

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

John T. Mangan	:
	:
v.	:
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The City of Carbondale	: No. 1143 C.D. 2011
Zoning Hearing Board,	: Argued: June 4, 2012
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	:
Appellant	:

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES GARDNER COLINS, Senior Judge

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
SENIOR JUDGE COLINS**

**FILED: June 27, 2012**

The City of Carbondale Zoning Hearing Board (ZHB) appeals from an interlocutory order of the Lackawanna County Court of Common Pleas (trial court) that (1) reversed the ZHB’s denial of a special exception applied for by John T. Mangan (Applicant), granting him the exception, and (2) reversed the ZHB’s denial of variances without ruling on its merits, remanding the matter to the ZHB for further proceedings on the variance applications. The trial court’s order also expressly permitted Applicant to file an amended application for variances. The ZHB appealed the trial court’s order, seeking reinstatement of its decision denying the application for a special exception and for variances. This Court, by order dated July 28, 2011, instructed the parties to address in their briefs whether the

order was appealable in light of the trial court's remand. Finding that the order is not appealable, we quash.<sup>1</sup>

On August 19, 2010, Applicant submitted an application for a special exception and dimensional variances to the ZHB of the City of Carbondale, in connection with his proposed construction of a one story, two-unit, two-family townhouse on the property he owns at 46-48 Brook Street, Carbondale, Pa. (the Premises). Applicant sought a special exception to build a townhouse (*i.e.*, two tax parcels, one per family), as opposed to a duplex or single home for two families, for which no exception would be required (*i.e.*, one tax parcel for two families). Applicant also sought dimensional variances from set-back requirements for the front and rear of the lot and for the overall size of the lot.

The ZHB conducted a hearing on September 15, 2010, where Applicant presented evidence and three neighbors objected to the zoning relief sought. At the conclusion of the hearing, the ZHB members voted two for, and two against the requested relief. Thus, the relief was denied. Applicant appealed to the trial court. The ZHB issued a brief set of findings of fact as part of the certified record to the trial court.

The trial court reversed the denial of the special exception, reasoning that because a townhouse is specifically listed as a permitted special exception in an R-2 zoned district, and Applicant sought to build a townhouse, the ZHB abused its discretion by denying the application. Regarding the variance request, the trial

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<sup>1</sup> When the trial court does not take additional evidence, our Court's scope of review in a land use appeal is limited to determining whether the Board committed an abuse of discretion or an error of law. *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 554 Pa. 249, 256, 721 A.2d 43, 46 (1998). The Court may address *sua sponte* the issue of its subject matter jurisdiction over an appeal. *Pa. Department of Transportation v. Rollins Outdoor Advertising Co., Inc.*, 464 A.2d 653, 655 (Pa. Cmwlth. 1983).

court found that the ZHB committed error when its members took only one vote on the two separate applications before them, *i.e.*, the application for a special exception and the application for variances. The trial court reasoned that the burdens of proof and standards for determining each of these separate applications are so drastically different that to consider them in such a fashion was error. Based on the record before it, the court found: “Though the Board may have considered the merits of the variance application and found that the applicant failed to carry his burden, it is equally likely that the Board, knowing that the question of a variance was mooted by the failure to grant a special exception, failed to properly consider the applicant’s evidence as to the variance issue.” Trial Ct. Op. at 6. Thus, the trial court remanded to the ZHB “for the limited purpose of determining, in light of our conclusion that allowance of a special exception is appropriate, whether the applicant has met his burden of establishing the necessity of a dimensional variance.” Trial Ct. Op. at 7. The trial court also held that “Petitioner [Mangan] may file an amended plan with respect to the variance application within 30 days of the date hereof provided. However, if no amended plan is filed, the Board shall convene a further evidentiary hearing within 90 days of the date hereof.” The ZHB appealed to this Court.

We note initially that the trial court’s order is interlocutory. The Court’s jurisdiction to hear appeals from decisions of common pleas courts is limited to final orders, unless otherwise permitted by statute or rule. 42 Pa. C.S. § 762(a); Pa. R.A.P. 341. Rule 341(b) provides that a final order is any order that:

- (1) disposes of all claims and of all parties; or
- (2) is expressly defined as a final order by statute; or
- (3) is entered as a final order pursuant to subdivision (c) of this rule [permitting entry of a final order as to less

than all of the claims or parties upon the express determination by a court or governmental unit that an immediate appeal would facilitate resolution of the entire case].

Pa. R.A.P. 341(b).

We have repeatedly ruled that a court order remanding a matter to an administrative agency for additional hearings is interlocutory and is not a final order from which an appeal may be taken. *Domagalski v. Szilli*, 812 A.2d 747, 749 (Pa. Cmwlth. 2002); *Kramer v. Zoning Hearing Bd. of Upper Saucon Twp.*, 641 A.2d 685, 687 (Pa. Cmwlth. 1994); *Roth v. Borough of Verona*, 519 A.2d 537, 539 (Pa. Cmwlth. 1986); *Phila. Comm'n on Human Relations v. Gold*, 503 A.2d 1120, 1121 (Pa. Cmwlth. 1986).

Here, the trial court reversed the ZHB's denial of a special exception, and remanded to the ZHB, with the option of conducting a further evidentiary hearing, to evaluate the variance applications and better explain its rationale. As such, the order did not end the litigation or dispose of the entire case. Nor is the trial court's order expressly defined as final by statute. Therefore, the order is interlocutory and not final within the meaning of appellate Rule 341.

The ZHB argues that the trial court's order is an interlocutory order appealable as of right under Pennsylvania Rule of Appellate Procedure 311(f)(2) and our holding in *Schultheis v. Board of Supervisors of Upper Bern Township*, 727 A.2d 145 (Pa. Cmwlth. 1999). More specifically, the ZHB argues that if its appeal is denied, the denial of Applicant's variance applications will ultimately evade our review because the trial court permitted Applicant to revise them.

The trial court's order is not appealable under appellate Rule 311(f)(2), which provides for appeals as of right from an interlocutory order where the order remands a matter to an administrative agency and that matter would

ultimately evade appellate review if immediate appeal were not permitted. In *Domagalski*, after a property owner's variance application was initially granted by the local zoning hearing board, adjacent landowners appealed. 812 A.2d at 749. The trial court, without ruling on the merits of the appeal, remanded the matter to the board to conduct a further evidentiary hearing. *Id.* We determined that the trial court's order was not appealable under Rule 311(f). *Id.* at 749-50. We explained that because the trial court did not decide the merits of the appeal before remanding, there was no issue capable of evading our review, and if they were aggrieved, the adjacent landowners (*i.e.*, appellants) could question the propriety of the remand order on a later appeal. *Id.* at 750.

Our holding in *Schultheis* is distinguishable from the situation here and in *Domagalski*. We permitted the appeal of an interlocutory order in *Schultheis* because the court of common pleas there decided the merits of the case before it remanded the matter to the zoning hearing board. *Schultheis*, 727 A.2d at 148; *Domagalski*, 812 A.2d at 750 (discussing *Schultheis*).

Here, the trial court's order remanded the variance applications to the ZHB without ruling on the merits of the appeal. Accordingly, under *Domagalski*, there is no issue capable of evading our review. If aggrieved, the ZHB (*i.e.*, appellants) may on later appeal question the propriety of the trial court's remand order. Accordingly, appellate Rule 311(f)(2) does not apply and we quash the appeal from the trial court's interlocutory order.

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JAMES GARDNER COLINS, Senior Judge

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

John T. Mangan

v.

The City of Carbondale  
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Appellant

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**ORDER**

AND NOW, this 27<sup>th</sup> day of June, 2012, the appeal in this matter is quashed.

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JAMES GARDNER COLINS, Senior Judge