

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY  
COMMONWEALTH OF PENNSYLVANIA  
CIVIL DIVISION - LAW**

**EAST ALLEN TOWNSHIP,**

**Appellant,**

**vs.**

**GREGG AMORE and ZONING  
HEARING BOARD OF EAST ALLEN  
TOWNSHIP,**

**Appellees.**

**No.: C-48-CV-2011-1341**

**OPINION OF THE COURT**

East Allen Township, Northampton County, Pennsylvania (the "Township") appeals from a January 19, 2011 public notice published by Gregg Amore ("Amore") in which Amore asserted that he has received a "deemed approval" from the East Allen Township Zoning Hearing Board (the "Zoning Hearing Board") for proposed uses associated with certain renovations to a building on his property. Amore asserts that the East Allen Township Zoning Officer (the "Zoning Officer") made an erroneous determination that Amore's proposed renovations constituted a "change in use" of his property under the East Allen Township Zoning Ordinance (the "Zoning Ordinance"), East Allen Code § 250-1 *et seq.*, and that Amore was therefore required to obtain a zoning permit. Amore appealed the Zoning Officer's determination to the Zoning Hearing Board and, in the alternative, applied directly to the Zoning Hearing Board for (1) approval of his proposed

activities as a special-exception use; and (2) expansion of an accessory use and a variance from certain restrictions on that accessory use set forth in the Zoning Ordinance. Amore asserts that the Zoning Hearing Board failed to hold a hearing on his appeal and applications within the time required under the Pennsylvania Municipalities Planning Code ("MPC"), 53 P.S. § 10101 *et seq.*, and that he therefore received a deemed approval of his proposed uses. Amore further asserts that because the Township did not appear at a hearing before the Zoning Hearing Board to oppose his appeal and applications, the Township has no standing to appeal the deemed approval to this Court.

The Township asserts that Amore's deemed approval should be vacated, because (1) the Zoning Officer made no appealable determination that Amore was in violation of the Zoning Ordinance; (2) Amore neither applied for nor was denied a zoning permit; (3) Amore failed to establish any other basis for jurisdiction before the Zoning Hearing Board; (4) Amore's appeal and applications were not properly before the Zoning Hearing Board, because the Zoning Officer rejected them and returned them to him; and (5) Amore failed to exhaust his administrative remedies. The Township further asserts that a municipality is always a party to proceedings before the Zoning Hearing Board and has standing to appeal even if it did not appear or object at a hearing.

On June 12, 2013, pursuant to 53 P.S. 11005-A, the Court granted the Township's motion to present additional evidence and directed the parties to appear for an evidentiary hearing limited to the issue of whether Amore applied to the Zoning Officer for a zoning permit for his proposed use and, if so, whether the application was granted or denied. On October 8, 2013, the parties appeared for an evidentiary hearing on that issue before the Honorable Michael J. Koury, Jr. For the reasons that follow, the Court finds that (1) the Township has standing to appeal the deemed approval; (2) Amore's appeal and applications were properly submitted to the Zoning Hearing Board; (3) the Zoning Hearing Board had jurisdiction to hear the appeal and applications; and (4) because the Zoning Hearing Board failed to hold a hearing on the appeal and applications within the time required by the MPC, Amore received a deemed approval of his proposed uses. Accordingly, the Court orders that the Township's appeal be quashed.

### **FINDINGS OF FACT**

#### **I. Amore's Family Farm and Winery**

Amore owns a family farm at 6811 Steuben Road in the Township, where he grows grapes and operates a winery. See Notes of Testimony at 8-9, Ex. A-3, *East Allen Twp. v. Amore*, No. C-48-CV-2011-1341 (C.P. Northampton Co. Oct. 8, 2013) ("N.T."); Brief of Appellee, Gregg Amore, in Opposition to Land Use Appeal at 1, *East Allen Twp. v. Amore*, No. C-48-CV-2011-1341 (C.P. Northampton Co. Dec. 6, 2013) ("Amore's Br."). On

October 14, 2009, Amore's barn was damaged in a fire. See Ex. A-5; Brief of East Allen Township at 2, *East Allen Twp. v. Amore*, No. C-48-CV-2011-1341 (C.P. Northampton Co. Nov. 12, 2013) ("Township's Br."). Before the fire, Amore had maintained a wine-tasting room on the first floor of the barn, where he had sold wine and held social gatherings involving music, presentations, and the serving of food, wine, and other refreshments. See N.T. at 36; Exs. A-2, A-3, A-4. These activities were connected to the promotion and sale of the grapes and wine Amore produced on the farm. See Exs. A-3; A-4. Amore referred to these promotional activities as "agritainment" or "agritourism." See Ex. A-3. After the fire, Amore began restoring the barn. See Ex. A-1. He planned to continue his agritainment activities but expand them from the first floor to the second floor and create an "improved, enlarged and more weather proof environment." N.T. at 36-37; Ex. A-3.

## II. Activities That Require a Zoning Permit

Section 250-71 of the Zoning Ordinance states: "Persons desiring to undertake any new construction, structural or site alteration, or changes in the use of a building or lot, shall apply to the Township Secretary for a zoning permit by filling out the appropriate application form and by submitting the required fee." East Allen Code § 250-71. Thus, a zoning permit is required for (1) new construction; (2) site alterations; (3) structural alterations; or (4) a change in use. See *id.* The Zoning

Ordinance defines "site alteration" as changing the topography or water features on a lot. East Allen Code § 250-10. It defines "structural alteration" as changes to the supporting components of a building, such as walls, columns, beams, girders, floors, roof or ceiling, but excluding interior alterations. *See id.*

### III. Uses Permitted Under the Zoning Ordinance

Amore's property is located in the Township's Agricultural/Rural Residential ("A/RR") zoning district. *See* N.T. at 23. In the A/RR District, there is a list of "permitted principal uses" that fall into three categories: (1) uses permitted "by right" by the Zoning Officer; (2) "special-exception uses," which may be permitted by the Zoning Hearing Board in accordance with certain standards set forth in section 250-25 of the Zoning Ordinance; and (3) "conditional uses," which may be permitted by the Board of Supervisors in accordance with certain standards set forth in section 250-26 of the Zoning Ordinance. *See* East Allen Code § 250-16B-D.

There is a separate list of "accessory" uses that may accompany any one of the permitted principal uses. East Allen Code § 250-16E. "Accessory use" is defined as a use "subordinate and customarily incidental to the principal use on the same lot." East Allen Code § 250-10. Accessory uses are permitted only if they comply with certain standards set forth in section 250-27 of the Zoning Ordinance. *See* East Allen Code § 250-16E.

Under certain circumstances, the Zoning Hearing Board may grant a variance from the requirements of the Zoning Ordinance. See 53 P.S. 10910.2 ("The [Zoning Hearing Board] shall hear requests for variances where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant . . .").

Where a proposed activity is not listed in any of the three categories of permitted principal uses or as an accessory use, the Board of Supervisors may amend the Zoning Ordinance to create a new use for that activity. See 53 P.S. 10909.1(b)(5) (Board of Supervisors has exclusive jurisdiction over "[a]ll petitions for amendments to land use ordinances . . ."). Alternatively, the Board of Supervisors may "rezone" the property, *i.e.*, amend the zoning map to move the property into a zone where the proposed activity is already permitted or might be more appropriately permitted. See 53 P.S. 10609(b) (setting forth procedures for enacting amendments to zoning maps).

The Zoning Ordinance sets out the procedures to be followed for filing applications for zoning permits, special-exception uses, variances, and conditional uses. See East Allen Code § 250-72.

**§ 250-72. Permits and certificates.**

A. Zoning permit.

. . . .

(2) Types of uses.

a) Permitted use. A zoning permit for a permitted use may be issued by the Zoning Officer.

- b) Special exceptions and variances. A zoning permit for a use requiring a special exception or variance shall be issued by the Zoning Officer only upon the written order of the Zoning Hearing Board after a hearing following review by the Planning Commission. An application for a special exception, variance, or for interpretation of any part or provision of this ordinance shall be made to the Zoning Hearing Board on forms which may be obtained from the Township Secretary.
- c) Conditional use. A zoning permit for a conditional use shall be issued by the Zoning Officer only upon the written order of the Board of Supervisors following a review by the Planning Commission. An application for a conditional use shall be made to the Board of Supervisors on forms which may be obtained from the Township Secretary.

*Id.* Nothing in section 250-72 indicates whether a property owner must apply for a zoning permit before applying to the Zoning Hearing Board for a special exception or variance. *See id.*

#### IV. The Zoning Officer's Intervention

On January 7, 2010, the Township's Assistant Zoning Officer, Tina Serfass, wrote a letter to Amore stating: "In reviewing your file pertaining to the fire restorations at the winery, it has come to my attention there are no zoning permits issued for this business." Ex. A-1. Serfass acknowledged that the Township had allowed Amore to operate his winery without a zoning permit for approximately eight years and had taken no enforcement action against him. *Id.* However, she stated, "[N]ow that there are repairs being done I feel it is imperative that I enforce the Ordinances of East Allen Township and require you to apply for the proper permits." *Id.*

In her letter, Serfass stated that "winery" was not listed in any of the lists of permitted uses in the A/RR District. *Id.* She stated that Amore could apply to the Zoning Hearing Board for a variance to permit a winery in the A/RR District. *See id.* However, she recommended instead that he petition the Board of Supervisors to (1) rezone his property by moving it from the A/RR District into the Limited Planned Commercial ("PC-2") District; and (2) amend the Zoning Ordinance to add "winery" as one of the "special exception uses" permitted in the PC-2 District. *Id.*; N.T. at 8-9, 13-14, 30. This option would have required Amore to place money in escrow to pay the Township's professionals to revise the Ordinance. *See id.* at 14-15, 22-23.

On February 24, 2010, Amore met with Serfass and Township Manager Deborah A. Seiple and told them he did not wish to have his property rezoned from the A/RR District to the PC-2 District, as Serfass had suggested. *See* N.T. at 47-49; Ex. A-5. Serfass and Seiple advised Amore that if he wished to keep his property in the A/RR District, he could petition the Board of Supervisors to amend the Zoning Ordinance to add "winery" as one of the "conditional uses" permitted in the A/RR District. N.T. at 48, Ex. A-5. They told him that if he chose that option, he should define the proposed conditional use to include "banquet facilities" and "agritainment." N.T. at 48-49, Ex. A-5. This option also would have required Amore to place money in escrow to pay the Township's professionals to revise the Ordinance. *See* N.T. at 14-15, 22-23.



#### V. Zoning Approval for the First Floor of the Barn

On March 4, 2010, Serfass issued a "Certificate of Use & Occupancy" stating that the lower level of Amore's barn complied with the Zoning Ordinance. N.T. at 16-17, Ex. A-2. The Certificate listed both the prior and current uses of the lower level as "wine tasting room." N.T. at 16-17; Ex. A-2. This Certificate of Use & Occupancy appeared to resolve the Zoning Officer's concerns as to the first floor of the barn but not as to the second floor. See N.T. at 16-17.

#### VI. Amore's Letter Requesting Approval of a Conditional Use

On March 5, 2010, Amore sent Serfass a letter describing the agritainment activities he planned to conduct on the second floor of the barn and asking her to accept the letter as an application for a conditional use. See N.T. at 20; Ex. A-3. Amore said he emailed Serfass a draft of the letter before he sent it and that she approved the language. See N.T. at 32-34. However, Serfass said she did not recall approving the language. See *id.* at 21-22. When Amore received no response to his letter, he called Serfass and asked when he could expect action. See *id.* at 37-38. Serfass told Amore that his letter was insufficient and that he would need to file a formal petition. See *id.* at 38, 40. Amore also spoke to Zoning Officer Don Keller, who advised him that he would need to file a petition, arrange to have it signed by an attorney, and place \$500 in escrow. See *id.* at 38-42. Amore then retained counsel. See *id.* at 39.

## VII. The Zoning Officer's Letter Threatening Legal Action

On July 20, 2010, Amore's counsel sent a letter to Serfass in an attempt to clarify the issues. See Ex. A-4. On September 3, 2010, Keller sent a letter to Amore's counsel summarizing the extensive discussions that he and his staff had held with Amore over a period of almost one year. See Ex. A-5.

In the letter, Keller identified Amore's proposed renovations as "a kitchen area, rest room facilities and electrical upgrades." *Id.* He asserted that the Zoning Ordinance required Amore to obtain a zoning permit before proceeding with these renovations. See *id.* As noted above, section 250-71 of the Zoning Ordinance states that a property owner must obtain a zoning permit for "new construction," "site alterations," "structural alterations," or a "change in use" of the property. East Allen Code § 250-71. Keller did not suggest that Amore's proposed renovations constituted "new construction," "site alteration" or "structural alteration" within the meaning of section 250-71. Ex. A-5. Rather, he asserted that Amore's proposed activities constituted a "change in use" of his property from an agricultural use, "farming," to a non-agricultural use, a "banquet facility." *Id.*

To date renovations have continued to the barn, without Uniform Construction Code approval or Zoning approval, to create a banquet facility. These renovations have included a kitchen area, rest room facilities and electrical upgrades. The kitchen area and rest rooms, in my opinion, are certainly not customary

to an agricultural barn used for farming purposes. It is, in my opinion, a definite change of use which requires a Zoning permit.

*Id.*

Serfass had previously advised Amore that his proposed agritainment activities were not a permitted use under any of the existing categories in the A/RR District. See Ex. A-1. Keller's September 3, 2010 letter reiterated Serfass's previous advice that Amore's only option was to petition the Board of Supervisors to amend the Zoning Ordinance to either (1) rezone his property from the A/RR District to the PC-2 District; or (2) add his proposed agritainment activities as a new permitted use in the A/RR District. See Ex.

A-5.

As suggested by both Ms. Serfass and myself, the options available are a Zoning district change or a text change to the existing A/RR (Agricultural/Rural Residential) District. This would require filing the complete Zoning Amendment application as well as posting of the required escrow funds and application fee.

*Id.*

Keller's letter concluded by stating:

As of this date, Mr. Amore is in violation of the Township Zoning Ordinance and has 30 days to address this issue. Failure to do so may result in the commencement of legal action.

*Id.*

Amore did not apply for a zoning permit. See N.T. at 9. He also declined to follow Keller's recommendation that he petition the Board of Supervisors to amend the Zoning Ordinance. See *id.* at 11-12, 49.

### VIII. Amore's Appeal and Applications to the Zoning Hearing Board

On October 1, 2010, Amore filed an "Appeal Petition" to the Zoning Hearing Board. N.T. at 10-11, 30-31; Ex. EAT-1. He used the Zoning Hearing Board's preprinted form, which was used not only for appeals from determinations by the Zoning Officer but also for direct applications to the Zoning Hearing Board for variances, special-exception uses, and other relief. See Ex. EAT-1. The form provided boxes to be checked for each type of relief sought. See *id.* Amore checked all of the boxes. See *id.*

First, Amore indicated that he was appealing the Zoning Officer's September 3, 2010 determination that his proposed agritainment activities constituted a change in use for which he required a zoning permit. See Appeal Pet. ¶ 4(a). Amore stated that the present use of the barn was "[g]eneral agriculture, and activities associated with the sale of products grown and produced on-site." *Id.* ¶ 9(a). He asserted that "general agriculture" is a use permitted by right in the A/RR District under section 250-16B(1) of the Zoning Ordinance. *Id.* ¶ 11. He stated that the proposed use of the barn was "to continue its existing use, for wine sales, sampling, and promotion, with expanded activity on second level." *Id.* ¶ 12(c). He further asserted that agritainment is general agriculture and therefore did not constitute a new or different use. See *id.* ¶ 14.

Whether called agritourism, or agrientertainment, or simply agricultural promotion, the activity associated with the winery is the same type of promotional activity which occurs at fall festivals at other farms, and at tree farms around the early

winter sales season: sampling of product, refreshments, entertainment. . . . The barn is not proposed for use as a banquet hall or restaurant.

*Id.* ¶ 14. These statements set forth Amore's contentions that (1) his barn was presently being used for general agriculture, a use permitted by right in the A/RR District; (2) the barn would continue to be used for general agriculture, because agritainment is general agriculture and not a "banquet hall or restaurant"; and (3) there was therefore no change in use of the barn that required a zoning permit. *See id.*

Second, Amore indicated that, "in the alternative," he was making a direct application to the Zoning Hearing Board for approval of his agritainment activities as a "special exception" use in the A/RR District. *Id.* ¶ 4(b). Amore asserted that agritainment may be considered "commercial outdoor recreation," one of the existing "special-exception uses" listed in the A/RR District under Zoning Ordinance § 250-16C(3). *Id.* ¶ 11. "Just as a barn is used by others as a haunted house, this barn is used for wine promotion activities, which for some, is a recreational activity." *Id.* ¶ 14. These statements set forth Amore's contention that even if agritainment did not constitute general agriculture, a "permitted-by-right use," it nevertheless qualified as commercial outdoor recreation, a "special-exception use," and the Zoning Ordinance need not be amended to provide for it. If the Zoning Hearing Board agreed with Amore, it could then approve or deny his application for a special-exception use based on whether his proposed

activities complied with the standards governing commercial outdoor recreation set forth in section 250-25 of the Zoning Ordinance.

Third, Amore indicated that, "in the alternative," he was making a direct application to the Zoning Hearing Board for (1) approval of his agritainment activities as expansion of an "accessory" use accompanying the principal use of general agriculture; and (2) a variance from certain restrictions on that accessory use set forth in the Zoning Ordinance. *Id.* ¶¶ 4(c)-(d). Amore asserted that his agritainment activities could be considered a "seasonal roadside produce market," one of the existing accessory uses listed in the A/RR District under Zoning Ordinance section 250-16E(2)(h). *Id.* ¶ 11. He stated: "[The barn] is akin to a produce stand within an existing building." *Id.* ¶ 14 (emphasis in original). However, he noted that the standards governing seasonal roadside produce markets contain certain restrictions as to size and portability, and he requested a variance from those restrictions. *See id.* ¶ 12(c) ("Variance required as to size and portability.") (citing East Allen Code § 250-27(10)). These statements set forth Amore's contention that even if agritainment did not qualify as general agriculture, a "permitted-by-right use," or commercial outdoor recreation, a "special-exception use," it nevertheless qualified as a seasonal roadside produce market, an existing "accessory use," and the Zoning Ordinance need not be amended to provide for it. If the Zoning Hearing Board agreed with Amore, it could then approve or deny his

application for expansion of the accessory use and his application for a variance from the standards governing seasonal roadside produce markets set forth in section 250-27 of the Zoning Ordinance.

IX. The Zoning Officer's Rejection of Amore's Appeal Petition

On October 21, 2010, Serfass wrote a letter to Amore stating:

We are in receipt of your Zoning Hearing Appeal Petition, however you still have not formally applied to the Zoning office for the use and the Township has not issued a formal denial letter for this use.

In order for this appeal to be submitted to the Zoning Hearing Board for review you must first apply for zoning.

We are returning your check in the amount of \$600 and the completed appeal petition.

Please note the Zoning Hearing Board does not issue relief for Conditional use. This needs to be obtained through the Board of Supervisors. I have enclosed an application for Conditional Use. If this is the route you wish to take, please complete the enclosed application and return it with a check in the amount of \$600.00.

N.T. at 10-11, 31; Ex. EAT-1.

Serfass's letter focused solely on the appeal set forth in Amore's Appeal Petition and did not mention his direct applications to the Zoning Hearing Board for a special exception use and expansion of an accessory use and variance. See Ex. EAT-1. At the evidentiary hearing, Serfass testified: "He applied to a zoning hearing to get relief granted for the use of the barn where in fact he should've applied for a zoning permit and then upon denial would've been able to apply to the zoning hearing board." N.T. at 10.

## X. Amore's Notice of Deemed Approval and the Township's Appeal

On January 19, 2011, Amore published a public notice in *The Express-Times* newspaper stating that Amore's Appeal Petition had received a "deemed approval" due to the failure of the Zoning Hearing Board to hold a hearing within the time specified by the MPC. Township's Br. at 4. On February 11, 2011, the Township filed a timely appeal from Amore's January 19, 2011 notice of deemed approval. See Amore's Br. at 4. On June 12, 2013, pursuant to 53 P.S. § 11005-A, the Court granted the Township's motion to present additional evidence and directed the parties to appear for an evidentiary hearing limited to the issue of whether Amore applied to the Zoning Officer for a zoning permit for his proposed use and, if so, whether the application was granted or denied. See *East Allen Twp. v. Amore*, No. C-48-CV-2011-1341 (C.P. Northampton Co. June 12, 2013). On October 8, 2013, the parties appeared for the evidentiary hearing before the Honorable Michael J. Koury, Jr.

### **DISCUSSION**

#### I. Amore's Deemed Approval and the Township's Appeal

When an applicant has submitted an application to the Zoning Hearing Board, the Zoning Hearing Board is required to hold a hearing on the application within sixty days. See 53 P.S. § 10908(1.2) ("The first hearing before the [Zoning Hearing Board] or hearing officer shall be commenced within 60 days from the date of receipt of the applicant's application, unless



the applicant has agreed in writing to an extension of time." ). If the Zoning Hearing Board fails to hold the required hearing within sixty days, the applicant receives a deemed approval. See 53 P.S. § 10908(9).

[W]here the [Zoning Hearing Board] fails to render the decision within the period required by this subsection or fails to commence, conduct or complete the required hearing as provided in subsection (1.2), the decision shall be deemed to have been rendered in favor of the applicant unless the applicant has agreed in writing or on the record to an extension of time.

*Id.*

The Zoning Hearing Board is required to give public notice of a deemed approval, but if it fails to do so, the applicant may publish the notice, as Amore did here. See 53 P.S. 10908(9).

When a decision has been rendered in favor of the applicant because of the failure of the [Zoning Hearing Board] to meet or render a decision as hereinabove provided, the [Zoning Hearing Board] shall give public notice of said decision . . . . If the [Zoning Hearing Board] shall fail to provide such notice, the applicant may do so.

*Id.*

An appeal from a deemed approval is taken from the public notice of the decision. See 53 P.S. § 11002-A(a).

All appeals from all land use decisions rendered pursuant to Article IX, [53 P.S. 10901 *et seq.*] shall be taken to the court of common pleas of the judicial district wherein the land is located and shall be filed . . . in the case of a deemed decision, within 30 days after the date upon which notice of said deemed decision is given as set forth in section 908(9) of this act [53 P.S. 10908(9)].

*Id.* Under these provisions, this Court has jurisdiction over the Township's

appeal from Amore's January 19, 2011 public notice of the deemed approval. *See id.*

On appeal from a deemed approval, in which there is no record, the Court may take additional evidence. *See* 53 P.S. § 11005-A (“If, upon motion, it is shown that proper consideration of the land use appeal requires the presentation of additional evidence, a judge of the court may hold a hearing to receive additional evidence . . . .”). If the Court takes additional evidence, then the Court becomes the factfinder and hears the matter *de novo*. *See id.* (“If the record does not include findings of fact or if additional evidence is taken by the court or by a referee, the court shall make its own findings of fact based on the record below as supplemented by the additional evidence, if any.”); *Gryshuk v. Kolb*, 685 A.2d 629, 634 (Pa. Commw. 1996) (“[T]he proper course in reviewing a deemed approval is for the trial court to make its own findings . . . .”); *Faulkner v. Board of Adjustment*, 624 A.2d 677, 679 (Pa. Commw. 1993) (“[W]hen a deemed decision of a zoning hearing board is appealed to a common pleas court, the common pleas court is the fact-finder.”).

Here, the Court held an evidentiary hearing on factual issues raised in the Township’s notice of appeal. Accordingly, we hear this matter *de novo* based on the record presented at the evidentiary hearing.

## II. The Township's Standing to Appeal

Amore asserts that because the Township did not oppose his appeal and applications before the Zoning Hearing Board, it lacks standing to appeal the deemed approval to this Court. See Amore's Br. at 16-17. We disagree.

Section 10908(9) of the MPC states: "Nothing in this subsection shall prejudice the right of any party opposing the application to appeal the decision to a court of competent jurisdiction." 53 P.S. 10908(9). Section 10908(3) of the MPC provides that the municipality "shall be" a party to any hearing before the Zoning Hearing Board. 53 P.S. 10908(3).

Under these provisions, a municipality is always deemed to be a party to proceedings before the Zoning Hearing Board and has standing to appeal even if it did not appear or object at a hearing. See *Leoni v. Whitpain Twp. Zoning Hearing Bd.*, 709 A.2d 999, 1002 (Pa. Commw. 1999) ("[Sections 10908(3) and (9)] authorize standing only to a municipality to appeal a zoning board decision without having first appeared, affording the municipality alone special status."); *West Manchester Twp. v. Zoning Hearing Bd.*, 403 A.2d 234, 234 (Pa. Commw. 1979) ("[T]he municipality is made a party to all zoning board proceedings whether or not the municipality appears at the hearings or otherwise objects and thus has standing to appeal an adverse decision of the zoning board . . .").

In designating a municipality as a party to all zoning board hearings, it is clear that the legislature intended that it be the collective representative of all residents and property owners, and, as such, interested in the proper enforcement and

application of its zoning ordinance. . . . In our view, the legislature has declared that a township has such an interest as would cause it to be aggrieved, for purposes of appeal, by a decision of the Zoning Hearing Board which it considered to be adverse to its best interests. Since the Township is a "party aggrieved", it may appeal the zoning board decision to the lower court, even though it did not participate in the hearing before the zoning hearing board.

*Lower Paxton Twp. v. Fieseler Neon Signs*, 391 A.2d 720, 723 (Pa. Commw. 1978) (interpreting predecessor provision, 53 P.S. § 11007).

Amore relies on *Board of Supervisors v. Mager*, 855 A.2d 917, 920 (Pa. Commw. 2004) for the proposition that a municipality has no standing to appeal a deemed approval, because a deemed approval is the consequence of the municipality's own inaction. See Amore's Br. at 16-17. However, *Mager* is not applicable to the facts of this case.

In *Mager*, a township appealed a deemed approval of an application for conditional use. See 855 A.2d at 920. The application had been presented to the board of supervisors, which, as the township's governing body, was the same entity as the township. See *id.* The Court held that in matters heard by a board of supervisors, the township is itself the tribunal and therefore cannot also be a party opposing the application. See *id.* ("[T]he Board in a conditional use application is acting in a quasi-judicial capacity and not as a party opposing the application."). The Court held that the township, acting as the tribunal, had approved the application, even if only by operation of law, and had no standing to appeal its own approval. See *id.*

[I]n deemed approval cases, the municipality's decision, *i.e.*, approval, has already been made for it by operation of law as a result of the municipality's own delay. . . . Consequently, absent an appeal by a party actually *opposing* the application, the municipality cannot appeal from its own decision *approving* the application.

In view of the foregoing, we conclude that inasmuch as the Board cannot be considered a party opposing Mager's conditional use application, the Board lacked standing under Section 913.2(b)(3) of the MPC to appeal from the deemed approval of Mager's conditional use application.

*Id.* (citations omitted) (emphasis in original).

Here, by contrast, Amore's appeal and applications were presented not to the Board of Supervisors but to the Zoning Hearing Board, an entity distinct from the Township. The Township was not, as in *Mager*, sitting as the tribunal. Here, the Zoning Hearing Board sat as the tribunal, and the Township was a party to the proceeding. See 53 P.S. §§ 10908(3) and (9). It was the Zoning Hearing Board, not the Township, which approved Amore's applications by operation of law. Because the Township did not approve Amore's applications, the Township was not deprived of standing to appeal the deemed approval. Thus, *Mager* does not support Amore's argument that the Township lacks standing to appeal a deemed approval by the Zoning Hearing Board.

Amore argues that there is no practical difference between the Zoning Hearing Board and the Board of Supervisors, because they are both "instrumentalities" of the Township. Amore's Br. at 16. Thus, Amore argues, just as a township may not appeal a deemed approval by its board

of supervisors, it also should not be allowed to appeal a deemed approval by its zoning hearing board. *See id.* We disagree.

As discussed above, the MPC prescribes that in proceedings before the Zoning Hearing Board, the municipality is not the tribunal but a party to the proceeding. *See* 53 P.S. §§ 10908(3) and (9). If Amore were correct that the Township is, by definition, the tribunal in proceedings before the Zoning Hearing Board, then the statutory sections and case law stating that the Township is a party to those proceedings would be meaningless. Thus, we hold that the Township has standing to appeal Amore's deemed approval from the Zoning Hearing Board.

### III. The Township's Challenge to Amore's Deemed Approval

The Township argues that Amore's deemed approval should be vacated, because (1) Amore failed to establish any of the statutory bases for jurisdiction before the Zoning Hearing Board set forth in the MPC; and (2) by appealing to the Zoning Hearing Board without having first applied for a zoning permit, Amore has failed to exhaust his administrative remedies and improperly attempted to "bypass" the Zoning Officer. Township's Br. at 6-7, 11. We disagree.

A. Bases for Jurisdiction Before the Zoning Hearing Board

The MPC sets forth the bases for jurisdiction before the Zoning Hearing Board:

**§ 10909.1. Jurisdiction**

(a) The zoning hearing board shall have exclusive jurisdiction to hear and render final adjudications in the following matters:

. . . .

(3) Appeals from the determinations of the zoning officer, including, but not limited to, the granting or denial of any permit, or failure to act on the application therefor, the issuance of any cease and desist order or the registration or refusal to register any nonconforming use, structure or lot.

. . . .

(5) Applications for variances from the terms of the zoning ordinance . . . , pursuant to section 910.2.

(6) Applications for special exceptions under the zoning ordinance . . . , pursuant to section 912.1.

53 P.S. § 10909.1.

The Township asserts that because Amore did not apply for a permit, there was nothing for him to appeal and therefore no jurisdiction before the Zoning Hearing Board. Township's Br. at 6 ("[S]ince no application for a zoning permit was made, no zoning denial had been issued. Accordingly, there was nothing for Dr. Amore to appeal from. Stated another way, no appeal could be taken, since there was no denial issued."). However, Amore never indicated that he was appealing the denial of a permit. Rather, his

Appeal Petition stated that he was (1) appealing the Zoning Officer's "determination" that he had changed the use of his property and was therefore required to obtain a permit; (2) applying directly to the Zoning Hearing Board for a special-exception use; and (3) applying directly to the Zoning Hearing Board for expansion of an accessory use and a variance. Ex. EAT-1. We hold that Amore established all three of these bases for jurisdiction before the Zoning Hearing Board.

1. Appeal from the Zoning Officer's Determination

The MPC defines "determination" as a "final action by an officer, body or agency charged with the administration of any land use ordinance or applications thereunder." 53 P.S. § 10107(b). Where a zoning officer has reviewed the plans describing a proposed use and communicated his decision on the applicability of the zoning ordinance to that use, the Zoning Officer's decision constitutes a "final action" and is therefore an appealable determination. *North Codorus Twp. v. North Codorus Twp. Zoning Hearing Bd.*, 873 A.2d 845, 847-48 (Pa. Commw. 2005) (zoning officer's verbal statement to property owner that his proposed development plan would be governed by new zoning ordinance rather than old ordinance was an appealable determination; "[G]iven the broad language of section 909.1(a)(3) and [the Zoning Officer's] admission that he reviewed the plans, the [Zoning Hearing Board] did not err as a matter of law or abuse its



discretion in concluding that [the Zoning Officer's] statement was a determination by the Zoning Officer over which it had jurisdiction.").

We conclude that, under *Codorus*, the Zoning Officer's September 3, 2010 letter was a "final action" and therefore an appealable determination. The Zoning Officer had extensively reviewed the available information and was not awaiting further information or action from Amore that might have changed his opinion. See Ex. A-5. In his letter, the Zoning Officer summarized his past communications with Amore and stated his conclusion that Amore's agritainment activities constituted a "change in use" of his property from "farming" to a "banquet facility" and therefore required Amore to obtain a zoning permit. *Id.* The Zoning Officer set forth Amore's options under the Zoning Ordinance. See *id.* He concluded by stating that Amore was "in violation of the Zoning Ordinance," that he had thirty days to address the issue, and that if he failed to do so, he might be subjected to legal action. *Id.* Thus, if Amore wished to challenge the Zoning Officer's conclusion that he had changed the use of his property and was required to obtain a zoning permit, he had no alternative but to take an appeal to the Zoning Hearing Board within thirty days of the Zoning Officer's letter or risk possible legal action. It is difficult to imagine how the Zoning Officer's decision could have been more final.

The Township argues that the September 3, 2010 letter was not final and therefore was not an appealable determination. See Township's Br. at

9-11. First, the Township argues that, unlike the decision in *Codorus*, which left the landowner's development plan "dead in the water," here the Zoning Officer suggested options that would have enabled Amore to proceed with his plans. *Id.* at 11.

It can hardly be said that the September 3, 2010 letter can constitute a "determination" by suggesting so many options being available to Dr. Amore to request zoning approval. . . . [N]othing communicated by the Zoning Officer in the September 3, 2010 letter had in any way the same "drop dead" final effect as was present in the *North Codorus* case.

*Id.* at 10-11.

Second, the Township argues that the Zoning Officer's decision here imposed no immediate consequences but only threatened future legal action.

*See id.* at 10.

The September 3, 2010 letter cannot be interpreted as a "final" action since it does not preclude Dr. Amore from doing or not doing anything in the use of his land. No consequences were imposed directly or indirectly by the September 3, 2010 letter. The indication that future actions might be taken by the Township indicates that a "final action" had not yet occurred.

*Id.*

We are unpersuaded by the Township's efforts to distinguish *Codorus*. First, although the Township is correct that the Zoning Officer presented Amore with certain options for how to proceed, Amore's chosen option of proceeding without a permit was, to use the Township's words, "dead in the water." *Id.* at 11. Keller's letter had precisely the same "drop dead" effect

on that option as the determination in *Codorus* had on the land development proposal at issue in that case. *Id.* at 10.

Second, we do not agree that a decision must impose immediate consequences in order to be considered a final action. Most decisions by a Zoning Officer would require some implementation or enforcement before consequences would occur. Thus, we hold that under *Codorus*, the Zoning Officer's September 3, 2010 letter was a final action and therefore a determination appealable to the Zoning Hearing Board.

## 2. Application for a Special Exception

Amore applied, in the alternative, for approval of his agritainment activities as "commercial outdoor recreation," a special-exception use in the A/RR District. App. Pet. ¶ 11. As noted above, Serfass did not mention this application in her October 21, 2010 letter when she returned Amore's Appeal Petition to him. Similarly, the Township has not mentioned the application in its brief on appeal. The Township has only asserted that the Zoning Hearing Board lacked jurisdiction over Amore's Appeal Petition because Amore never applied for or was denied a zoning permit.

If the Township is suggesting that filing an application for a zoning permit is a prerequisite to filing a direct application for a special exception with the Zoning Hearing Board, then we disagree. The Township has cited nothing in the MPC or the Zoning Ordinance stating that a landowner must apply for and be denied a zoning permit before applying for a special

exception. The Township has presented no other arguments as to why the Zoning Hearing Board lacked jurisdiction over Amore's application for a special exception. Thus, we hold that the Zoning Hearing Board had jurisdiction over the application.

### 3. Application for Expansion of Accessory Use and a Variance

Amore applied, in the alternative, for expansion of an accessory use, a "seasonal roadside produce market," and a variance from certain size and portability restrictions on that use set forth in the Zoning Ordinance. Appeal Pet. ¶ 11. As noted above, Serfass did not mention this application in her October 21, 2010 letter when she returned Amore's Appeal Petition to him. Similarly, the Township has not addressed this application in its brief on appeal. As with Amore's application for a special exception, the Township has only asserted that the Zoning Hearing Board lacked jurisdiction over Amore's Appeal Petition because Amore never applied for or was denied a zoning permit.

Again, if the Township is suggesting that filing an application for a zoning permit is a prerequisite to filing a direct application for a variance with the Zoning Hearing Board, then we disagree. The MPC expressly states that a zoning hearing board may, if it chooses, require that an application for a variance be submitted to the zoning officer before it is submitted to the zoning hearing board. See 53 P.S. § 10910.2 ("Zoning hearing board's functions; variances. . . . The [Zoning Hearing Board] may by rule prescribe

the form of application and may require preliminary application to the zoning officer.”). However, there is no indication that the East Allen Township Zoning Hearing Board has enacted a rule requiring that an application for a variance be submitted to the zoning officer before it is submitted to the zoning hearing board. The East Allen Township Zoning Ordinance simply states that the Zoning Hearing Board’s practices with respect to variances will comply with the standards set forth in the MPC. See East Allen Code § 250-74E (“Zoning Hearing Board’s functions with regard to variances shall be in conformance with the standards set forth in the Municipalities Planning Code and/or any amendments thereto.”). The Township has presented no other arguments as to why the Zoning Hearing Board lacked jurisdiction over Amore’s application for expansion of an accessory use and a variance. Thus, we hold that the Zoning Hearing Board had jurisdiction over the application.

#### 4. Effect of Rejection of Amore's Appeal Petition

As noted above, Serfass rejected Amore’s Appeal Petition for filing and returned it to him. See EAT-1. However, we hold that she had no authority to reject Amore’s submission and that the rejection was therefore without effect.

The Zoning Ordinance sets forth the requirements for submitting an appeal and/or application to the Zoning Hearing Board. See East Allen Code § 250-74F.

F. Applications to the Board

- 1) All appeals from a decision of the Zoning Officer and applications to the Board shall be in writing on forms prescribed by the Board.
- 2) Every appeal or application shall include the following:
  - a) The name and address of the applicant, or appellant;
  - b) The name and address of the owner of the property to be affected by such proposed change or appeal;
  - c) A brief description and location of the property to be affected by such proposed change or appeal;
  - d) A statement of the present zoning classification of the property in question, the improvements thereon and the present use thereof;
  - e) A statement of the section of this ordinance under which the appeal is made and reasons why it should be granted, or a statement of the section of this ordinance governing the situation in which the alleged erroneous ruling is being appealed and the reasons for this appeal; and
  - f) A reasonably accurate description of the additions or changes intended to be made under this application, indicating the size, material, and general construction of such proposed improvements. A plot plan of the property to be affected, indicating the location and size of the lot and the size of existing and intended improvements, shall be attached to the description.

*Id.*

When an application is submitted to the Zoning Hearing Board, the Zoning Officer is required to accept it. See East Allen Code § 250-73B.

**§ 250-73. Zoning Officer.**

. . . .

B. Duties and powers.

1) The Zoning Officer shall:

a) Administer this ordinance in accordance with its literal terms

. . . .

c) Receive and examine all applications required under the terms of this ordinance

*Id.*

Amore submitted his Appeal Petition on the preprinted form provided by the Zoning Hearing Board, included the required information, and clearly set forth his requested relief. See Appeal Pet. It is undisputed that the Zoning Officer received his submission. The Township has not asserted that the Appeal Petition was incomplete or defective. Serfass's sole basis for returning the Appeal Petition to Amore was that he had not applied for or been denied a zoning permit and therefore, in Serfass's opinion, had nothing from which he could appeal, *i.e.*, that he had failed to establish a basis for jurisdiction before the Zoning Hearing Board. See EAT-1. The Township has cited nothing in the Zoning Ordinance or the MPC that would permit the Zoning Officer to reject an appeal and application based on the Zoning Officer's belief that the applicant had failed to establish jurisdiction.

Accordingly, we hold that Amore's appeal and applications were properly submitted to the Zoning Hearing Board and that the Assistant Zoning Officer's action in purporting to return them was of no effect.

B. Amore's Alleged Failure to Exhaust His Administrative Remedies

In its brief on appeal, the Township does not clearly articulate how Amore allegedly failed to exhaust his administrative remedies other than by asserting that he failed to apply to the Zoning Officer for a zoning permit. Presumably, the Township is suggesting that after receiving the Zoning Officer's September 3, 2010 letter, Amore should have applied for a permit, waited for it to be denied by the Zoning Officer, and then appealed the denial on the basis that no permit was required. However, the thrust of Amore's appeal was that he had not changed the use of his property and therefore did not need to apply for a zoning permit. Requiring him to apply for a permit and wait for it to be denied would have defeated the purpose of his appeal, *i.e.*, to avoid applying for a permit.

In addition, if Amore had followed that procedure and the Zoning Hearing Board had ultimately held that the September 3, 2010 letter was in fact a determination, Amore's appeal would have been dismissed as untimely. See 53 P.S. § §§10914.1 ("All appeals from determinations adverse to the landowners shall be filed by the landowner within 30 days



after notice of the determination is issued." ).<sup>1</sup>

### **CONCLUSION**

We hold that the Zoning Hearing Board had jurisdiction to hear Amore's appeal and applications. Amore was not required to apply to the Zoning Officer for a zoning permit before submitting his appeal and applications to the Zoning Hearing Board, and he therefore did not fail to exhaust his administrative remedies. Amore complied with the requirements of the MPC and the Zoning Ordinance in submitting his appeal and applications to the Zoning Hearing Board, and the Zoning Officer had no authority to reject them. Thus, the appeal and applications were properly before the Zoning Hearing Board. Because the Zoning Hearing Board failed to hold a hearing on the appeal and applications within the time required by the MPC, Amore received a deemed approval of his proposed uses. Accordingly, the Court orders that the Township's appeal be quashed.

**WHEREFORE**, we enter the following:

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<sup>1</sup> Amore argues that he was required to treat the September 3, 2010 letter as a valid "enforcement notice," the legal document by which the Zoning Officer commences an enforcement action, and file an appeal from it or risk a later determination that he had waived any objection to the Zoning Officer's assertion that he was in violation of the Zoning Ordinance. See Amore's Br. at 9. We need not address this issue, because we hold that Amore properly appealed the September 3, 2010 letter as a determination of the Zoning Officer.



**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY  
COMMONWEALTH OF PENNSYLVANIA  
CIVIL DIVISION - LAW**

**EAST ALLEN TOWNSHIP,**

**Appellant,**

**vs.**

**GREGG AMORE and ZONING  
HEARING BOARD OF EAST ALLEN  
TOWNSHIP,**

**Appellees.**

**No.: C-48-CV-2011-1341**

**ORDER OF COURT**

**AND NOW**, this 24th day of February, 2014, upon consideration of the Appeal filed by Plaintiff East Allen Township (the "Township") from the public notice of deemed approval filed by Defendant Gregg Amore ("Amore"), Amore's response thereto, the briefs and arguments presented thereon, and testimony presented at an evidentiary hearing on October 8, 2013, it is hereby **ORDERED** and **DECREED** that the Township's appeal is **QUASHED**. It is further ordered that because the Zoning Hearing Board failed to hold a hearing on Amore's Appeal Petition within the time required by the

Municipalities Planning Code, 53 P.S. 10101 *et seq.*, Amore received a deemed approval of his proposed uses.

**BY THE COURT:**

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**MICHAEL J. KOURY, JR., J.**