IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carol Stuckley, Jane and John Johnson, Gene Epstein, Kris Riley, John Melsky, Ruth Ann Melsky-Moore, Otto Schneider, Gertrude Schneider, James Defalco, Pam Fitzpatrick, Taylor Baudeley, Leo Fitzpatrick, Rachel Baudeley, Frances Bielski, Nick Seibel, Edwin Bielski, and Theresa Parrilla	:	
	:	No. 758 C.D. 2010
v.	:	
Zoning Hearing Board of Newtown Township, et al.	:	
	:	Argued: December 6, 2010
v.	:	
Toll Brothers, Inc., Dolington Land, LLP, and Toll PA XIII LP, Appellants	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE QUIGLEY **FILED: March 17, 2011**

Toll Brothers, Inc., Dolington Land, LLP, and Toll PA XIII LP (together, Toll Brothers) appeal from the March 25, 2010, order of the Court of Common Pleas of Bucks County (trial court) reversing a decision of the Zoning Hearing Board of Newtown Township (ZHB) to end hearings on the validity of the

township's zoning ordinance and remanding for further proceedings. We affirm with modification.

In 1983, several townships, Upper Makefield Township, Newtown Township and Wrightstown Township (collectively, the Jointure), enacted a Joint Municipal Zoning Ordinance. On October 25, 2006, the townships amended the ordinance to create a Federal Cemetery Overlay District (FCO Ordinance), consisting of twelve large parcels of land in Upper Makefield Township and Newtown Township.

Leo Holt, the owner of two parcels in Newtown Township adjacent to an FCO District area, filed an Application for a Hearing (Application) with the ZHB, challenging the validity of the FCO Ordinance on eleven different grounds. Between January and June 2007, the ZHB held eight hearings on Holt's Application. Other residents in the vicinity of FCO District areas (together Neighbors) entered their appearance and were granted party status.[1] During the hearing on June 6, 2007, Holt withdrew his Application. On June 18, 2007, the townships repealed and reenacted the FCO Ordinance, intending to cure any possible procedural errors. Neighbors attempted to continue the challenge initiated by Holt, but the ZHB took no further action.

[1] The residents included appellees Carol Stuckley, Jane and John Johnson, Gene Epstein, Kris Riley, John Melsky, Ruth Ann Melsky-Moore, Otto Schneider, Gertrude Schneider, James Defalco, Pam Fitzpatrick, Taylor Baudeley, Leo Fitzpatrick, Rachel Baudeley, Frances Bielski, Nick Seibel, Edwin Bielski and Theresa Parrilla.

Neighbors filed a mandamus action with the trial court, requesting an order to compel the ZHB to hold further hearings on the validity of the FCO Ordinance or, in the alternative, to issue written findings regarding its reasons for not doing so. On December 11, 2008, the trial court granted mandamus, ordering the ZHB to issue findings concerning its decision to discontinue the hearings.

On March 5, 2009, the ZHB issued a decision, explaining that it discontinued the hearings because Holt was the only "party appellant," and, although Neighbors were "parties to the hearing," they did not have the right to continue Holt's challenge after Holt withdrew his Application.

Neighbors filed an appeal with the trial court, and Toll Brothers intervened.[2] The trial court reversed and remanded to the ZHB, explaining that the only distinction between a "party appellant" and a "party to the hearing" in the Pennsylvania Municipalities Planning Code (MPC)[3] is that a "party appellant" initiates the hearing.

Toll Brothers filed an appeal with this court but, subsequently, filed an application to dismiss the appeal and vacate the trial court's order as moot. In making the argument, Toll Brothers pointed out that the FCO Ordinance had been repealed and reenacted on June 18, 2007. This court denied the application, and Toll Brothers filed a motion for reconsideration. This court granted the motion for

[2] Toll Brothers was preparing to do residential development on ninety-four acres in the FCO District.

[3] Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10101 – 11202.

reconsideration, ordering that the mootness question be decided with the merits of the appeal.

We first consider Toll Brothers' argument that the trial court erred in concluding that Neighbors have the right to continue the hearings on the validity challenge of Holt.

Section 908 of the MPC provides, in pertinent part, as follows:

> (3) The **parties to the hearing** shall be the municipality, any person affected by the application who has made timely appearance of record before the board, and any other person including civic or community organizations permitted to appear by the board. The board shall have power to require that all persons who wish to be considered parties enter appearances in writing on forms provided by the board or the hearing officer.
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> . . . .
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> (5) The **parties shall have the right** to be represented by counsel and shall be afforded the opportunity to respond and present evidence and argument and cross-examine adverse witnesses on all relevant issues.
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> . . . .
>
> (7) The board or the hearing officer, as the case may be, shall keep a stenographic record of the proceedings. . . . The cost of the original transcript . . . shall be paid by the person appealing from the decision of the board if such appeal is made . . . . In other cases the **party** requesting the original transcript shall bear the cost thereof.
>
> (8) The board or the hearing officer shall not communicate, directly or indirectly, with any party or his representatives in connection with any issue involved

> **except upon notice and opportunity for all parties to participate**, shall not take notice of any communication, reports, staff memoranda, or other materials, except advice from their solicitor, **unless the parties** are afforded an opportunity to contest the material so noticed and shall not inspect the site or its surroundings after the commencement of hearings with any party or his representative **unless all parties** are given an opportunity to be present.
>
> (9) . . . . If the hearing is conducted by a hearing officer and there has been no stipulation that his decision or findings are final, the board shall make his report and recommendations available to the parties within 45 days and the **parties shall be entitled** to make written representations thereon to the board prior to final decision or entry of findings . . . .

53 P.S. §10908 (emphasis added).

Here, there is no question that Neighbors are "parties to the hearing" pursuant to section 908(3) of the MPC. As such, Neighbors have the right to be represented by counsel, present evidence, cross-examine adverse witnesses, present argument and obtain copies of the hearing transcript. Moreover, as "parties to the hearing," Neighbors have the right to notice and an opportunity to participate in any of the ZHB's communications with other parties, to contest materials of which the ZHB would take notice and to be present for inspections.[4] The MPC does **not** state that these rights of the "parties to the hearing" are **contingent** upon the "party

[4] Moreover, as "parties to the hearing," Neighbors have standing to appeal a decision of the ZHB. *Weston v. Zoning Hearing Board*, 994 A.2d 1185, 1192 (Pa. Cmwlth. 2010).

appellant" remaining in the action.[5,6] Thus, the trial court did not err in concluding that Neighbors could continue to exercise their hearing rights after Holt withdrew.

We next address the Toll Brothers' argument that the trial court's order is moot due to the repeal and reenactment of the FCO Ordinance.[7] In this regard, section 1962 of the Statutory Construction Act of 1972 provides:

> Whenever a statute is repealed and its provisions are at the same time reenacted in the same or substantially the same terms by the repealing statute, the earlier statute shall be construed as continued in active operation. All

[5] Toll Brothers suggests that *Frank v. Mobil Oil Corporation*, 296 A.2d 300 (Pa. Cmwlth. 1973), supports its position. We disagree. In that case, individuals who signed a petition and volunteered to testify as witnesses at the hearing argued that such actions gave them party status. This court disagreed, stating that section 908(3) of the MPC required that the individuals enter an appearance as "parties to the hearing." *Id.* at 303-304. Unlike the individuals in *Frank*, Neighbors did enter their appearance as "parties to the hearing."

[6] In this way, parties to the hearing, such as Neighbors, are analogous to intervenors. With respect to intervenors, the Supreme Court has stated:

> Intervention is a procedural tool by which a person not originally a party can participate in a given action. Generally, once intervention is allowed the intervenor is afforded all the rights of a party to the action, and unless otherwise specified an intervenor's right to participate in an appeal is not contingent upon the continued participation of the original appellant.

In re: Appeal of the Municipality of Penn Hills, 519 Pa. 164, 168, 546 A.2d 50, 52 (1988) (citations omitted).

[7] The appellees argue that Toll Brothers have waived the mootness issue because they failed to raise it before the ZHB or trial court. However, this court may raise the issue of mootness *sua sponte*. *Utility Workers Union of America, Local 69, AFL-CIO v. Public Utility Commission*, 859 A.2d 847, 849 (Pa. Cmwlth. 2004). Thus, the fact that Toll Brothers failed to raise the mootness issue before the ZHB and trial court does not prevent this court from considering it.

> rights and liabilities incurred under such earlier statute are preserved and may be enforced.

1 Pa. C.S. §1962. Thus, the FCO Ordinance continued in active operation with respect to any rights or liabilities incurred prior to its repeal and reenactment in 2007.

Toll Brothers assert that no rights or liabilities were incurred under the FCO Ordinance because no preliminary or final plan for land development was ever approved under the 2006 FCO ordinance, and that it did not submit land development plans to the Upper Makefield Township Board of Supervisors until August 2, 2007, after the repeal and reenactment of the FCO Ordinance. Neighbors assert that, to the contrary, Toll Brothers submitted land development plans in 2006, and Toll Brothers' rights would be governed by the 2006 FCO Ordinance.[8] Regardless of whether Toll Brothers' accrued rights under the 2006 FCO Ordinance or the 2007 FCO Ordinance, its rights and liabilities are the same, per Section 1962. Therefore, Neighbors claims are not moot in this regard.[9]

In its brief, however, Toll Brothers also asserts that Neighbors' appeal is moot because on June 28, 2010, the Jointure enacted Joint Municipal Zoning

[8] Neighbors argue that Toll Brothers submitted a sketch plan in 2006. Under *Belber v. Lower Merion Township*, 639 A.2d 1325 (Pa. Cmwlth. 1994), where the submission of a sketch plan is required by a local ordinance, approval of all plans is governed by the zoning ordinance in existence when the sketch plan was filed. *See* section 508(4) of the MPC, 53 P.S. §10508(4).

[9] We do note, however, that one of the issues raised by Holt did have to do with the procedural validity of the 2006 FCO Ordinance. To the extent that the reenactment of the FCO Ordinance in 2007 was procedurally valid, this would cure the procedural invalidity of the 2006 FCO Ordinance.

Ordinance No. 2010-1, which, Toll Brothers claims, cures the substantive validity issues raised by Holt's Application. Additionally, Toll Brothers asks this Court to take notice of land development proceedings before the Upper Makefield Township Board of Supervisors and the trial court that Toll Brothers argues renders the current appeal moot. However, the record in this court does not contain this information, much of which arose after the trial court's decision and the documents offered for judicial notice do not offer sufficient factual information to determine the questions at issue.

Accordingly, we affirm the trial court's order with respect to the right of Neighbors to continue the hearing, but we modify the trial court's order to state that, on remand to the ZHB for further proceedings, the ZHB shall take evidence and make findings of fact and conclusions of law on the issue of mootness.[10]

KEITH B. QUIGLEY, Senior Judge

[10] If the ZHB concludes that this matter is not moot, the ZHB shall conduct further proceedings on the merits.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carol Stuckley, Jane and John Johnson, Gene Epstein, Kris Riley, John Melsky, Ruth Ann Melsky-Moore, Otto Schneider, Gertrude Schneider, James Defalco, Pam Fitzpatrick, Taylor Baudeley, Leo Fitzpatrick, Rachel Baudeley, Frances Bielski, Nick Seibel, Edwin Bielski, and Theresa Parrilla	:	
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O R D E R

AND NOW, this 17th day of March, 2011, the order of the Court of Common Pleas of Bucks County (trial court), dated March 25, 2010, is **AFFIRMED** but is **MODIFIED** to state that, on remand to the Zoning Hearing Board of Newtown Township (ZHB) for further proceedings, the ZHB shall take evidence and make findings of fact and conclusions of law on the issue of mootness consistent with this opinion. If the ZHB concludes that the matter is not moot, the ZHB shall also take evidence and make findings of fact and conclusions of law on the merits.

KEITH B. QUIGLEY, Senior Judge