IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David Updyke and Leslie Updyke, Appellants	:	
v.	:	No. 1099 C.D. 2007
	:	Argued: December 10, 2007
Zoning Hearing Board of Mt. Joy Township	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY FILED: January 17, 2008

David Updyke and Leslie Updyke (Appellants) appeal from an order of the Court of Common Pleas of Adams County (trial court), denying their appeal from an order of the Zoning Hearing Board of Mount Joy Township (the Board), which, in turn, denied Appellants' challenge to the validity of a zoning map amendment to the Mount Joy Township (the Township) zoning ordinance which rezoned their property from Rural Residential to Agricultural Conservation. We now affirm.

Appellants are the owners of land located at 361 Updyke Road, Littlestown, Mount Joy Township, Pennsylvania. Appellants' property had been located in an area zoned Rural Residential under the Township's zoning ordinance. On September 22, 2003, after discussions with the Township's Supervisors, the Planning Commission and an Advisory Committee which included residents and professional consultants on land use planning, the Township adopted a Comprehensive Plan. This Comprehensive Plan recommended, inter alia, the

creation of an Agricultural Conservation district, which was lacking in the Township. The Township thereafter amended its zoning ordinance to create a new Agricultural Conservation district which included several parcels of property. Appellants' property was not one of these parcels.

Nevertheless, the Comprehensive Plan provided that "[i]n the future, consideration should be given to extending the agricultural conservation zoning into additional areas if there is grass roots support among a majority of the affected property-owners." (R.R. at 245a). In 2005, the Township's Board of Supervisors began considering an amendment to the zoning ordinance to designate additional properties in the Agriculture Conservation district. The intent of this amendment was to protect the Township's investment in Agricultural Land Preservation Areas by rezoning properties that are contiguous to land that is in either the Township or the Adams County land preservation programs. The Board of Supervisors conducted a public hearing on May 31, 2005. Despite the opposition of twelve of thirteen witnesses at the hearing, as well as a petition in opposition signed by over 100 Township and Adams County residents, on November 17, 2005, the Board of Supervisors passed an amendment to the Township's zoning map which effectively rezoned 146 parcels of property from Rural Residential to Agricultural Conservation.[1] Appellants' property was one of these parcels.

On December 19, 2005, Appellants filed an application for a hearing before the Board with respect to a challenge to the validity of the zoning map

[1] Although the Board of Supervisors had identified 149 potential parcels for rezoning, only 146 parcels were, in fact, rezoned.

amendment.[2] The Board conducted several hearings with respect to Appellants' application.[3] Mr. Updyke testified on his own behalf, indicating that he has lived on the property his entire life and has owned the same since January 1, 2001. Mr. Updyke noted that the property to the north and south of his property remains zoned Rural Residential. Mr. Updyke also noted that part of his property to the east extends into a neighboring township, which is bordered by other property which contains residential uses, i.e., two housing developments. Mr. Updyke further noted that a pasture for a dairy farm borders his property to the west. Mr. Updyke indicated that he testified in opposition to the zoning map amendment at the Board of Supervisor's May 31, 2005, hearing, and also signed the opposition petition presented at that time.

On cross-examination, Mr. Updyke acknowledged that he had previously appeared before the Board in opposition to a proposed housing development north of his property and now wishes to maintain a residential zoning classification on his own property in case of future residential development. Mr. Updyke further indicated that the reason he wanted his property to remain zoned Rural Residential was because of the potential to earn more money from the land than if it was zoned Agricultural Conservation. Mr. Updyke testified that with the exception of certain portions of his property, he is capable of farming a majority of his land.

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[2] At the same time, Robert Gitt, another landowner affected by the rezoning, filed a similar application with the Board. Following consent of the parties, Mr. Gitt's application and Appellants' application were heard together by the Board.

[3] At the first hearing in this matter, two of the Board members recused themselves to avoid any potential conflict of interest. An alternate member was then seated with the lone remaining Board member and the case proceeded.

Appellants also presented the testimony of Sam Dayhoff, as on cross-examination, in support of their application. Mr. Dayhoff was a member of the Township's Board of Supervisors who participated in the development of the Township's Comprehensive Plan. Pursuant to this Plan, Mr. Dayhoff indicated that the intent of the Agricultural Conservation district was to preserve large contiguous areas of farmland. Despite the witnesses and petition in opposition to zoning map amendment presented at the Board of Supervisor's May 31, 2005, hearing, Mr. Dayhoff maintained that a majority of the Township's residents supported the amendment. Mr. Mayhoff indicated that he and the other members of the Board of Supervisors reviewed the parcels of land identified by a Zoning and Land Use Committee that should be rezoned Agricultural Conservation prior to adoption of the zoning map amendment.[4] Mr. Mayhoff noted that said review was meant to ensure that properties surrounding previously preserved farmlands would be included in the rezoning.

When questioned as to why at least one particular property was not included in the rezoning when it was connected to and/or surrounded previously preserved farmlands, Mr. Dayhoff simply indicated that the Board of Supervisors received a request from the landowners not to rezone their property. As to other properties that surrounded such farmlands but were not rezoned, Mr. Dayhoff could not offer an explanation. When questioned later as to why certain properties that met the requirements for rezoning were not in fact rezoned, Mr. Dayhoff acknowledged that "we made a mistake." (R.R. at 99a-100a).

[4] This Committee is comprised of two Township residents, Harold Kirschner and George Scott.

In opposition to Appellants' application, the Board of Supervisors presented the testimony of Timothy Knoebel, an engineer who is employed by a firm that acts as an engineering consultant for the Township. Mr. Knoebel analyzed the potential uses and profitability of Appellants' property under both the Rural Residential and Agricultural Conservation zoning classifications. Under the former classification, Mr. Knoebel indicated that Appellants could develop a maximum of approximately fifty lots. Under the latter classification, Mr. Knoebel indicated that Appellants could develop a maximum of approximately fifteen lots. However, with the addition of an internal road network and sewer system, Mr. Knoebel noted that the maximum number of lots under this classification could increase anywhere from sixty to eighty-five lots. Under either classification, Mr. Knoebel testified that Appellants could continue to use their property for farming and that said property remained financially viable.

Ultimately, by opinion and order dated August 3, 2006, the Board denied Appellants' application. In its opinion, the Board concluded that the intention of the zoning map amendment was the preservation of agricultural land, a legitimate government goal. While the Board acknowledged some errors in the rezoning, such as five properties out of 149 that could have been rezoned but were not and the admission of Township Supervisor Mr. Dayhoff that a mistake was made, the Board concluded that said errors did not constitute sufficient evidence to show that the amendment was enacted unreasonably or arbitrarily or that it was not substantially related to promoting the public health, safety and welfare. The Board noted that "[a]n ordinance need not be perfect to be valid." (R.R. at 415a).

Appellants thereafter filed an appeal with the trial court. The Township then filed a notice of intervention. The trial court did not take additional evidence but

instead relied upon the record created before the Board. By opinion and order dated May 8, 2007, the trial court denied Appellants' appeal. In its opinion, the trial court rejected Appellants' argument that the treatment of properties under the zoning map amendment was arbitrary. The trial court acknowledged the same errors noted in the Board's decision, i.e., certain properties that could have been rezoned were not. However, the trial court characterized these properties as a "paltry minority," since 146 of the 149 properties identified for rezoning were in fact rezoned. (Opinion of Trial Court at 4). The trial court concluded that since Appellants' property was treated similarly to the vast majority of properties in the same circumstance, it could not conclude that the Board of Supervisors arbitrarily singled out their property. The trial court noted the high burden placed upon a party challenging the constitutionality of a zoning ordinance.

In addition, the trial court concluded that Appellants had failed to demonstrate how the switch in zoning classifications from Rural Residential to Agricultural Conservation resulted in disparate treatment. The trial court noted that during his testimony, Mr. Updyke's primary concern was the future profitability of his land. However, the trial court cited to the testimony of Mr. Knoebel that said change in classification would not inhibit Appellants' ability to develop their property and may even increase Appellants' ability to do so. The trial court likewise rejected Appellants' argument that the zoning map amendment resulted in impermissible spot zoning. With respect to this argument, the trial court noted that Appellants' property is not entirely surrounded by property zoned Rural Residential, but borders other agricultural land which was also rezoned Agricultural Conservation. The trial court further noted the lack of any evidence showing that the Board of Supervisors acted to

isolate certain parcels of land within the Township. Appellants thereafter filed a notice of appeal with the trial court.

On appeal,[5] Appellants first argue that the Board and the trial court erred as a matter of law in failing to conclude that the Board of Supervisors acted arbitrarily and treated similarly situated properties differently. We disagree.

We have previously addressed a constitutional challenge to the validity of an ordinance, stating as follows:

> Property owners have a constitutionally protected right to enjoy their property without governmental interferences. Surrick v. Zoning Hearing Board of the Upper Province Township, 476 Pa. 182, 382 A.2d 105 (1977). The municipality may, however, enact zoning ordinances reasonably restricting the property right to protect and promote the public health, safety and welfare under its police power. Cleaver v. Board of Adjustment, 414 Pa. 367, 200 A.2d 408 (1964). A zoning ordinance is presumed to be valid. Schubach v. Silver, 461 Pa. 366, 336 A.2d 328 (1975). Therefore, one challenging the zoning ordinance has the heavy burden of establishing its invalidity. Id. Where the validity of the zoning ordinance is debatable, the legislative judgment of the governing body must control. Bilbar Construction Co. v. Easttown Township Board of Adjustment, 393 Pa. 62, 141 A.2d 851, 49 Mun. L Rep. 324 (1958).
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> In Pennsylvania, the constitutionality of the zoning ordinance is reviewed under a substantive due process

[5] Our scope of review in land use appeals is well established. Where, as here, a full and complete record was made before the governing body and the lower court takes no additional evidence, our scope of review is limited to determining whether the governing body committed an error of law or abused its discretion. See Herr v. Lancaster County Planning Commission, 625 A.2d 164 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 538 Pa. 677, 649 A.2d 677 (1994). A conclusion that the governing body abused its discretion may be reached only if its findings of fact are not supported by substantial evidence. Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983).

> analysis. Boundary Drive Assoc. v. Shrewsbury Township Board of Supervisors, 507 Pa. 481, 491 A.2d 86 (1985). Under such analysis, the party challenging the validity of provisions of the zoning ordinance must establish that they are arbitrary and unreasonable and have no substantial relationship to promoting the public health, safety and welfare.[6] Shohola Falls Trails End Property Owners Ass'n v. Zoning Hearing Board of Shohola Township, 679 A.2d 1335 (Pa. Cmwlth. 1996), appeal denied, 548 Pa. 651, 695 A.2d 788 (1997).
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> Preservation of agricultural lands is recognized as a legitimate governmental goal that can be implemented by zoning regulations. Hopewell Township Board of Supervisors v. Golla, 499 Pa. 246, 452 A.2d 1337 (1982). Section 603(c)(7) of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. 10603(c)(7), authorizes municipalities to enact zoning ordinances containing provisions to promote and preserve prime agricultural land. Section 604(3) of the MPC, 53 P.S. 10604(3), further provides that the provisions of the zoning ordinances must be designed, inter alia, 'to preserve prime agricultural and farmland considering topography, soil type and classification, and present use.' A significant factor in determining the reasonableness of land use restrictions is whether the restrictions are consistent with stated purposes of the particular zoning district. Hock v. Board of Supervisors of Mount Pleasant Township, 622 A.2d 431 (Pa. Cmwlth. 1993).

McGonigle v. Lower Heidelberg Township Zoning Hearing Board, 858 A.2d 663, 668-69 (Pa. Cmwlth. 2004).

In the present case, the Township adopted a Comprehensive Plan in 2003. This Comprehensive Plan specifically recommended the creation of an

[6] Our Supreme Court has previously indicated that "an ordinance will be deemed to be arbitrary where it is shown that it results in disparate treatment of similar landowners without a reasonable basis for such disparate treatment." C&M Developers, Inc. v. Bedminster Township Zoning Hearing Board, 573 Pa. 2, 15, 820 A.2d 143, 151 (2002).

Agricultural Conservation district, which was lacking in the Township. The Township followed this recommendation by later amending its zoning ordinance to create a new Agricultural Conservation district.[7] The Township's Board of Supervisors then attempted to expand the Agricultural Conservation district with the 2005 zoning map amendment. Appellants do not dispute that the underlying reasoning of the Township's Board of Supervisors in enacting this zoning amendment was further preservation of agricultural lands, especially lands bordering other previously preserved land.[8] Indeed, Mr. Dayhoff repeatedly testified to the same before the Board.

Rather, Appellants contend that the Board of Supervisors acted arbitrarily and unreasonably in implementing the amendment. We disagree with Appellants' contention in this regard. In support of their argument, Appellants note that while the Board of Supervisors identified 149 parcels that met the requirements for rezoning, only 146 parcels were actually rezoned. Appellants argue that the failure to rezone these three parcels constitutes evidence of the Board of Supervisors' disparate treatment of similar landowners. However, we believe that the failure to

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[7] Section 110-21.D of the Mount Joy Township Code of Ordinances describes the purposes of the Agricultural District as follows:

> (a) To preserve contiguous prime agricultural areas, and control the numbers and locations of homes within prime agricultural areas to minimize conflicts.
> (b) To establish a maximum lot size for nonagricultural uses to encourage the retention of tracts in sizes sufficiently large for efficient agriculture.
> (c) To implement the authority established under Section 604(3) of the Pennsylvania Municipalities Planning Code.

[8] Mr. Updyke himself testified before the Board that his land was a working farm which contained prime agricultural soils. See R.R. at 133a-139a.

rezone evidences nothing more than a "mistake" by the Board of Supervisors, as testified to by Mr. Dayhoff before the Board. See R.R. at 99a. We agree with the Board's conclusion that "[a]n ordinance need not be perfect to be valid." (Opinion of Board at 5).

Moreover, we note that Mr. Updyke himself testified before the Board that despite his opposition to a neighboring residential development, his underlying motivation for opposing the zoning map amendment which rezoned his property from Rural Residential to Agricultural Conservation was his desire to obtain maximum financial benefit from his property should he desire a similar development in the future. This Court has previously addressed a similar issue, holding as follows:

> The Ordinance in this case is a classic example of the governing body of the Township choosing through its legislative judgment to impose certain standards and densities to encourage the preservation of large amounts of open space and to discourage development in the AG-1 District which belies that district's purpose. We also point out that an ordinance is not to be declared invalid merely because it may deprive the owner of the most lucrative and profitable uses.

Crystal Forest Associates v. Buckingham Township Supervisors, 872 A.2d 206, 217-8 (Pa. Cmwlth. 2005), petition for allowance of appeal denied, 586 Pa. 760, 895 A.2d 551 (2006). In the present case, we cannot declare the zoning map amendment to the Township's ordinance invalid because said amendment may deprive Appellants of a more profitable use of their property.

After consideration of the evidence of record discussed above as well as the extremely high burden placed on Appellants in challenging the ordinance/zoning map amendment, we cannot say that the Board or the trial court erred as a matter of

law in failing to conclude that the Board of Supervisors acted arbitrarily and treated similarly situated properties differently.

Next, Appellants argue that the Board and the trial court erred as a matter of law in failing to conclude that the Board of Supervisors engaged in spot zoning. Again, we disagree.

In McGonigle, we described the term "spot zoning" as a "singling out of a small lot for different treatment from that accorded to neighboring lands, indistinguishable in character, for the economic benefit or detriment of the owner of the lot." McGonigle, 858 A.2d at 672. In addition, we have previously indicated that "[w]hile the size of the zoned tract is a relevant factor in a spot zoning challenge, the most important factor in an analysis of a spot zoning question is whether the rezoned land is being treated unjustifiably different from similar surrounding land." In re Appeal of Realen Valley Forge Greenes Associates, 576 Pa. 115, 134, 838 A.2d 718, 729 (2003) (citation omitted). Furthermore, in considering cases of alleged spot zoning, we have previously indicated that "courts should consider the effect of the rezoning on public health, safety, morals and general welfare, and the relationship of the rezoning to the comprehensive plan." Knight v. Lynn Township Zoning Hearing Board, 568 A.2d 1372 (Pa. Cmwlth. 1990) (citation omitted).

Contrary to Appellants' argument in their brief to this Court, the evidence of record fails to indicate that Appellants' property was a peninsula of agriculturally zoned property surrounded by residential uses. Rather, such evidence reveals that Appellants' property is bordered by land to the west and the south that is also zoned Agricultural Conservation.[9] Additionally, Mr. Updyke testified before the

[9] At the Board hearing, Mr. Updyke acknowledged that a dairy farm abuts his land to the west. (R.R. at 137a).

Board that he and his wife own the adjoining property to the east in a neighboring township which they also use for farming. Given that the evidence of record reveals that Appellants' property is surrounded by other land rezoned Agricultural Conservation, as well as the fact that preservation of agricultural lands is recognized as a legitimate governmental goal, consistent with the Township's Comprehensive Plan, we cannot say that the Board or the trial court erred as a matter of law in failing to conclude that the Board of Supervisors engaged in spot zoning.

Accordingly, the order of the trial court is affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge

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v.	:	No. 1099 C.D. 2007
Zoning Hearing Board of Mt. Joy Township	:	

O R D E R

AND NOW, this 17th day of January, 2008, the order of the Court of Common Pleas of Adams County is hereby affirmed.

JOSEPH F. McCLOSKEY, Senior Judge