

## **No Subdivision? Commonwealth Court Says, 'No Problem!': Commonwealth Court opinion rules developer's original application controlling**

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By Robert A. Silverman

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What if your client wants to buy a tract of real estate that is not separately subdivided?

He tells you that he is not worried about any municipal fines that may be incurred as a result of violating the applicable subdivision ordinance. He is also not worried about the need to obtain building permits that might not be obtainable in the absence of a valid subdivision approval, and says he will worry about all of those "details" later. All your client wants to know is whether, as a real estate conveyancing matter, good title to the non-subdivided parcel can be conveyed to him.

While previously you may have told your client that you weren't sure such a transaction could be done, a recent Commonwealth Court decision may have changed things.

If you turn to the Pennsylvania Municipalities Planning Code, 53 P.S. §§ 10101-11202 (MPC) for the answer, you will see that Section 507 provides in pertinent part: "[w]here a subdivision and land development ordinance has been enacted by a municipality under the authority of this article no subdivision or land development of any lot, tract or parcel of land shall be made ... except in accordance with the provisions of such ordinance."

Because under the MPC a "subdivision" is defined as "the division or redivision of a lot, tract or parcel of land by any means into two or more lots, tracts, parcels or other divisions of land ... for the purpose, whether immediate or future, of ... transfer of ownership or building or lot development ..." this gives you pause.

However, these provisions of the MPC did not appear to trouble the Commonwealth Court of Pennsylvania in the recently decided *Riverwatch Condominium Owners Association v. Restoration Development Corp.*

In *Riverwatch*, Riverfront Inc. owned approximately 3.1593 acres of land in Delaware County, Pa. Riverfront filed a declaration of condominium in which it submitted a 1.089-acre portion of the parcel (hereinafter called the "one-acre parcel") to a condominium and designated the remaining 2.0703-acre parcel (hereinafter called the "two-acre parcel") as flexible real estate that could be added to the condominium in the future. No subdivision approval was apparently obtained in connection with the filing of the declaration of condominium and the separation of the one-acre parcel from the two-acre parcel.

Riverfront Inc. subsequently conveyed the two-acre parcel to Riverfront Marina Inc. At the time of the conveyance, a separate tax parcel number was assigned by the municipality to the two-acre

parcel, but again, no formal subdivision approval was obtained. Riverfront Marina Inc. then subsequently conveyed the two-acre parcel to Restoration Development Corp.

Riverwatch Condominium Association, the association for the condominium created on the one-acre parcel, then filed a complaint in the Delaware County Court of Common Pleas asking for, among other things, the court to declare that the condominium association was the owner of the two-acre parcel.

The association argued that the declaration of condominium itself called for the two-acre parcel to be part of the condominium.

More interestingly, however, the association also argued that it was the owner of the two-acre parcel on the grounds that it could not be owned separately from the one-acre parcel because the two parcels had never been subdivided from one another.

In addressing this issue, the trial court cited a 2005 Pennsylvania Supreme Court case, *Guido v. Township of Sandy*, in which the Supreme Court had suggested that under the MPC a de facto subdivision could occur under certain circumstances without formal governmental action, and if such de facto subdivision had occurred, then the property could be conveyed without a formal legal subdivision approval. The trial court went on to state that "subdivision approval is solely a land use issue with no effect on whether a grantee owns legal title."

The Commonwealth Court agreed with the trial court that the association could not successfully claim ownership of the two-acre parcel as a result of it not being a separately subdivided parcel.

However, the Commonwealth Court did not adopt the trial court's rationale in deciding the subdivision issue. Instead, without making any analysis of the MPC and without observing whether the MPC or any Pennsylvania cases might provide guidance on this issue, the Commonwealth Court cited to a 2006 New Hampshire case, *Ryan James Realty LLC v. Villages at Chester Condominium Association*, and concluded that no subdivision was necessary because any subdivision deficiencies have no effect on title to the real estate.

In other words, the Commonwealth Court did not believe that any subdivision had to occur at all for land conveyancing purposes.

Perhaps the Commonwealth Court chose not to adopt the trial court's reliance on the *Guido* case because the Pennsylvania Supreme Court stated in *Guido* that a de facto subdivision "does not amount to a governmentally recognized subdivision; indeed, an interested governmental body may view a particular division in fact as illegal . . . . The pragmatic implications, if any, of such illegality are unclear, and need not be determined here."

If the Commonwealth Court had determined that no conveyance of the two-acre parcel could have occurred without a subdivision approval, should that have led to a holding that the two-acre parcel was now owned by the association? One might argue that the filing of the declaration of condominium on less than an entire subdivided lot was itself an illegal subdivision (so that the creation of the condominium would have been invalid) if the Commonwealth Court had determined that a conveyance cannot be effectuated if it would violate applicable subdivision laws.

If the condominium was not validly created, did the unit owners have valid title to their units and did the association have any standing to sue on behalf of a condominium that does not validly exist?

Section 3106 of Pennsylvania's Uniform Condominium Act (UCA) provides that subdivision laws "may not prohibit the condominium form of ownership or impose any requirement upon a condominium which it would not impose upon a physically identical development under a different form of ownership. Otherwise, no provision of this subpart invalidates or modifies and provision of any ... subdivision [law]. ... Without limiting the other provisions of this section, the creation of a condominium ... out of an entire lot ... shall not in and itself constitute a subdivision."

Note that the provision quoted above implies that the UCA is not intended to prohibit the application of subdivision laws to the creation of a condominium out of less than an entire lot.

Whether the failure of a parcel of land to be subdivided affects the ability to convey such parcel is of great concern to real estate lawyers. The American Land Title Association form of title policy excludes from its coverage the violation or enforcement of any law, ordinance, permit or governmental regulation relating to the subdivision of land. Accordingly, if a conveyance fails due to lack of a subdivision approval, the grantee will not be covered by title insurance unless it has a separately issued endorsement (which is not customarily obtainable).

On Dec. 1, 2009, the Pennsylvania Supreme Court denied a petition for allowance of appeal in *Riverwatch*. However, because the Commonwealth Court did not cite to any Pennsylvania statute or case law as mandating its holding and because the Supreme Court has never ruled on the subdivision issue, real estate lawyers should not assume that *Riverwatch* is settled law.

If the Supreme Court ever decides to hear a case dealing with the subdivision issue that was the subject of *Riverwatch*, it may look for guidance from the MPC at 53 Pa.C.S.A. §10515.1, which provides that "the municipality may institute and maintain appropriate actions by law or in equity to restrain, correct or abate violations." Does this mean that a conveyance in violation of a subdivision ordinance may be "voidable" if the municipality seeks to have the transaction unwound, but in the absence of such municipal action the conveyance is valid?

Pennsylvania's Statutory Construction Act provides at 1 Pa.C.S.A §1928 that as a general matter (with some exceptions not applicable here) "provisions of a statute shall be liberally construed to effect their objects and to promote justice." If the MPC states that no subdivision shall be made without subdivision approval, one might conclude that a liberal construction of the MPC would require that a conveyance in violation of applicable law is not valid.

Perhaps the Commonwealth Court, as a matter of policy, reached the right result in its holding in *Riverwatch*. If a conveyance in violation of subdivision law were not effective, confirming who owns title to real estate would be made more difficult and could lead to a host of tricky issues (such as what if a conveyance were made in violation of subdivision laws but the property is later subdivided to comply).

Nevertheless, the issue seems worthy of more analysis of Pennsylvania's existing statutory framework than that afforded by the Commonwealth Court in *Riverwatch*. •

**Robert A. Silverman** is a member of the real estate practice group at Cozen O'Connor where he concentrates his practice on the representation of developers, lenders and owners in a variety of sophisticated transactions, including joint ventures and the development and sale of office buildings, shopping centers, hotels, apartment buildings and condominiums.