

DALE and SUSAN ANGLE, et al., Plaintiffs,  
v. ROBERT E. EBERLY, et al., Defendants  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch  
Civil Action — Law, No. 2008-1292

*Preliminary Objections – Failure to Join Indispensable Party – Demurrers to Mandamus – Subject Matter Jurisdiction – The Public Official and Employee Ethics Act*

1. A party is indispensable when he or she has a claim-related right that is so essential to the merits of the action that relief cannot be given without violating the due process rights of the absent party.
2. A party who has a claim-related right essential to the action is not indispensable when relief can be given without violating that party's due process rights.
3. When deciding a demurrer, the Court must accept as true all well-pleaded facts and also all inferences reasonably derived from those facts.
4. Mandamus will only lie to compel official performance of a ministerial act or mandatory duty where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and a lack of any other adequate and appropriate remedy at law.
5. A private zoning enforcement action provides an adequate and appropriate remedy at law for a private party seeking a writ of mandamus against borough officials requiring them to enforce a zoning ordinance.
6. The Public Official and Employee Ethics Act gives Plaintiffs an adequate and appropriate remedy at law because they can file a complaint with the State Ethics Commission.
7. The State Ethics Commission has the duty to enforce the Public Official and Employee Ethics Act, so Greencastle has no obligation that would support a writ of mandamus against it for enforcement of the Act.
8. Mandamus damages are appropriate under 42 P.S. §8303 only if there is a viable underlying mandamus claim.
9. The Court has subject matter jurisdiction of a mandamus claim even though the ultimate success of the claim involves interpreting the Public Official and Employee Ethics Act.

Appearances:

Paige Macdonald-Matthes, Esq., *Counsel for Plaintiffs*

G. Bryan Salzmann, Esq., *Counsel for Defendants*

OPINION

Walsh, J., October 14, 2008

Facts

The Court must decide the Preliminary Objections of Defendants Robert Eberly, Charles Eckstine, Paul

Schemel, Harry Foley, Christopher Grimm, H. Duane Kinzer, Craig Myers, Kenneth Womack, and the Borough of Greencastle. This case concerns a number of homeowners who want to be exempted from a homeowners association in their development. The salient facts, as pled in Plaintiffs' complaint, are as follows. Frank Plessinger, a developer, constructed Moss Spring Estates, a planned residential development, which included lots in the Borough of Greencastle as well as in neighboring Antrim Township. Plessinger submitted a preliminary subdivision plan to Greencastle and to Antrim Township, and both municipalities provisionally approved it. However, instead of submitting a final plan to Greencastle, Plessinger presented the final plan only to Antrim Township and, after the Township approved the final plan, Plessinger recorded it. The controversial homeowners association was included in both the preliminary and final plans. Plaintiffs are individual homeowners in the development, and they assert that Plessinger has violated Greencastle's zoning ordinances. In January 2008, Plaintiffs met with Defendants to convince Defendants to initiate enforcement proceedings against Plessinger.

The Borough declined to do so, and, on March 20, 2008, Plaintiffs filed a two-count mandamus complaint against Defendants. Count I sought an order requiring Defendants to initiate zoning enforcement

proceedings against Plessinger and to comply with the Public Official and Employee Ethics Act<sup>[1]</sup> (hereinafter "the Ethics Act") by eliminating the alleged conflicts of interest of Paul T. Schemel and J. Edgar Wine. In Count II Plaintiffs invoked 42 P.S. §8303 as a basis for mandamus damages.

On April 11, 2008, Defendants filed four preliminary objections to the complaint. Two objections stemmed from Plaintiffs' failure to join necessary parties. Also, Defendants brought three demurrers against claims in the complaint and an objection to subject matter jurisdiction under the Ethics Act. The Court has reviewed the Defendants' Preliminary Objections and Brief in Support, the Response and Brief in Opposition of Plaintiffs, the complaint, the parties' oral arguments, and the law and will now decide the issues.

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## Discussion

### **I. Failure to Join Antrim Township**

Defendants argue that Plaintiffs have not joined an indispensable party, Antrim Township. A party is indispensable when he or she has a claim-related right that is so essential to the merits of the action that relief can not be given without violating the due process rights of the absent party. Grimme Combustion, Inc v. Mergentime Corp., 595 A.2d 77, 81 (Pa. Super. 1991).

Here, Antrim Township has no claim-related right essential to the merits of the action. Essentially, this case involves an examination of whether Greencastle has properly enforced its zoning ordinances against Plessinger with respect to lots located within Greencastle. Defendants have failed to point to any right of Antrim Township jeopardized by this action. Accordingly, Antrim Township is not an indispensable party to this action.

### **II. Failure to Join Frank Plessinger**

Next, Defendants assert that Frank Plessinger is indispensable to this mandamus action. As noted earlier, a party is indispensable when the party has a right that is related to the claim and that is so essential to the merits of the action that relief can be given only by violating the due process rights of the absent party. Grimme Combustion at 81. Defendants suggest that Plessinger's ability to continue to construct the planned residential development may be jeopardized if the Court grants mandamus. Certainly, construction of the planned residential development could ultimately be placed in doubt if the mandamus is granted and enforcement proceedings are initiated by Greencastle. However, the Court can grant mandamus relief without joining Plessinger because any enforcement proceedings will afford Plessinger due process. See Greencastle Zoning Ordinance, Chapter 205, Section 39. Crucially, mandamus is a preliminary step that does not directly implicate Plessinger's right to build the development. Additionally, any final resolution of the enforcement action would fully vindicate Plessinger's due process rights, and, thus, Plessinger is not an indispensable party.

### **III. Demurrers**

When deciding a demurrer, the Court must accept as true all well pleaded facts and also all inferences reasonably derived from those facts. Hess v. Fox Rothschild, LLP, 925 A.2d 798, 805 (Pa. Super. 2007). A demurrer may be upheld only if, on the facts averred, the law bars recovery. Werner v. Plater-Zyberk, 799 A.2d 776 (Pa. Super. 2002). "Mandamus will only lie to compel official performance of a ministerial act or mandatory duty where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and a lack of any other adequate and appropriate remedy at law." Delaware River Port Authority v. Thornburgh, 493 A.2d 1351, 1355 (Pa. 1985). The Court will resolve Defendants' three demurrers under

this standard.

#### *A. Mandamus Claim for Zoning Enforcement Action*

Initially, Defendants demur to Counts I and II, where Plaintiffs seek a writ of mandamus directing Defendants to initiate zoning enforcement proceedings against Plessinger. Indeed, Plaintiffs have failed to plead a prima facie case for mandamus because they have an adequate remedy at law of which they have failed to avail themselves.<sup>[2]</sup> The Greencastle zoning ordinance, which parallels the enabling legislation found in 53 P.S. §10617, permits “any aggrieved owner of real property...who shows that his property or person will be substantially affected” by an alleged violation to “institute any appropriate action or proceeding to prevent...any act, conduct, business, or use constituting a violation.” Ordinances, Chapter 205, Section 38. The language of this provision affords private parties, such as Plaintiffs, the opportunity to abate zoning violations independently from municipal authorities. Hanson v. Lower Frederick Township Board of Supervisors, 667 A.2d 1221, 1222-1223 (Pa. Commw. 1995). Thus, Plaintiffs have failed to plead a prima facie case for mandamus since they have an adequate remedy at law. Id. The Court will sustain Defendants’ demurrer to Plaintiffs’ request for a writ of mandamus directing Defendants to initiate enforcement proceedings against Plessinger.

#### *B. Mandamus Claim for Ethics Violations*

Next, Defendants demur to Plaintiffs’ claim for a writ of mandamus against Greencastle directing it to comply with the Public Official and Employee Ethics Act by eliminating any conflicts of interest involving Paul T. Schemel and J. Edgar Wine. However, mandamus cannot lie for this cause of action, because Plaintiffs have an adequate remedy at law and because Greencastle does not have a duty to enforce the Ethics Act.

To begin, the Ethics Act affords Plaintiffs an adequate remedy at law of which they have yet to avail themselves. Plaintiffs can eliminate any conflicts of interest that Schemel or Wine has simply by filing a complaint with the State Ethics Commission, which has jurisdiction under the Act. 65 P.S. §§1101 *et seq.* Its final orders can be appealed. 65 P.S. §1108(i). When a complaint is filed, the Commission conducts a preliminary inquiry within 60 days, and a full investigation, if necessary, within 180 days. 65 P.S. §1108. If the Commission finds a conflict, it can remediate the problem appropriately. Thus, Plaintiffs have a remedy at law.

Furthermore, Greencastle has no duty to enforce the Ethics Act. The Plaintiffs seek an order for Greencastle to “immediately comply with the...Act...and take all necessary action [sic] to eliminate the clear conflict of interest.” See Plaintiff’s Complaint. In substance, Plaintiffs want Greencastle to enforce the Act. Yet, mandamus will only lie against a defendant if that defendant has a duty to act. Delaware River Port Authority at 1355. Here, Greencastle has no duty to enforce the Ethics Act, which is enforced by the State Ethics Commission. 65 P.S. §1101.1(c). So, Plaintiffs have failed to plead facts demonstrating that Greencastle has a duty to eliminate the perceived conflicts of interest of its borough officials.

In conclusion, Plaintiffs have failed to plead facts that are essential to their claim for mandamus against Greencastle for the alleged conflicts of interest of Schemel and Wine. Plaintiffs have an adequate remedy at law, and they have failed to plead facts that obligate Greencastle to enforce the Ethics Act. Therefore, mandamus will not lie against Greencastle for the alleged conflicts of interest of Schemel and Wine, and the Court will grant Defendants’ demurrer to the ethics violations claimed in Count I.

#### *C. Mandamus Damages*

Also, Defendants demur to Plaintiffs’ claim for mandamus damages under 42 P.S. §8303.<sup>[3]</sup> As a precondition to relief, the statute requires Plaintiffs to prevail on a mandamus claim before they may derivatively receive mandamus damages. Id. Here, Plaintiffs have brought two mandamus claims, but neither is viable. Accordingly, since Plaintiffs have failed to state a claim for mandamus, their derivative cause of action for mandamus damages must also fail. Thus, the Court will grant Defendants’ demurrer to Plaintiffs’ claim for mandamus damages.

#### **IV. Ethics Act Jurisdiction**

Finally, Defendants object to Plaintiffs’ Ethics Act-based mandamus claim because the State Ethics Commission has original jurisdiction under the Act. Although the Act, 65 P.S. §§1101 *et seq.*, empowers the State Ethics Commission to enforce the Act, Plaintiffs have made a mandamus claim against Greencastle, rather than an ethics claim under the Act. So, the Court properly has subject matter jurisdiction of this claim.

## Conclusion

In conclusion, the Court will grant some of Defendants' preliminary objections and deny others. First, Antrim Township is not an indispensable party, because the township has no right essential to the action. Second, Frank Plessinger is not indispensable to this case, since the Court can grant mandamus without violating Plessinger's due process rights. Third, the Court will grant Defendants' demurrer to Plaintiffs' claim for mandamus against Defendants for failing to enforce the Greencastle zoning ordinances, as Plaintiffs have an adequate remedy at law. Fourth, the Court will sustain Defendants' demurrer to Plaintiffs' mandamus claim against Greencastle for the alleged conflicts of interest of Schemel and Wine, because Plaintiffs have a remedy at law and Greencastle has no duty to enforce the Ethics Act. Fifth, the Court will uphold Defendants' demurrer to mandamus damages, since Plaintiffs will be unable to prevail on either of their two underlying mandamus claims. Finally, the Court will dismiss Defendants' objection to the Court's subject matter jurisdiction, as a claim for mandamus does not fall under the jurisdiction of the State Ethics Commission. Plaintiffs may file an amended complaint that comports with the requirements of this Opinion.

## ORDER OF COURT

October 14, 2008, the Court having reviewed the Preliminary Objections of Defendants, their Brief in Support of the Objections, Plaintiffs' Response and Brief in Opposition, the record, and the law, it is hereby ordered that Defendants' Preliminary Objections are granted in part and denied in part as follows.

1. The objection to Plaintiffs' Complaint based upon the failure to join Antrim Township is denied.
2. The objection to Plaintiffs' Complaint based upon the failure to join Frank Plessinger is denied.
3. The demurrer to Plaintiffs' claim for mandamus against Defendants for their failure to enforce the borough zoning ordinance is granted.
4. The demurrer to Plaintiffs' claim for mandamus against Greencastle for failure to eliminate the conflicts of interest of Paul T. Schemel and J. Edgar Wine is granted.
5. The demurrer to Plaintiffs' claim for mandamus damages is granted.
6. The objection based upon the Court's subject matter jurisdiction under the Ethics Act is denied.
7. Plaintiffs shall have twenty (20) days from the date of entry of this order to amend their complaint in a manner consistent with the foregoing opinion.

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[1] 65 P.S. § 1101 *et seq.*

[2] In paragraph 105 of their complaint, Plaintiffs assert that they have no adequate remedy of law. However, the Court will disregard this statement, because it is a legal conclusion and not a "well pleaded fact."

[3] "A person who is adjudged in an action in the nature of mandamus to have failed or refused without lawful justification to perform a duty required by law shall be liable in damages to the person aggrieved by such failure or refusal." 42 P.S. §8303.