

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Appeal of Frank W. Szabo and :
Madeline J. Szabo, h/w from the :
Decision, dated 6th of April, 2010, :
of the Zoning Hearing Board of the :
Township of Upper Dublin, :
Montgomery County, Pennsylvania :
: No. 85 C.D. 2011
Appeal of: Frank W. Szabo and : Submitted: April 29, 2011
Madeline J. Szabo, h/w :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: September 20, 2011

Frank and Madeline Szabo appeal, *pro se*, an order of the Court of Common Pleas of Montgomery County (trial court) denying their land use appeal. The trial court affirmed the decision of the Upper Dublin Township Zoning Hearing Board (Board) that the Szabos failed to file a timely appeal of a zoning enforcement notice in accordance with the procedures set forth in the Upper Dublin Township Zoning Code (Zoning Code).¹ Discerning no error, we affirm the order of the trial court.

¹ CODE OF THE TOWNSHIP OF UPPER DUBLIN, CHAPTER 255 ZONING (January 10, 1995), *as amended* (ZONING CODE).

The Szabos own a residential lot, approximately 1.6 acres in size and improved with a single family dwelling, in Upper Dublin Township (Township). The property is zoned A-Residential. At some point, the Szabos constructed a chicken coop on the rear of their home. In addition to approximately 17 chickens, the Szabos feed 12 ducks, although it is unclear whether the ducks actually live on the property.

On November 16, 2009, the Township's Director of Code Enforcement, Richard Barton, sent a notice of zoning violation to the Szabos, explaining that keeping poultry on their property violated the Zoning Code. Specifically, Section 255-27.A states, in relevant part, as follows:

as to a private stable or barn, no animals shall be housed therein unless the stable is located on a lot *at least five acres in area* and the stable or barn is located at least 100 feet from any boundary line *and at least 150 feet from any dwelling*.

ZONING CODE §255.27.A (emphasis added). The enforcement notice directed the Szabos to remove the chickens and ducks; to apply for a variance; or to appeal the enforcement notice to the Board no later than December 17, 2009. Reproduced Record at 24a (R.R.____).

Rather than exercise any of the options in the enforcement notice, the Szabos wrote a letter to the Board on December 11, 2009, challenging the Board's jurisdiction. On December 18, 2009, Barton sent a letter to the Szabos advising them of the proper appeal procedures. Barton's letter included copies of the appeal form and explained the need for supporting documentation and a filing fee. On January 8, 2010, Barton sent a letter by certified mail enclosing a copy of his December 18 letter and extending the Szabos' appeal deadline to January 22, 2010.

On January 25, 2010, the Szabos responded with a letter to Barton stating that it was inappropriate for him to communicate with the Szabos; that the Szabos had filed a demand with the Board; that Barton was in violation of his oath of office; that the law did not require the Szabos to fill out the appeal form; and that the Szabos did not need to pay the filing fee. On February 24, 2010, a hearing was held before the Board.

Barton testified for the Township. He described the small shed and fenced-in area the Szabos had constructed on their property to accommodate their chickens. Barton testified that the Township property maintenance inspector went to the Szabos' property on the day of the hearing to see if the Szabos had removed the poultry and the structures; he found the birds and the structures still there. This fact was also confirmed by several photographs which Barton submitted into evidence.

The Township also presented the testimony of the Szabos' next door neighbor, David Webster. Webster testified that the shed, chicken coop, and the poultry are all visible from his deck and upstairs windows. Webster stated that

[t]here's an odor that comes from [the Szabos' yard] that's enough to gag you at times. I also have a recording of a typical morning when the roosters, you know, tend to crow.

Notes of Testimony, 2/24/2010, at 32 (N.T.____). According to Webster, the ducks "have free range to fly wherever they want to, particularly over on [Webster's] property." N.T. 38. Webster further testified that the chicks would "squeeze beneath the fence" separating the Szabos' yard from his own and "scratch through" Webster's flowerbeds. N.T. 39. Webster stated that the ducks left enough feathers in his yard to "make a king size pillow." *Id.* Webster testified that he is afraid to

leave his small dog on his deck because of the chicken hawks and a fox that frequent the area, drawn by the Szabo poultry.

Frank Szabo testified on behalf of himself and his wife. He offered various exhibits, including the Pennsylvania Constitution, in support of his claim that the Township lacks jurisdiction to regulate private property through its zoning ordinance. Mr. Szabo's testimony can be summed up in his statement that "[z]oning cannot possibly apply to private property." N.T. 50. Essentially, Mr. Szabo argued that zoning ordinances that govern private property disputes have no constitutional authority. Szabo stated that keeping poultry on his property "has nothing to do with public health or public safety." *Id.*

On cross-examination, Mr. Szabo confirmed that the photographs admitted into evidence accurately depicted his property. He explained that he did not apply for a variance or pay the \$500.00 fee because the Board lacks jurisdiction to tell him how to use his private property. Szabo opined that the Pennsylvania Municipalities Planning Code (MPC)² applies only to public property, and not to private property.

The Board found that Section 255-176 of the Zoning Code requires appeals and applications for zoning relief to be submitted in writing, on forms prescribed by the Board.³ Further, an application for zoning relief must set forth

² Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§10101 - 11202.

³ Section 255-176 of the Zoning Code provides, as follows:

The Board shall adopt rules of procedure in accordance with the several provisions of this chapter as to manner of filing appeals or applications for special exceptions or for variance from the terms of this chapter. All appeals and applications made to the Board shall be in writing, on forms prescribed by the Board. Every appeal or application shall refer to the specific provision of the ordinance involved and shall exactly set forth the interpretation that is claimed,

(Footnote continued on the next page . . .)

the applicant's basis for the application and must be accompanied by the payment of the required fee. The Board found, as fact, that the Szabos did not apply for zoning relief or file a timely appeal of the enforcement notice. The Szabos appealed to the trial court.

On December 7, 2010, the trial court heard oral argument. The Szabos claimed that the trial court judge could not decide their appeal but, rather, a jury should decide their case. The Board countered that the Szabos' appeal should be dismissed because they had failed to seek zoning relief in accordance with the terms of the Zoning Code.

The trial court affirmed. It held that the Board has jurisdiction over private property and private citizens in zoning matters. Further, the Szabos had failed to file a timely appeal of the Township's notice of violation. Finally, the trial court held that the Szabos were not entitled to a trial by jury. *See Township of Lower Milford v. Britt*, 799 A.2d 965 (Pa. Cmwlth. 2002) (holding that a party appealing a decision of a zoning hearing board is not entitled to a trial by jury under Pennsylvania law).

In their appeal to this Court,⁴ the Szabos present essentially three issues for our consideration. First, the Szabos argue that the MPC and the Zoning

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the use for which the special exception is sought, the details of the variance that is applied for and the grounds on which it is claimed that the variance should be granted, as the case may be.

ZONING CODE §255-176.

⁴ Where the trial court has taken no additional evidence, the scope of review is generally limited to whether a zoning hearing board committed an abuse of discretion or an error of law. *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 554, 462 A.2d 637, 639 (1983).

Code do not give the Board jurisdiction over private property owned by a private citizen unless the citizen allows the Board to exercise such jurisdiction; thus, the Board's adjudication in this matter violated the Szabos' constitutional rights. Second, the Szabos claim that the trial court had original jurisdiction in this matter, not appellate jurisdiction. Third, the Szabos contend that the trial court erred in not granting the Szabos a trial by jury.

We begin with a review of the relevant statutory provisions. Section 909.1 of the MPC provides as follows:

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

* * *

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

53 P.S. §10909.1(a)(3).⁵ Consistent with Section 909.1, the Zoning Code states, in relevant part, as follows:

The Board shall have the following powers:

- A. Appeals and interpretations. To hear and decide appeals where it is alleged that there is an error in any order, requirement, decision or determination made by any administrative official in the enforcement of said Act or of this chapter adopted pursuant thereto.

⁵ Section 909.1 was added by the Act of December 21, 1988, P.L. 1329.

ZONING CODE §255-173. Significantly, a zoning ordinance is presumptively valid and constitutional. *Ficco v. Board of Supervisors of Hempfield Township*, 677 A.2d 897, 899 (Pa. Cmwlth. 1996). Further, the procedural framework set forth in the MPC, *i.e.*, an application for relief submitted to a zoning hearing board, is the exclusive means of challenging the validity of a zoning ordinance on constitutional grounds. *See Reynolds v. Zoning Hearing Board of Abington Township*, 578 A.2d 629, 631 (Pa. Cmwlth. 1990).

In light of these principles, we turn to the Szabos' challenge to the Board's jurisdiction. The Szabos' arguments assume that the MPC applies only to public or municipal property, noting, for example, that the purpose of a zoning ordinance is to promote the public health. The Szabos claim that since private property is not "public," the provisions of the MPC cannot govern the use of private property. The Szabos further claim that the Board could only have jurisdiction over the use of their private property if they, as private landowners, acquiesced in the Board's jurisdiction.

The Szabos' logic is flawed. The provisions of the MPC and the Zoning Code safeguard the interests of all landowners within the municipality, whether private or public. Where a zoning ordinance has been enacted, no part of the municipality may be left unzoned. 53 P.S. §10605.⁶ The MPC empowers

⁶ Section 605 provides, in relevant part:

In any municipality, other than a county, which enacts a zoning ordinance, no part of such municipality shall be left unzoned. The provisions of all zoning ordinances may be classified so that different provisions may be applied to different classes of situations, uses and structures and to such various districts of the municipality as shall be described by a map made part of the zoning ordinance. Where zoning districts are created, all provisions shall be uniform for each class of uses or structures, within each district...

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municipalities to adopt zoning ordinances that ensure a comprehensive approach to land development within the municipality. The Township is authorized, pursuant to the MPC, to enforce its Zoning Code against any owner of property on which a violation has occurred. 53 P.S. §10616.1.⁷ In short, the Szabos' jurisdiction argument lacks merit.

We next address the Szabos' contention that their appeal fell within the trial court's original jurisdiction, rather than its appellate jurisdiction. Specifically, the Szabos argue that the Board is an administrative body and not a "court of record." Szabos' Brief at 24. The Board counters that the Szabos' challenge had to be heard first by the Board and then by the trial court. We agree with the Board.

Where the MPC provides that a zoning hearing board has exclusive jurisdiction to hear an appeal from the decision of a zoning officer, a direct appeal to a trial court must be dismissed. *See Bakerstown Liquid Burners, Inc. v. Richland Township*, 447 A.2d 1071 (Pa. Cmwlth. 1982) (holding that the exclusive means of appealing a decision by a zoning officer to revoke building permits was

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53 P.S. §10605. Section 605 was added by the Act of December 21, 1988, P.L. 1329.

⁷ Section 616.1 provides, in relevant part:

- (a) If it appears to the municipality that a violation of any zoning ordinance enacted under this act or prior enabling laws has occurred, the municipality shall initiate enforcement proceedings by sending an enforcement notice as provided in this section.
- (b) The enforcement notice shall be sent to the owner of record of the parcel on which the violation has occurred, to any person who has filed a written request to receive enforcement notices regarding that parcel, and to any other person requested in writing by the owner of record.

53 P.S. §10616.1(a)-(b). Section 616.1 was added by the Act of December 21, 1988, P.L. 1329.

by appeal to the township zoning board of appeals, not to the court of common pleas). Here, the Szabos were required to appeal to the Board and refused to do so. The Szabos cannot appeal the decision of a zoning officer directly to the trial court. *See id.* Thus, the trial court correctly held that the Szabos failed to properly appeal the enforcement notice.

Finally, the Szabos contend that the trial court erred in denying them a jury trial in this matter. The Szabos argue that they have a constitutional right to a jury trial in “controversies respecting property.” Szabos’ Brief at 15. Because this matter involves the use of the Szabos’ private property, they insist they have the right to a jury trial before the trial court, rather than a hearing before the Board.

Land use appeals are governed by the MPC, which provides that the exclusive method of securing review of a decision rendered by a zoning hearing board is to appeal to the trial court of the county in which the property is located. *See* 53 P.S. §11006-A.⁸ This provision explains that a trial court will review the

⁸ Section 1006-A of the MPC provides, in relevant part:

- (a) In a land use appeal, the court shall have power to declare any ordinance or map invalid and set aside or modify any action, decision or order of the governing body, agency or officer of the municipality brought up on appeal.

* * *

- (d) Upon motion by any of the parties or upon motion by the court, the judge of the court may hold a hearing or hearings to receive additional evidence or employ experts to aid the court to frame an appropriate order. If the court employs an expert, the report or evidence of such expert shall be available to any party and he shall be subject to examination or cross-examination by any party. He shall be paid reasonable compensation for his services which may be assessed against any or all of the parties as determined by the court. The court shall retain jurisdiction of the appeal during the pendency of any such further proceedings and may, upon motion of the landowner, issue such supplementary orders as it deems necessary to protect the rights of the landowner as declared in its opinion and order.

53 P.S. §11006-A(a), (d).

decision of the Board and may conduct hearings to receive additional evidence. Notably, the Szabos did not request an evidentiary hearing, as permitted by the MPC, but instead, presented only oral argument before the trial court. Furthermore, in *Township of Lower Milford*, 799 A.2d 965, this Court held that a party appealing a decision of a zoning hearing board or a decision finding a violation of a zoning ordinance is not entitled to a trial by jury. The trial court properly held that the Szabos did not have a right to a trial by jury.

For the foregoing reasons, we affirm the order of the trial court.

MARY HANNAH LEAVITT, Judge

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ORDER

AND NOW, this 20th day of September, 2011, the order of the Court of Common Pleas of Montgomery County, dated December 13, 2010, is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge