, and the propagation and furtherance of the Gospel of the Lord Jesus Christ; also to conduct for Christian worship and instruction, churches, schools parsonages, and other charitable, and benevolent character, to the end that its own members and others may be generally instructed and guided concerning the doctrines of the word of God.

Ullman, Painter and Misner
Attorneys
10 East Main Street
Waynesboro, PA 17268

11/13/87

The ordinance provides inter alia:

5. Sand pits, slate pits, and related surface mining operations, which are subject to the rules and regulations of the Commonwealth of Pennsylvania, Department of Enviromental Resources, Bureau of Surface Mine Reclamation, are subject to the following Standards as well as the applicable provisions set forth in Article IX of this Ordinance.

   a. An individual, corporate, or otherwise, proposing such activity shall verify compliance and licensing with the Pennsylvania Department of Enviromental Resources.

   b. All extraction and processing operations located within five hundred feet (500') of any residence shall be conducted between the hours of 6:00 A.M. and 7:00 P.M.

   c. All extraction processing and stock piling operations shall be screened in accordance with Definition #88 of This Ordinance and a plan of such screening shall be submitted to the Township prior to conditional use approval.

   d. The land is owned or leased by an individual, or corporate or otherwise that has been engaged in the business of mineral extraction.

   e. The land contains mineral deposits of a demonstrable economic value.

Section 3.7 FLOOD HAZARD DISTRICT (FH). In addition to subsection K, L and M, supra, provides inter alia:

A. Purpose

1. To promote the general welfare, health and safety of Township residents by controlling the erection of structures in flood hazard areas.

2. Preserve the natural characteristics of designated flood prone area by preventing rapid water runoff to contribute to downstream flooding and by providing areas for groundwater absorption for maintenance of the subsurface water supply.

3. Encourage appropriate construction practices in order to prevent or to minimize flood damage in the future.

4. Reduce financial burdens on the community at large by preventing excessive development in areas subject to flooding.

C. District Applicability:

The Flood Hazard District shall be deemed and overlay on any Zoning District now or hereafter applicable to any lot. Should the Flood Hazard District be declared inapplicable to any lot by action of the Township or any court of competent jurisdiction, the zoning of such lot shall be deemed to be the District in chich it is located without consideratin of this section. It shall be unlawful for any construction, subdivision or development to be undertaken unless all appropriate permits and approvals have been obtained from Greene Township Board of Supervisors or its designated agent.

F. Municipal Liability:

The granting of a building permit or approval of a subdivision or land development plan in any flood hazard district shall not constitute a prepresentation, guarantee or warranty of any kind by the Township, or by any official or employee thereof, of the practicability or safety of any structure, use, or other proposed plan and shall create no liability on, or cause of action against, such public body, official, or employee for any damage that may result pursuant thereto.

G. Administration:

1. Subdivision and land development plan approvals, if applicable, and building permits shall be required before any construction or development is undertaken within any area of the Township.

2. **Issuance of Building Permit:**
   a. The Zoning Officer shall issue a Building Permit only after it has been determined that the proposed work to be undertaken will be in conformance with the requirements of this and all other applicable codes and ordinances.

   b. Prior to the issuance of any building permit the Zoning Officer shall review tha application for permit to determine if all other necessasry government permits required by State and Federal laws have been obtained, such as those required by the Pennsylvania Sewage Facilities Act (Act 1966-537, as amended); the Pennsylvania Dam Safety and Encroachments Act (Act 1978-325, as amended); the Pennsylvania Clean Streams Act (Act 1937-394, as amended); the U.S. Clean Water Act, Section 404, 33, U.S.C. 1334. No permit shall be issued until this determination has been made.

   c. No encroachment, alteration, or improvement of any kind shall be made to any watercourse until all adjacent

municipalities which may be affected by such action have been notified by the Township, and until all required permits or approvals have been first obtained from the Department of Enviromental Resources, Bureau of Dams and Waterway Management.

In addition, the Federal Insurance Administrator and Pennsylvania Department of Community Affairs, Bureau of Community Planning, shall be notified by the Township prior to any alteration or relocation of any watercourse.

O. Variances:

If compliance with any of the requirements of this Section would result in exceptional hardship to a prospective builder, developer or property owner, the Township may upon request to the Zoning Hearing Board, grant relief from the strict application of the requirements of this Section. Request for a variance shall be made according to Section 8.4.3 of this Ordinance and the following procedures.

1. If granted, a variance shall involve only the least modification necessary to provide relief.

2. In granting any variance, the Township shall attach whatever reasonable conditions and safeguards it considers necessary in order to protect the public health, safety, and welfare, and to achieve the objectives of this Ordinance.

3. Whenever a variance is granted, the Township shall notify the applicant, in writing, that:
   a. The granting of the variance may result in increased premium rates for flood insurance.
   b. Such variances may increase the risks to life and property.

4. In reviewing any request for a variance, the Township shall consider, at a minimum, the following:
   a. That there is good and sufficient cause.
   b. That failure to grant the variance would result in exceptional hardship to the applicant.
   c. That the granting of the variance will; (i) neither result in an unacceptable or prohibited increase flood heights, additional threats to public safety, or extraordinary public expense; (ii) nor create nuisances, cause fraud on, or victimize the public, or conflict with any other applicable State or Local Ordinances and Regulations.

ambiguity, the letter of it is not to be disregarded under the pretext of pursing its spirit.

(c) When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:

(1) The occasion and necessity for the statute.
(2) The circumstances under which it was enacted.
(3) The mischief to be remedied.
(4) The object to be attained.
(6) The consequences of a particular interpretation.
(8) Legislative and administrative interpretations of such statute.

Section 1922 provides inter alia:

In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:

(1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.

(2) That the General Assembly intends the entire statute to be effective and certain.

(5) That the General Assembly intends to favor the public interest as against any private interest.

Section 1933 provides:

Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be constructed if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be constructed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provisions shall prevail.

Section 1934 provides:

Except as provided in section 1933 of this title (relating to particular controls general), whenever, in the same statute, several clauses are irreconcilable, the clause last in order of date or positions shall prevail.

The agreement of the Appellant and Appellee that surface mining is an allowed use in an R-1 Zoning District with a flood hazard district overlay, appears to be predicted upon the deposi-

tion of Andrew C. Paszkowski, a township engineer/planner for Appellee, and Lawrence John Lahr, a planning consultant for Appellee and various exhibits identified and attached to their depositions. The witnesses were employed in their respective capacities during the times relevant to the case at bar.

From a review of the depositions and exhibits, we find the following facts:

1. The Greene Township Comprehensive Plan finds the extraction of sand and gravel deposits constitutes the primary industrial activity within the township and identifies areas currently being worked as well as areas including the one here in question owned or leased for future working.

2. The Comprehensive Plan recommends "The Township move, through its zoning powers, to insure continued development of their natural resources, and to assure that undeveloped natural resources will not be forever lost by prior development of the land for other purposes", and to protect the community from ill effects by providing for proper extraction procedures.

3. Non-conforming uses in Greene Township are registereed and mapped, and a list of non-conforming uses maintained. Ongoing surface mining operations in flood hazard districts are not listed as non-conforming uses.

4. The Township's existing land use map identifies Appellee's real estate here in question as a proposed extractive use area.

5. During the time here relevant, Mr. Lahr recalled that one permit was issued for surface mining as a conditional use in an R-1 district with a flood hazard district overlay. Mr. Paszkowski could recall of no applications being refused.

6. Surface mining was permitted as a conditional use in R-1 districts by a 1979 amendment to the zoning ordinance.

7. Amendments to the zoning ordinance pertaining to flood hazard districts were adopted to maintain subsidized flood insurance eligibility for the Township.

8. On September 12, 1983, Mr. Paszkowski sent a memorandum to the Greene Township Planning Commission concerning the final subdivision plan review for the real estate here in question. In addition to recommending final plan approval, he observed inter alia:

> "Both lots . . . will continue to be used for farming until such time Valley Quarries, Inc. obtains a conditional use permit in accordance with section 3.2(B) of the Greene Township Zoning Ordinance, and a mining permit from the Pennsylvania Department of Enviromental Resources.
>
> "The applicant should also be advised that Valley Quarries, Inc. must comply with section 3.7 of the Zoning Ordinance which governs the *flood hazard* area adjacent to the Conococheague Creek and Tract A-1. . . These *surface water runoff problems must be addressed when the conditional use* permit for Valley Quarries, Inc. is submitted for approval.
> (Underlining* Mr. Paszkowski)

9. The witnesses neither participated in or were aware of any discussions, memoranda or correspondence pertaining to permitting or prohibiting surface mining in a flood hazard district.

10. When an R-1 district is located in a flood hazard district the real estate in that district is subject to the regulations and procedures set forth in both sections of the zoning ordinance with the preponderant control being the major district designated on the zoning map.

11. Section 3.7 K.7 coupled with sections 3.7.L.2 and 3 were apparently employed to grant conditional use permits for a town house, barn and various structures not qualifying as permitted uses under subsection K-1 through 6, and not specifically identified as conditional uses.

From our review of all the applicable sections of the ordinance, the application of appropriate sections of the Statutory Construction Act and the interpretation given those ordinance sections here under review, we conclude:

1. The need for subsidized flood insurance caused the inclusion of the flood hazard district section in the ordinance.

2. Surface mining is economically important to Greene Township and being in the nature of a "favored industry" the Township intended to regulate such activities in flood hazard districts but not to prohibit them by implication, for that would be absurd, economically unreasonable and contrary to the stated objectives of the ordinance.

3. An ambiguity exits between sections 2.4E, 3.7K and L, various technical provisions of 3.7 to the Zoning Hearing Board to grant relief by variance in cases of extraordinary hardship; for a strict construction of sections 2.4E and 3.7K and L would prohibit all uses not permitted; whereas the subsections clearly evidence an intent to permit uses not otherwise permitted.

4. Section 2.4E constitutes a general provision whereas sections 3.7N and O are special provisions and must, therefore, be construed as exceptions to the general provision. Furthermore, sections 3.7N and O must prevail because they appear after section 2.4E in the ordinance.

5. The unchallenged administrative interpretation of the ordinance and the grant of conditional use permits for uses apparently prohibited by section 2.4E demonstrates an intent on the part of the municipal government to authorize uses in flood hazard districts which are neither specifically

*Editor's note - Italics used here (pg. 251), in place of underlines

prohibited nor permitted subject to appropriate requirements, regulations and restrictions.

We, therefore, conclude the surface mining is a conditional use which may be authorized in an R-1 Zoning District with a flood hazard district overlay.

We now turn to the second issue whether the amendment to the zoning ordinance effective May 29, 1984 is binding upon the Appellant. Appellant acquired the real estate in question by deed dated October 12, 1983 under an option agreement dated January 11, 1983. Appellant expended funds in testing the property and preparing for the subdivision application procedure and engaged in communications concerning the proposed use with the engineer for the Township Supervisors. Appellant filed its application for a conditional use permit on January 16, 1986.

Appellant asserts the position that its purchase of the option for the real estate, expenditures of funds, acquisition of title, subdivision of the tract, coupled with the knowledge by the Township of the intended use of the real estate prior to the amendment of the ordinance affecting surface mining, must result in its being subject only to the pre-amendment provisions of the ordinance. Appellant cites *City of Erie v. Griswold,* 184 Pa. 435, 39 A. 231 (1898), for the proposition that where *vested rights* will be impaired, an ordinance should not be given retroactive effect. (Emphasis added).

The basic distinction between *Griswold* and the present fact situation is that in *Griswold* the owner had obtained *vested rights.* The Appellant had established no vested rights before the time when the amendment became effective. Appellant errs in relying upon Ryan, *Pennsylvania Zoning Law and Practice,* Section 8.2.8, as authority for its position that the combination of the owner acting in good faith and incurring expenses in reliance upon the existing ordinance would establish a vested right and render the pending ordinance rule inapplicable. We perceive Section 8.2.8 to conclude that the "good faith" of the applicant becomes significant where the expenses were incurred on the basis of a *permit issued.* (Emphasis added). We note that in Section 8.2.9 of the same text, it is pointed out that in *Shapiro v. Zoning Board of Adjustment*, 377 Pa. 621, 105 A.2d 299 (1954), while the court granted the applicant's permit because it found the amendment to constitute special legislation directed at the applicant, the opinion specifically indicates that while the particular applicant had incurred expenses in reliance on that permit, the case did not turn on that fact.

Daywalt paid $150.00 of the cost of the well drilling and defendants paid $500.00 plus they gave the well driller the mobile home axles which defendant Delbert Daywalt estimated to have a value of $50.00. The well is connected to the mobile home and provides running water.

11. In subsequent years the defendants:

(a) Erected a frame porch on the front of the trailer and enclosed it to make storage space. It is attached to the mobile home by a floor joist bolted to the fram and by lag bolts attached to the studding of the trailer. It was set on pieces of telephone poles sunk into the ground.

(b) Erected a frame bedroom addition on the west side of the mobile home. A piece of sheeting was removed from the side of the mobile home and a door cut into it to permit access to the bedroom. The bedroom addition is placed on a cement block foundation and attached to two metal plates.

(c) Erected seven or eight small sheds or pens for storage space, trapping supplies and as chicken coops.

(d) The defendants planted a row of 20 or more pine trees around the northern property line adjoining the Potter property. They also planted two peach trees, two apple trees and two pear trees on the real estate, and erected a small grape arbor to accommodate grapevines which had volunteered themselves.

12. The bedroom addition is attached to the mobile home by sinking special screw-type spikes into the mobile home studding.

13. The defendants testified that they pay a real estate tax on the mobile home but no real estate taxes on the land.

14. The defendants have never paid any rent to Allen E. Daywalt or to the plaintiffs.

15. The defendants did not secure a building permit for the additions to the mobile home.

16. The defendants intended the additions to the trailer to be permanent and feel they would damage the mobile home if they destroyed the additions. They are also uncertain whether they could remove the mobile home from the real estate even if the axles were acquired and attached, and the additions removed.

17. Prior to Allen E. Daywalt's marriage to Kathryn in November 1978, he had told his son, Delbert, one of the defendants, that he would give him the real estate his mobile home was on if he had it

surveyed and brought him a deed to convey it. He never withdrew that offer but believed Delbert would understand once he was married that it was no longer available.

18. The defendant, Delbert Daywalt, testified that at no time did he or his wife ever have the real estate surveyed, have a deed prepared and presented to Allen E. Daywalt so that they could acquire title to the property here in question or any portion thereof.

19. Prior to the plaintiff's purchase of the real estate here in question, plaintiff, Robert F. Bennett, talked to defendant, Delbert Daywalt, and the defendant told him that he owned the real estate. When the plaintiff asked to see his deed the defendant told him he'd show it to him in court. On several other occasions when the plaintiff, Robert F. Bennett, was working on the mobile home they purchased from Allen E. Daywalt and Kathryn L. Daywalt, repeated that he owned the property.

20. The defendant, Delbert Daywalt also told the plaintiff, Robert F. Bennett, that he had forged his mother's signature to a deed but he was not clear as to what deed he was referring to. The plaintiffs examined the chain of title to the property and found no record evidence of any interest of Della Daywalt in the real estate.

21. The defendant, Delbert Daywalt, told plaintiff's surveyor, Randy McIntyre, prior to the date of purchase of the real estate by the plaintiffs that the only title defect had to do with his mother's interest, and the divesting of her interest without her knowledge or consent.

22. The plaintiffs have owned the real estate in question since October 21, 1985. On October 28, 1985 their attorney wrote to the defendants advising them of the purchase of the real estate; they they could continue to occupy the real estate on the condition that they paid rent in the amount of $50.00 per month commencing November 1, 1985 on a month-to-month basis and that eviction proceedings would be commenced if rent was not paid.

23. On January 29, 1986, the plaintiffs formally notified the defendants to vacate within thirty days of service, and service was made on January 29, 1986.

24. The defendants have remained in possession from October 21, 1985 to the date of trial, and have paid no rent to the plaintiffs.

25. The plaintiff, Robert F. Bennett, testified that if he rented the premises he would charge $90.00 per month, and the plaintiffs asserted in their reply to the counterclaim that the fair rental value for the premises occupied by the defendants was $90.00 per month.

26. The plaintiffs made no claim for rent in the amount of $90.00 per month until their reply was filed, and they are limited to their initial claim of $50.00 per month.

27. The well servicing the defendants' mobile home increased the value of the plaintiffs' real estate by $500.00.

28. The defendants' mobile home remains equipped with a trailer hitch and can be moved from plaintiff's real estate, if equipped with necessary axles and wheels. The additions can be dismantled and removed. The sheds and pens can be removed.

DISCUSSION

Defendants oppose this ejectment action asserting that they are entitled to ownership of the real estate. In his brief, defense counsel argued that Allen Daywalt's promise to convey the land is binding on the theory of promissory estoppel. Paragraph (1) of §590 of Restatement (Second) of Contracts states:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

In the present case, the testimony given failed to disclose evidence that Mr. Daywalt's gratuitious promise induced the defendants to move onto the land. Instead, it appears that the move was motivated by the defendants' eviction from adjacent land and immediate need for ground space. Nor is there any evidence that injustice can be avoided only by enforcement of the promise. The evidence presented showed only that Allen Daywalt offered to convey real estate to his son if his son procured the survey and deed. The father testified that he thought the land should be worth at least that much to his son; and that his son would understand that his marriage terminated the offer. The son never took the required actions. The major improvement, the mobile home, can be moved from the property. Delbert Daywalt also improved the land by clearing it of junk and brush, digging a well and planting trees. The monetary value of these improvements was less than a thousand dollars, which is not an unreasonable amount of rent to pay for a ten year occupancy. Justice does not compel enforcement of the promise.

> "If promissory estoppel is loosely applied, any promise, regardless of the complete absence of consideration would be enforceable."

NOTICE IS HEREBY GIVEN that HEISEY CORP., a Pennsylvania corporation having its registered office at 92 West Main Street, Waynesboro, Pennsylvania 17268, has filed a Certificate of Election to Dissolve with the Department of State of the of the Commonwealth of Pennsylvania in Harrisburg pursuant to and in accordance with the provisions of the Business Corporation Law of the Commonwealth of Pennsylvania, approved May 5, 1933, as amended, and that the said corporation is winding up its affairs in the manner prescribed by said law, so that its corporate existence shall be ended upon the issuance of a Certificate of Dissolution by the Department of State of the Commonwealth of Pennsylvania.

MAXWELL, MAXWELL, DICK & WALSH
Wayne Building
92 West Main Street
Waynesboro, PA 17268-1591
Solicitors

12/18, 12/25

NOTICE IS HEREBY GIVEN that Articles of Incorporation have been filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania on December 2, 1987, for the purpose of obtaining a certificate of incorporation. The name of the proposed corporation organized under the Commonwealth of Pennsylvania Business Corporation Law approved May 5, 1933, P.L. 364, as amended, is APPRAISAL REALTY ASSOCIATES, LTD. The purpose for which the corporation has been organized is to render realty appraisal services and any other lawful purpose for which corporations may be incorporated under the Business Corporation Law of the Commonwealth of Pennsylvania.

Martin and Kornfield
17 North Church Street
Waynesboro, PA 17268

12/25/87

IN THE COURT OF COMMOM 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: January 7, 1988.

LEGAL NOTICES, cont.

CORMANY: First and final account, statement of proposed distribution and notice to the creditors of Valley Bank and Trust Company, Executor for the Estate of Thelma Cormany, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

OVERCASH: First and final account, statement of proposed distribution and notice to the creditors of Chambersburg Trust Company, Executor of the Estate of Wilbur H. Overcash, late of Chambersburg, Franklin County, Pennsylvania, deceased.

TROUPE: First and final account, statement of proposed distribution and notice to the creditors of Citizens National Bank and Trust Company of Waynesboro, Pennsylvania, Trustee for benefit of Janet Inez Troupe who died June 8, 1986, and for living remaindermen. This is a testamentary trust established under the Maryland Last Will and Testament of Hubert F. Troupe, deceased.

WALLECH: First and final account, statement of proposed distribution and notice to the creditors of Pearl M. Wincer and Ruth E. Shives, Executrices of the Estate of Clarence A. Wallech, late of Antrim Township, Franklin County, Pennsylvania, deceased.

WALLECH: First and final account, statement of proposed distribution and notice to the creditors of Ruth E. Shives, Executrix of the Estate of Olive G. Wallech, late of Guilford Township, Franklin County, Pennsylvania, deceased.

Robert J. Woods
Clerk, Orphans' Court

12/11, 12/18, 12/25/87 & 1/1/88

> "If promissory estoppel is loosely applied, any promise, regardless of the complete abscence of consideration would be enforceable." *Volkwein v. Volkwein,* 146 Pa. Super. 265 at 273, 22 A.2d (1941).

We also consider whether, as the defendants claim, this failed oral contract for the conveyance of land can be saved by the theory of a constructive trust. A constructive trust may arise under two theories. First, if a transferor conveys property to another as the result of fraud, duress, undue influence, mistake or during the existence of a confidential relationship, and there is an actual promise by the transferee to hold the property in trust and reliance upon that trust by the transferor. *Kohr v. Kohr,* 271 Pa. Super. 321, 413 A.2d 687 (1979); Restatement (Second) of Trusts §44. Although some of this language crept into counsels' briefs no one is arguing that such a state of facts exist here. Secondly, a constructive trust may arise

> "[W]here a person holding title to property is subject to an equitable duty to convey it to another on the grounds that he would be unjustly enriched if he were permitted to retain it . . ." *Yohe v. Yohe,* 466 Pa. 405, 411, 353 A.2d 417 (1976), *Denny v. Cavalier,* 297 Pa. Super. 129, 443 A.2d 333 (1982). Restatement of Restitution §160 (1937).

It does not require an agreement or intention to create a trust but is simply an equitable remedy designed to prevent the unjust enrichment of one party. The fundamental question of unjust enrichment is whether justice or the need for fair dealing warrants imposition of a trust. *Buchanan v. Brentwood Federal Savings & Loan,* 457 Pa. 135, 320 A.2d 117 (1974).

> "[A]n undertaking which is not binding as a contract because of lack of consideration will not be tortured into a declaration of trust." *Volkwein,* 146 Pa. Super. at 273.

We are not convinced that when Allen Daywalt held the title, he was subject to a duty to convey it to Delbert Daywalt on the grounds that he would be unjustly enriched if he retained it. Allen Daywalt made an offer which his son never accepted. The son voluntarily made certain home improvements to make his home larger and more comfortable. Allen Daywalt did not acquire the permanent improvements by making a promise that was misleading. Nor did he exercise any advantage in the nature of superior knowledge or influence to secure the improvements. While we sympathize with the defendants over the loss of their homesite, the facts do not support their claim for relief in the form of a constructive trust imposed on Allen Daywalt.

It is appropriate that we also observe that even if the evidence justified the erection of a constructive trust with Allen Daywalt as trustee for the benefit of Delbert Daywalt, the trust would not survive the transfer to the plaintiffs. A subsequent conveyance is subject to a constructive trust unless there is a sale to a bona fide purchaser. *Rife v. Guyer,* 59 Pa. 393, 98 A. 351 (1868). At the time of purchase, the Bennetts were aware of the existence of the well and the trees planted by Delbert Daywalt. These permanent improvements were part of the bargained purchase price paid by the Bennetts. They neither bargained for nor anticipated acquisition of the defendants' mobile home, its additions or sheds. They did anticipate either the payment of rent or the termination of defendants' occupancy and the removal of the mobile home. Delbert Daywalt only notified the Bennetts of a possible title defect relating to his mother's interest. The Bennetts commissioned a survey and reviewed the chain of title paying particular attention to Delbert's claims. They found nothing amiss. We are persuaded that if a constructive trust had been erected, it was extinguished by the conveyance to the Bennetts for value and without notice of facts giving rise to the existence of a constructive trust or breach thereof.

We conclude nothing appears in the record to indicate that the Bennett's acquisition and retention of the real estate would result in their unjust enrichment. We, therefore, also conclude as a matter of law if a constructive trust was imposed upon the property for the benefit of the defendants, it would not have been carried forward to affect the fee simple interest of the plaintiffs as innocent purchasers for value.

Failing to establish a constructive trust, defendants assert a counterclaim for the value of the permanent improvements which they made to the land. Those improvements are claimed to be the mobile home, the addition of a room and porch, a driveway, well, cleared lot and tree plantings. The trailer can be moved from the property with the addition of axles and wheels, much of the additions can be salvaged. The value of the construction of the driveway and the clearing of the lot was not established. The various sheds can be removed. The well and the trees are permanent improvements to the land. The value of these improvements was presumably included in the purchase price paid by the plaintiffs. The plaintiffs were innocent purchasers for value and may not be required to pay twice for these improvements. The defendants' action, if any, for the value of the improvements lies against Allen Daywalt.

The plaintiffs made a claim for rent by advising the defendants of their ownership and charging rent in the amount of $50.00 per month beginning November 1, 1986. The defendants are entitled to rent in that amount due the first of each month from November 1, 1986 to the present: $50.00 per month x 15 months or $75.00.

Plaintiffs asked for their counsel fees and costs of this action. They presented no authority for their entitlement or evidence of amount expended. Therefore, we will consider this claim abandoned.

ORDER OF COURT

NOW, this 3rd day of February, 1987, the defendants are ordered to vacate and give up possession of the real estate at 11884 South Mountain Road, Quincy Township, Franklin County, Pennsylvania forty-five (45) days from the date of service of this order.

Verdict is entered in favor of the plaintiffs and against the defendants for $750.00 with accrued interest. From and after February 1, 1987 rent shall accrue in favor of the plaintiffs and against the defendants at the rate of $50.00 per month.

KOZIEL v. ZONING HEARING BOARD OF BOROUGH OF WAYNESBORO, C.P. Franklin County Branch, Miscellaneous Vol. Y, Page 552

Zoning Appeal - Permit Erroneously Issued - Vested Right in Variance

1. A property owner acquires a vested right as a result of a permit issued in error by establishing the following: (a) due diligence; (b) good faith; (c) expenditure of substantial unrecoverable funds; (d) expiration of appeal period; (e) no evidence to prove adverse effect on individual property rights or the public health, safety or welfare.

2. The exacerbation of an existing parking space problem does not rise to the level of a threat to public health, safety or welfare.