IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John E. Marino, Appellant	:	
v.	:	No. 1036 C.D. 2007
Zoning Hearing Board of the Township of Harrison and the Township of Harrison	:	Argued: February 12, 2008

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: July 10, 2008

John E. Marino (Marino) appeals from an order of the Court of Common Pleas of Allegheny County (Trial Court) which affirmed an order of the Zoning Hearing Board (ZHB) of the Township of Harrison (Township). The ZHB's order denied Marino's appeal challenging the validity of an amendment to a Township zoning ordinance raising the maximum permissible height of sports-related structures, and additionally imposing a time restriction limiting the permissible hours of operation on lighting structures exceeding 45 feet high. We affirm.

The Highland Hornets (Hornets), a local youth football organization, initiated a request to the Township for an amendment of Section 207 of the

Township's Zoning Ordinance (Ordinance) to allow them to increase the height of lighting standards at an athletic field to accommodate evening football games.[1] On May 1, 2006, following notice and advertisement, the Township Planning Commission held a public meeting regarding an amendment raising the maximum height of structures for sports-related uses from 45 feet to 60 feet above ground level. Following consideration of the issues raised at that meeting, the Planning Commission voted to forward a favorable recommendation of the amendment to the Harrison Township Board of Commissioners (Commissioners). On May 3, 2006, the Township's solicitor forwarded a letter to the Commissioners citing to the Pennsylvania Outdoor Lighting Council's Model Lighting Section for Subdivision and Land Development Ordinances which suggested a maximum mounting height for the lighting of football fields of 70 feet, and further recommending a 10:00 p.m. maximum time limitation for the operation of such lights.

The proposed amendment was advertised as scheduled to be addressed at a subsequent Commissioners meeting, on May 18, 2006, at which public comment was received. Following that meeting, the Commissioners unanimously approved Ordinance No. 1926 (the Amendment), raising the maximum height for the type of structures at issue from 45 feet to 60 feet. The

[1] In prior actions not at issue herein, the Hornets sought a zoning variance, and/or a special exception, to allow them to install new light standards at a height of 60 feet. The variance/special exception applications were denied.

Amendment further imposed a 10:00 p.m. time restriction on such lighting structures over 45 feet high.

Marino filed a timely validity challenge to the Amendment. A hearing thereon was held before the ZHB on July 26, 2006. At the hearing Marino, through counsel, argued that the Amendment was special legislation and/or spot zoning, and further raised issues regarding the Hornets' prior efforts in relation to the new lighting standards, and the outdated nature of the Township's 1969 Comprehensive Plan.

The ZHB dismissed Marino's challenge to the Amendment's validity. In its decision dated September 29, 2006, the ZHB concluded that the Amendment was neither special legislation, nor spot zoning, and that the Amendment was consistent with the Comprehensive Plan notwithstanding the age of that Plan, which factor was not determinative. The ZHB further concluded that the Hornet's prior special exception and variance relief efforts were "inapposite to the issue at hand," and that Marino had failed to adduce any evidence that the Commissioners acted in bad faith in their consideration and approval of the Amendment.

Marino thereafter timely appealed the ZHB's decision to the Trial Court, which heard the matter without receiving any additional evidence. Marino again argued that the Amendment constituted special legislation, in that it was, *inter alia*, unjustly discriminatory, arbitrary, and unreasonable. Marino alternately argued that the Amendment constituted spot zoning and/or contract zoning. The Trial Court concluded that the record supported the findings and decision of the

ZHB, and affirmed the ZHB by order dated May 2, 2007. Marino now appeals to this Court.

This Court's scope of review in zoning cases addressing validity challenges, where, as here, the trial court took no additional evidence, is limited to determining whether the zoning hearing board committed an error of law or an abuse of discretion. Appeal of Apgar from the Decision of the Board of Commissioners of Manheim Township, 661 A.2d 445 (Pa. Cmwlth. 1995).

Most generally stated, Marino's issues on appeal assert that the Amendment is invalid and unconstitutional, in that it constitutes unlawful special legislation, and/or spot zoning, and/or contract zoning. For purposes of clarity herein, we have reorganized and reordered Marino's issues and related arguments.

We first address Marino's argument that the Amendment constitutes special legislation, in that the Hornets are the sole and/or primary beneficiaries of the Amendment. The Trial Court applied our holding in Apgar, in which we rejected a claim of special legislation where a local municipality amended its zoning ordinance by reducing required front and rear yard setbacks in the wake of a water authority's denied request for a variance from the same dimensional requirement. The water authority sought to accommodate the installation of a pumping station. As in the instant matter, a neighboring landowner challenged the amendment, noting that the authority was the sole and/or primary beneficiary of the amendment at issue, and asserting that therefore the amendment constituted special legislation. As we summarized in Apgar, from our well-established body of zoning case law:

> A zoning ordinance enacted by a governing body is presumed to be valid and constitutional. . . Therefore, the party challenging the validity of [a] zoning ordinance[] on the basis of special legislation must clearly establish that the ordinance is unjustly discriminatory, arbitrary, unreasonable and confiscatory in its application to a particular or specific piece of property. . . If the validity of the zoning ordinance is debatable, we must allow the legislative judgment to control. . .
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> In deciding the validity of a zoning ordinance, the courts have consistently limited the application of the theory of special legislation to situations where amendatory zoning ordinances were adopted to deprive the applicant of vested interests in permits issued before the amendment or to prevent a permitted use proposed in the pending application. . . Thus, an amendatory zoning ordinance constitutes special legislation only where it is enacted to *prevent* a lawful use of land permitted under the existing ordinance.

Apgar, 661 A.2d at 447-448 (citations omitted). We rejected the special legislation claim in Apgar on the bases that the amendment at issue had no confiscatory application, and was not enacted to prevent any lawful use of land.

We agree with the Trial Court, and the ZHB, that Apgar controls the matter *sub judice*, both in its specific holding, and in its articulation and application of prior Pennsylvania zoning precedents. Dispositively in relation to the instant matter, Apgar's requirement that a successful special legislation validity challenge requires a finding of confiscatory application to a particular property, and the related requirement that a challenged amendment prevent some lawful land use, were neither argued nor proven by Marino herein, as the body of evidence presented establishes.

However, Marino argues, as the primary foundational assertion of his appeal, that Apgar in general, and the confiscatory/lawful land use prevention requirements in particular, have been implicitly overruled by our Supreme Court in C&M Developers, Inc. v. Bedminster Township Zoning Hearing Board, 573 Pa. 2, 820 A.2d 143 (2002). Marino asserts that under C&M, there is no longer any requirement that an ordinance be confiscatory in application, but instead it must be shown that there is no substantial relation to the police power interest. We disagree. C&M is factually distinguishable, and did not address Apgar and the ample precedents upon which it rests. Dispositively, in regards to C&M's applicability hereto, that case did not involve any special legislation, spot zoning, or contract zoning assertions or analysis.

In C&M, a township passed an ordinance restricting the development of large tracts of agricultural land. Although most generally characterized, that precedent did address a validity challenge to a zoning ordinance, the meaningful inquiry employed in reviewing that ordinance by the Supreme Court – which analysis Marino urges this Court to employ in the instant matter, in replacement of that applied in Apgar – was one founded on the reasonableness of a *restriction* on land use in light of a potential deprivation of a land owner's development rights. Thus, C&M bears no resemblance to the issues involved, or the rights implicated, in the instant appeal. It follows that C&M's validity challenge analysis cannot be read, in any way, to displace or supplant Apgar's special legislation analysis.

Furthermore , the amendment at issue in C&M bears no relation to the Amendment at issue presently. The Amendment in this matter is not restrictive, in

the sense of the amendment at issue in C&M. There is no potential deprivation of a landowner's development or use rights herein. C&M did not address any of the claims raised and preserved by Marino in this appeal, and did not expressly or implicitly overrule the long-established holdings employed in Apgar. As such, and contrary to Marino's assertions underpinning the vast majority of his argument to this Court, the ZHB did not err or abuse its discretion in its application of Apgar's clear principles to the matter before us.

Marino also argues that the Commissioners acted arbitrarily and unreasonably in enacting the Amendment, and that it is thusly special legislation. By focusing his multiple arguments on these two elements of a special legislation analysis, Marino has ignored his burden to prove that the Amendment is confiscatory in its application to any particular, specific piece of property. Even accepting Marino's arguments regarding the unreasonableness and arbitrariness of the Amendment *arguendo*,[2] Marino does not advance any argument, and our review reveals no evidence of record, of any prevention of any lawful use of land permitted under the existing Ordinance, or prior to the adoption of the Amendment. Therefore, the Amendment cannot be considered to be special legislation. Apgar. We emphasize Apgar's holding limiting "the application of the theory of special legislation to situations where amendatory zoning ordinances

[2] We emphasize that for any purpose other than entertaining Marino's arguments in the theoretical, we do not agree that the Commissioners acted arbitrarily or unreasonably. As the Trial Court noted, and as the record supports, the ZHB heard and considered all of the evidence cited by Marino in support of his limited arguments on these points. That the ZHB arrived at a different conclusion, after consideration of that evidence, than the conclusion preferred by

(Continued....)

were adopted to deprive the applicant of vested interests in permits issued before the amendment or to prevent a permitted use proposed in the pending application." Id. at 447-448. Again, Marino makes no such argument to this Court, and the record reveals no such deprivation or prevention.

Marino next argues that the Amendment constitutes spot zoning, and/or contract zoning. Spot zoning is the singling out of one lot or a small area for different treatment from that accorded to similar surrounding land indistinguishable from it in character, for the economic benefit of the owner of that lot or to his economic detriment. Apgar, 661 A.2d at 447 (citations omitted). Contract zoning is an unlawful form of spot zoning where rezoning is based on regulations and conditions devised by agreement between a municipality and a landowner. Knight v. Lynn Township Zoning Hearing Board, 568 A.2d 1372 (Pa. Cmwlth. 1990).

Marino is unable to cite to any evidence, or even advance any argument, that the amendment in this matter singles out one lot or small area for different treatment from that accorded to similar surrounding land. As such, the mere bald assertion that the amendment is illegal spot zoning must fail. Apgar. As for illegal contract zoning,[3] the sum and total of Marino's argument on this point is

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Marino, does not render the adoption of the Amendment unreasonable or arbitrary.

[3] Contract zoning, as a specific form of spot zoning, also requires evidence of the singling out of one lot or a small area for different treatment from that accorded to similar surrounding land indistinguishable from it in character, for the economic benefit of the owner of that lot or to his economic detriment. Knight. As such, notwithstanding our analysis above of Marino's specific contract zoning argument, Marino's failure to prove illegal spot zoning in general dispositively undermines, as a matter of law, his theory of contract zoning.

his assertion of the existence of various close personal relationships between certain members of the Hornets, and certain Commissioners. This evidence is insufficient on its face to demonstrate a rezoning based on regulations and conditions devised by agreement between a municipality and a landowner. See generally, Knight.

"[L]egislation must stand or fall on its own terms; even the strenuous lobbying by supporters of the zoning amendment for its passage itself does not render the amendment special legislation." Apgar, 661 A.2d at 448 (citation omitted). Although written in the course of analyzing alleged special legislation, we also emphasize the insufficiency of mere strenuous lobbying, and/or the mere intimations of personal relationships without evidence of any actual devised agreement, to establish illegal contract zoning. Accord Knight.

Accordingly, we affirm.

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JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 10th day of July, 2008, the order of the Court of Common Pleas of Allegheny County, dated May 2, 2007, at S.A. 06-988, is affirmed.

JAMES R. KELLEY, Senior Judge