This case involves complexities and nuances within the subject matter of "deemed approvals" of subdivision or land development plans, where the municipality fails to comply with time limitations for formal decisions, as set forth in Section 508 of the Pennsylvania Municipalities Planning Code ("MPC").

Philomeno and Salamone v. Board of Supervisors of Upper Merion Township

Facts.

The landowner, Philomeno and Salamone ("Applicant") submitted a subdivision plan to divide an 18-acre parcel into 17 residential lots and one remnant parcel. By written agreement between the Applicant and the township, the "90-day" review period specified in Section 508 of the MPC was extended. Prior to the expiration of the extended deadline, however, the Applicant filed an "alternate" development application, in the form of a conditional use application to develop the subject property into 28 townhouse units, together with 8-plus acres of open space and 4-plus acres of recreational uses.[2] The alternate plan for townhouse development was submitted at the request of the Planning Commission, its motivation being to foster the preservation of more of the subject property as open space.

After hearings, the conditional use application for the townhouse development was denied by the township Board of Supervisors. Meanwhile, the extended deadline for action on the original 17-lot subdivision plan had come and gone, and after receiving the Board's denial of its conditional use application for townhouse development, the Applicant filed an action in mandamus, seeking judgment that its original subdivision plan had been deemed approved by failure of the township to take formal action within the extended time limit.

The Montgomery County Court of Common Pleas granted the mandamus, ruling that the township's failure to act had served to grant deemed approval to the original plan. Commonwealth Court reversed the decision of the County Court, holding that by filing the subsequent application for conditional use approval of the townhouse development, the Applicant had abandoned the original subdivision plan application. The Court noted that in prior decisions, where the applicant's actions had caused confusion, the otherwise applicable deemed approval rules did not apply.

The Pennsylvania Supreme Court then granted allowance of appeal "to determine whether filing a subsequent conditional use application effectively withdraws a pending inconsistent subdivision application for the same tract of land."

Decision.

The Supreme Court reversed the Commonwealth Court's decision, concluding that the applicant was in fact entitled to the benefit of the deemed approval rule of Section 508 of the PaMPC:

[2] The inference is that single family lots were a permitted use by right and that townhouse development was a use permitted by conditional use under the applicable zoning ordinance provisions.

> "Our courts have long permitted landowners to file inconsistent subdivision or land development applications, and they are entitled to action on all applications." 966 A.2d at 1111.

Note that the Pennsylvania Supreme Court itself had not previously dealt with this type of issue, and was therefore constrained to cite several prior decisions of the Commonwealth Court in reaching its conclusion.

The Court first paid its respects to the Commonwealth Court decisions in *Wiggs v. Northampton County Hanover Township Board of Supervisors*, 441 A.2d 1361 (Pa.Cmwlth. 1982) and *DePaul Realty Company v. Borough of Quakertown*, 324 A.2d 832 (Pa.Cmwlth. 1974) where Commonwealth Court had concluded that the submission by an applicant of a revised subdivision plan containing substantial revisions served to automatically restart the 90-day "clock" for municipal action:

> "Cases holding that a revised subdivision application causes the time for decision to run from the filing of the revised plan [is herein applicable]." 966 A.2d at 1110.

The Court also noted that Commonwealth Court had previously held Section 508 to be "inoperative where an applicant creates confusion by submitting two inconsistent plans for the same tract," *Morris v. Northampton County Hanover Township Board of Supervisors,* 395 A.2d 697 (1978), but see *Appeal of David Fiori, Realtor, Inc.*, 422 A.2d 1207 (1980), where the deemed approval rule was nevertheless applied.

The Pennsylvania Supreme Court went on to note, however, that the Commonwealth Court's opinion in *Philomeno* had failed to address three of its own prior decisions, being *Capital Investment Development Corp. v. Jayes*, 373 A.2d 785 (1977), *Bobiac v. Richland Township Planning Commission*, 412 A.2d 202 (1980) and *Appeal of David Fiori, Realtor, Inc.*, *supra*.

The leading case of this trio was *Capital Investment Development Corp.*, where two mutually exclusive subdivision plans were submitted to the township. When the township failed to take formal action on either application, the Court concluded that the developer had the option to pursue either plan as "deemed approved," at the developer's option.

In *Bobiac*, two alternate plans had been submitted, one being for a shopping center and the other for a restaurant. While the second plan was timely rejected, the rejection of the original plan was past the 90-day time clock. Hence, the original plan was considered deemed approved in spite of the fact that the "alternate" plan had been subsequently filed during the pendency of the approval period for the original plan.

The Pennsylvania Supreme Court in *Philomeno* also failed to find any evidence of confusion on the part of the Upper Merion Township Board of Supervisors owing to the submission of the alternate townhouse plan. In this regard, the two plans were fundamentally different, one being for single family residential lots and the other for townhouse dwellings.

A Concurring Opinion was filed by Mr. Justice Saylor. In the Concurring Opinion, Justice Saylor comments on the majority Opinion as follows:

> "One difficulty with this analysis, it seems to me, is that the words 'alternate,' 'inconsistent' and 'revised' are not clearly defined, and in the context of land development plans, these terms are not necessarily mutually exclusive." 966 A.2d at 1113.

With respect to the submission of revised plans, Justice Saylor draws the distinction initially made by Commonwealth Court in the *Wiggs* and *DePaul* decisions:

> "In the case of minor revisions, I do not believe that a new 90 day period should begin." 966 A.2d at 1114, F.N. 5.

<u>Comment</u>.

Although the procedural context of this decision is based upon the submission of an alternate, inconsistent development plan as a conditional use application, rather than as a subdivision or land development plan under Article V of the MPC, the Pennsylvania Supreme Court does not, in this decision, make any distinction between these two scenarios. Consequently, I would treat the applicability of this decision to all subdivision or land development applications, whether or not the underlying use is one permitted only by conditional use or special exception.

Secondly, the single most important procedural issue is for municipalities to avoid making any undocumented assumptions with respect to whether or not the 90-day approval period for a particular application has been extended.

Any subsequent filing by an applicant during the pendency of an "original" plan would fall into one of the following three categories:

1. a new or alternate plan, proposing a use or configuration inconsistent with a pending initial plan. (For example, a new townhouse plan, as was the case in *Philomeno*, is clearly an alternate plan; similarly, a new plan based upon cluster zoning requirements would be considered a new or alternate plan in the face of an initial filing of a "straight lot" subdivision plan, with no open space.)

In this context, following *Philomeno*, both plans are entitled to independent consideration, and each plan must be decided and acted upon within the MPC Section 508 90-day time clock.

2. revisions to the initial plans which are "minor" or "insubstantial." Here, the 90-day time clock is **not** extended, and the plan as so modified must be acted upon within the 90-day limit.

3. "substantial" revisions to the original plan. In commenting on *Wiggs* and *DePaul*, the Supreme Court in *Philomeno* states that the type of revision to a pending plan which would serve to restart the 90-day clock must be both "voluntary" and "contain substantial changes."

While it seems that it should be fairly easy to discern an "alternate plan" when it is filed (and thus that the original plan is still entitled to the 90-day deemed approval protection of §508), an issue may often arise with respect to whether revisions to an original plan should be considered "minor or insubstantial" (thus <u>not</u> restarting the 90-day clock) or "voluntary and substantial" (thus restarting the 90-day clock). The lack of a "bright line" between what is minor versus what is substantial can lead to errors in judgment. (This is the point which Mr. Justice Saylor makes in his Concurring Opinion). Municipal staff should therefore request, when any revised or new plans are filed, that the "position" of the applicant should be clearly stated with respect to possible extension of the time clock, with that position being reduced to writing (and a written extension received where applicable), so that mistakes can be avoided.