IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel and Karen Stauffer, Joseph and Kay Bachkai, and Gerard and Clara Fronheiser et al., Appellants	:	
v.	:	
Board of Supervisors, Washington Township, Berks County, Pennsylvania and PA Grant Company, L.P.	:	No. 1134 C.D. 2007
	:	Submitted: January 25, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: March 19, 2008

Daniel and Karen Stauffer, Joseph and Jay Bachkai and Gerard and Clara Fronheiser (Appellants) appeal from the order of the Court of Common Pleas of Berks County (trial court) that denied their land use appeal.

Appellants are landowners who live adjacent to an 88.6-acre tract (Property) owned by PA Grant Company (Developer) known as the "Melcher Farm" along Old Route 100 in Washington Township (Township). Appellants oppose Developer's proposed "high density development" of the Property.

On January 29, 1997, Developer became equitable owner of the Property. At the time the Developer entered into the agreement of sale, the

Property was zoned primarily with the High-Density Residential and Village Zoning (HDV) Districts of the Township.[1]

On or about that same date, Developer notified the Township that it intended to develop the Property as a residential subdivision containing approximately 140 single-family, detached dwellings through the purchase of what are known as "transferable development rights" (TDR's) from property owners in what is known as the "TDR sending area" of the Township.[2]

On February 4, 1997, just six days after Developer became the equitable owner of the Property and announced its intention to develop the Property with the use of TDR's the Township advertised an emergency meeting of the Board of Supervisors (Board) regarding the HDV, and scheduled within 24 hours' notice for February 5, 1997.

On February 5, 1997, the Board declared Article VIII and Article XVI of the Washington Township Zoning Ordinance (Zoning Ordinance) governing

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[1] The purpose of the HDV district, as set forth the Township's zoning ordinance, is *inter alia*, "[t]o accommodate high density development in locations appropriate for such use by reason of access to transportation [and] characteristics of land …" and "[t]o provide for the application of development rights transferred from elsewhere in the township." Washington Township Zoning Ordinance #1993-4, §131-26.A, §131-26.F. Multi-family dwellings, including apartment buildings and townhouses, are uses by right in the HDV District.

[2] As the trial court explained, TDR's are intended to preserve agricultural land. They allow landowners in agricultural districts, or TDR sending areas (areas where a community would like to see less development), to detach development rights from their property and sell these rights thereby allowing them to profit from the sale of these rights while preserving the agricultural use of their land. A landowner purchasing these rights can then apply these development rights to any property owned within a TDR receiving area (where the community

(Footnote continued on next page…)

HDV Districts and TDR's to be invalid. Based upon this action, the Township asserted a moratorium on all development within the HDV District and the TDR's within the HDV District.

On June 25, 1997, Developer submitted a subdivision and land development plan application which included three alternative sketch plans, to the Washington Township Planning Commission. Developer proposed to build 142 homes, each with a minimum lot area of between 7,200 and 8,000 square feet which complied with the then current zoning ordinance, Ordinance **No. 1992-9,** which permitted lots with a 5,000 square foot minimum.

Thereafter, on July 24, 1997, the Board enacted Ordinance No. **1997-4** which greatly restricted the density of construction permitted in HDV Districts and changed the way in which the TDR's were calculated. On August 14, 1997, the Board also enacted Ordinance No. **1997-7** which eliminated a significant amount of the TDR receiving area within HDV Districts. This affected the Property as it was located within the TDR receiving area because it reduced the number of homes that could be built to approximately 70.

On September 28, 2000, the Board voted unanimously to reject all three sketch plans. The Developer filed a land use appeal and asserted that the Board violated §107-11 of the Township's Subdivision and Land Development Ordinance (SALDO) because it refused to engage in any discussion or entertain

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(continued…)

would like to see more development). The developers who purchase TDRs are allowed extra development or bonus density.

comments regarding the sketch plans. That appeal has been on hold and is still pending.

Developer also questioned the procedural validity of Ordinance No. **1997-4** and Ordinance No. **1997-7** before the Washington Township Zoning Hearing Board (ZHB), which denied its challenge. Developer appealed to the trial court which, in a memorandum opinion dated March 8, 2001, found Zoning Ordinance Nos. **1997-4** and **1997-7** to be procedurally invalid due to the Township's failure to give adequate notice.[3] The trial court did not address the substantive validity of the ordinance.

On April 16, 2003, Developer filed a preliminary development plan which proposed 109 building lots of 6,500 square feet. The Board considered the plans on May 1, 2003, ("May 2003 Plans").

Amendment of the SALDO – Ordinance No. 2003-4

After Developer submitted the May 2003 plans, the Board enacted Ordinance No. **2003-4**, on May 22, 2003, which amended the Township's SALDO.[4]

[3] In yet a third action, Developer filed a substantive challenge to the validity of the Township's SALDO under Section 916.1of the Pennsylvania Municipal Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10916.1, along with a curative amendment, pursuant to Section of the MPC, 53 P.S. §10609.1, on November 17, 2003. That action is also still pending. The Act of December 21, 1988, P.L. 1329, added Section 916.1 and generally provides that a landowner who desires to challenge the validity of an ordinance must submit his challenge to the governing body together with a request for a curative amendment.

[4] It is unclear from the record and Appellants' Brief how these amendments to the SALDO affected Developer.

Developer's Notice that it Intended to Submit Revised Plans

On June 20, 2003, Developer's attorney, Carl N. Weiner, Esquire (Attorney Weiner), sent a letter to the Township Solicitor indicating that Developer "will be submitting revised plans for the development of the Melcher Property" and that the Township need not "continue its review of the current plans at this time." Letter from Carl N. Weiner, Esquire, to Timothy Rowley, Esquire, June 20, 2003, at 1; Reproduced Record (R.R.) at 47a.

Subsequently, on July 8, 2003, Developer submitted revised plans to the Township Engineer. Those plans also showed 109 lots of 6,500 square feet. No new application and no application fee were submitted with the revised plans. At the time the revised plans were submitted, the Township had not issued a denial letter pursuant to Section 508(2) of the MPC, 53 P.S. §10508(2), for the May 2003 Plans.

Developer again followed **§131-28(c)(1)** of the Zoning Ordinance which allowed for 5,000 square foot minimum lots in the HDV District *with the purchase of TDR's*. The Township Engineer, however, returned the plans to Developer with a two page letter dated August 11, 2003, and explained that there was a "major discrepancy" in the plans because Developer specified the wrong lot size of 6,500 square feet where the minimum allowable lot size for the subdivision was "25,000 square feet…under Section 2 of Ordinance No. 1995-4 which amended Section 131-28(b)(1)-(6) of the Washington Township Zoning Ordinance concerning area and bulk regulations for the HDV District where both water supply and sewage disposal are provided by either a community or a public system *and for which no development rights have been purchased*." Letter from LTL Consultants to Quaker Homes, Inc., August 11, 2003, at 1; R.R. at 48a (Emphasis

added). In other words, the Engineer applied the criteria from Section 131-28(b)(1) which did not utilize TDR's. Developer maintained that it always intended to purchase TDR's and that the Township failed to honor its ordinances and failed to provide a means to implement the purchase and sale of TDR's at the time Developer submitted its May 2003 Plans.

Enactment of Zoning Ordinance No. 2004-1

On March 25, 2004, the Board enacted Zoning Ordinance No. **2004-1**. This Ordinance amended the Zoning Ordinance by completely eliminating TDR's and deleted and replaced the entire article relating to the HDV Districts. The Ordinance also rezoned land north of Old Route 100 from HDV to Watershed Conservation (WSC) in order to "maintain a low overall density of development in those environmentally sensitive portions of the Township which are important due to their location surrounding the headwaters of the Perkiomen Creek." Washington Township Zoning Ordinance §131-16. Additionally, Zoning Ordinance No. 2004-1 amended the prior zoning ordinance to provide for 7,500 square foot lots (from 25,000 square feet) within HDV Districts if both public water supply and sewage treatment were used.

May 2004 Plans

Developer submitted revised preliminary plans to the Township on May 14, 2004, ("May 2004 Plans"). The May 2004 Plans showed 102 single-family detached homes with lot sizes consisting of 7,500 square feet and open space lots consisting of 41 acres of open space. Thereafter, Developer filed nine plan revisions between August 2004, and November 2005. Each was responded to by the Township Engineer.

The Board ultimately granted conditional preliminary approval to Developer's preliminary plan by letter dated December 19, 2005.

On January 12, 2006, Appellants, the neighboring landowners, filed a land use appeal seeking reversal of the Board's conditional preliminary approval. The trial court denied the appeal and in a comprehensive, twenty-page opinion, addressed sixteen issues raised in Appellants' Concise Statement of Errors Complained of on Appeal.

Appellants raise three issues on appeal.[5] First, they assert that the Township erroneously reviewed Developer's plan and approved it under the Zoning Ordinance as it stood before the adoption of Ordinance No. 2004-1. Appellants argue that Developer "abandoned" its May 2003 Plans *via* Attorney Weiner's June 20, 2003, letter. They claim that the May 2004 Plans were "new" plans that were subject to Ordinance No. 2003-4 (SALDO) and Ordinance No. 2004-1 (Zoning Ordinance) enacted after submission of the May 2003 Plans but prior to the submission of the May 2004 Plans. Appellants further assert that because the Developer never purchased TDR's and never indicated that he intended to do so, Section 131-28B of the Zoning Ordinance required lots with a minimum of 25,000 square feet, not 7,500 square feet as approved by the Township.

[5] The Commonwealth Court's scope of review in a land use appeal, where the trial court did not take additional evidence, is limited to determining whether the township zoning hearing board committed an error of law or abused its discretion. Stoltzfus v. Zoning Hearing Board of Eden Township, Lancaster County, 937 A.2d 548 (Pa. Cmwlth. 2007).

Appellants assert, in the alternative, that even if Developer's revised plans were reviewed under the correct Zoning Ordinance and SALDO, the incorrect lot area was utilized by the Developer and the Township.

Finally, Appellants argue that Developer's preliminary plan contained numerous fatal defects and should not have been conditionally approved by the Board, including: (1) an impermissible annexation of adjoining property for intersection of Old Route 100 and Road 6; (2) an unavailable use of public water, public sewage and off-site storm water easements; and (3) an improper calculation of the Adjusted Tract Area.[6]

These issues were raised and argued before the trial court and ably disposed of in the opinion of the Honorable Jeffrey K. Sprecher. Therefore, this Court shall affirm on the basis of that opinion. Daniel and Karen Stauffer, *et al.* v. Board of Supervisors, Washington Township, Berks County, Pennsylvania, (No. 06-355), filed September 14, 2007.

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BERNARD L. McGINLEY, Judge

[6] Appellants also assert that the correct identity of the owner, equitable owner, applicant and developer were not shown on the preliminary plan. However, because this issue was not raised before the trial court it is waived. In any event, this Court agrees with Developer that this is a minor, correctable defect which does not preclude approval of a preliminary plan. Shelbourne Square Assoc. v. Board of Supervisors of Township of Exeter, 794 A.2d 946 (Pa. Cmwlth. 2002).

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O R D E R

AND NOW, this 19th day of March, 2008, the order of the Court of Common Pleas of Berks County in the above-captioned matter is hereby affirmed.

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BERNARD L. McGINLEY, Judge