IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Howell and Karen Howell, Appellants	:	
v.	:	No. 1149 C.D. 2007
	:	Argued: March 11, 2008
North Heidelberg Township and North Heidelberg Township Zoning Hearing Board	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE FLAHERTY FILED: April 30, 2008

Robert Howell and Karen Howell (Howell) appeal from an order of the Court of Common Pleas of Berks County (trial court) which affirmed the decision of the North Heidelberg Township Zoning Hearing Board (Board) denying Howell's request for a special exception and variances. We affirm.

Howell purchased a 10.2 acre tract of land (tract or property) in North Heidelberg Township on February 6, 2004. Old Church Road bisects the tract, creating one parcel, which is approximately 0.7 acres, on the north side of Church Road (north parcel) and a second parcel, which is 9.3 acres, on the south side of Old Church Road (south parcel). Howell currently resides in a house on the north parcel. Howell raises horses on the south parcel and also leases a portion of it to a farmer who grows alfalfa and grass for hay.

The property is located within the Agricultural Preservation District (AP District) under the Heidelberg-North Heidelberg-Robesonia-Womelsdorf Joint

Zoning Ordinance of 2001 (Ordinance). The minimum lot area within the AP District is forty acres and, as such, the Howell tract is non-conforming. In the AP District, a lot can be deemed "Not Productive Agricultural Land" by special exception pursuant to Section 308.D. of the Ordinance. If land is determined to be "Not Productive Agricultural Land" by special exception, then the property may be subdivided into new lots with a minimum lot area of one acre.

On June 5, 2006, Howell filed an application with the Board seeking a special exception under Section 308.D of the Ordinance declaring the tract as not agriculturally productive. Howell also requested variances from the minimum lot size requirements and dimensional variances in order to construct a house on the south parcel. Howell intends to sell the north parcel which contains the current house.

A hearing was conducted before the Board. The Board found that the evidence presented established that the soil was suitable for agricultural purposes and that a land evaluation and site assessment (LESA), which was performed by the zoning officer, showed a productivity rating of 210.5. In accordance with Section 308.D.1.a.(4) of the Ordinance, "if an existing lot has a LESA score of 120 or more, the entire existing lot shall be considered Productive Agricultural Land." The Board also found that the property contains a house, barn, and a field, which is used for growing grass and alfalfa. Four of the acres are leased to a tenant farmer and a majority of the property has been farmed on a regular basis for the last twenty years.

The Board observed that the burden of proof for a special exception lies with the applicant. Here, according to the Board, Howell failed to show that the tract, as a whole, cannot be used for agricultural purposes. In addition to

denying the special exception, the Board also concluded that Howell was not entitled to variances for construction of a house on the south parcel. Howell appealed to the trial court, which affirmed the decision of the Board. This appeal followed.[1]

Howell first argues that the Board failed to consider that Old Church Road naturally subdivides Howell's property into the north parcel and south parcel, such that the south parcel is a pre-existing non-conforming lot upon which a single family residence may be constructed under the Ordinance.[2]

Howell claims that he is not requesting that his property be subdivided. Rather, Howell maintains that the property has already been subdivided by the construction of Old Church Road, which created two non-conforming lots.[3] Howell maintains that he did not subdivide the property and therefore had no burden to get subdivision approval.

Howell relies on the case of Appeal of Martin, 723 A.2d 1064 (Pa. Cmwlth. 1998). Therein, Martin purchased a non-conforming 0.7 acre parcel of land which was "orphaned in 1907 when it was severed from its parent tract by the construction of New Holland Road." Id. A zoning ordinance was adopted in 1980. In 1995, Martin purchased the parcel and went before the planning commission for

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[1] Where, as here, the trial court does not take additional evidence, this court's review is limited to determining whether the zoning hearing board committed an abuse of discretion or error of law. Cardamone v. Whitpain Township Zoning Hearing Board, 771 A.2d 103 (Pa. Cmwlth. 2001).

[2] Board maintains that the issue of subdivision is being raised for the first time on appeal. We disagree. The application submitted by Howell to the Board states that "The property is already physically divided into two (2) lots by Old Church Road. Based on this division, Petitioners wish to subdivide the property into two (2) lots . . . ." (R.R. at 3a.)

[3] The record indicates that Old Church Road has been in existence since at least 1942. (Transcript of Board hearing at p. 88.)

approval to add to the parcel an adjoining 11 acre tract of land she intended to purchase which was on the same side of New Holland Road. The planning commission determined that the add-on proposal was inappropriate unless Martin first obtained a variance from the zoning hearing board as to lot size requirements. Specifically, the planning commission determined that the 0.7 acre tract was not a lot under the ordinance, as it did not meet the minimum lot size requirements.

Martin thereafter applied to the zoning hearing board for a variance. The zoning hearing board denied the request, determining that the 0.7 acre tract was not a lot because of its size and that it was still part of the larger tract from which it was severed until 1995, when the 0.7 acre tract was deeded to Martin. The trial court reversed the decision of the zoning hearing board and granted Martin the variance.

On appeal, this court affirmed the trial court and addressed the question of whether "the construction of a roadway which bisects a tract of land, leaving an undersized lot, act[s] as a subdivision of the property for zoning purposes." Id. at 1065. This court observed that the 0.7 acre lot existed prior to the adoption of the zoning ordinance which requires a one acre tract. This court further stated that "the construction of New Holland Road in 1907 did, in fact, effectuate a subdivision which thereby created the subject property as a separate parcel of land." Id. at 1068.

Howell claims that the facts here are similar to those in Martin. Specifically, the construction of Old Church Road acted to subdivide the north and south parcels. Moreover, the Ordinance recognizes the development of undersized lots. Specifically, although the minimum lot area in the district is forty acres, Section 308.B.g of the Ordinance provides:

> g. an existing underdeveloped lawful lot of record greater than 40,000 square feet of lot area may be used for one single family detached dwelling and its customary accessory uses.

Here, the undeveloped south parcel of 9.3 acres is larger than 40,000 square feet and Howell argues that it is a lawful lot of record by virtue of the bisection of Old Church Road.

We agree with the Board, however, that Martin is distinguishable. In Martin, there was an undeveloped 0.7 acre tract which Martin intended to join, not separate from, a larger tract. Here, Howell seeks to separate the 0.7 parcel, which is being used in conjunction with the remaining property, in that all of the property is used for a horse farm in conformity with the Ordinance. Moreover, as opposed to Martin, although Old Church Road separates the north and south parcels, conveyance of the property to Howell is described in one deed. As such, individually, neither the north nor south parcels constitute a "lawful lot of record."

The facts in this case are more akin to those in Washington Township v. Slate Belt Vehicle Recycling Center, Inc., 428 A.2d 753 (Pa. Cmwlth. 1981). In that case, a recycling center, which was the equitable owner of an 80 acre tract of land, sought a junkyard license and a building permit from the board of supervisors. The board of supervisors denied the applications for two reasons, one of which was that no plat had been submitted or application made for subdivision approval. Thereafter, the recycling center sought declaratory relief before the trial court. The trial court determined that the applications were improperly denied and stated that the subdivision and land development ordinance was inapplicable to the recycling center's applications.

On appeal to this court, we reversed the determination of the trial court. This court determined that the applications were properly denied by the

board of supervisors based on the failure of the recycling center to comply with the subdivision and land development ordinance. This court concluded that subdivision approval was necessary.

We observed that the land purchased by the recycling center was part of a larger tract acquired by the Beers family. The Beers retained approximately fifty acres and, prior to the transaction at issue, conveyed numerous small parcels without applying for and obtaining subdivision approval.

This court examined the provisions in Section 107 of the Municipalities Planning Code, which defined a subdivision as:[4]

> The division or redivision of a lot, tract or parcel of land by any means into two or more lots, tracts, parcels or other divisions of land including changes in existing lot lines for the purpose, whether immediate or future, of lease, transfer of ownership or building or lot development ….

This court then stated that the conveyance of part of a tract with the retention of the remainder, constitutes a "division or redivision . . . by any means." Washington Township, 428 A.2d at 757. Moreover, compliance with the subdivision and land development ordinance was not avoided "by the presence of a public road running between the parcel to be retained by the Beers and the land previously sold without approval and agreed to be sold to the Recycling Center." Id.

Issues with respect to variances and special exceptions are properly brought before the Board. However, it is within the authority of the municipality's governing body to grant subdivision approval. Appeal of Fiori, 635 A.2d 743 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 538 Pa. 638, 647 A.2d.

[4] Act of July 31, 1968 , P.L. 805, as amended, 53 P.S. § 10107.

512 (1994). Further, a zoning hearing board does not have jurisdiction to give an advisory opinion with respect to a zoning ordinance. Hopkins v. North Hopewell Township Zoning Hearing Board, 623 A.2d 938 (Pa. Cmwlth. 1993).

In this case, as in Washington Township, a road runs through Howell's property. Howell seeks to develop the south parcel with a house and later convey the north parcel with the existing house. As in Washington Township, such constitutes division of the lot, which requires subdivision approval. The ability to grant such subdivision approval is within the authority of the municipality's governing body, not the zoning hearing board.

Howell also argues that the Board erred in failing to designate by special exception under Section 308.D. that the property is not agriculturally productive land due to its size.

Howell claims that the property cannot be feasibly used for any agriculturally viable purpose due to its configuration and, therefore, is not agriculturally productive. The ten acre size alone is insufficient to be economically and agriculturally productive. Moreover, the property is physically split into two parcels, making it difficult for a single owner to fully utilize the property.

Howell has stipulated, however, that the soils are suitable for agriculture. Moreover, farming has been conducted on the property for over twenty years. Additionally, the LESA which was performed by the zoning officer produced a rating of 219.5, and under Section 308.D.1.a.(4) of the Ordinance, "[i]f an existing lot has an LESA score of 120 or more, the entire existing lot shall be considered Productive Agricultural Land." As such, the Board did not err in declining to designate the tract as agriculturally not productive.

Finally, Howell claims that the Board erred in failing to issue variances for the north and south parcels. Howell first observes that the property is in the AP District, which requires a minimum of 40 acres. Howell's property is approximately 10 acres. Howell maintains that it was an error for the Board to deny dimensional variances for the 0.7 acre north parcel, inasmuch as neither parcel conforms to lot size requirements and the north parcel cannot satisfy any of the dimensional requirements as it is presently configured.[5] Moreover, the Board erred in failing to grant a variance for the south parcel with respect to the lot width requirement of 150 feet.

According to Howell, the Board failed to recognize that the north parcel, which is currently used for residential purposes, is a pre-existing non-conforming lot and therefore, not subject to the minimum lot size requirements of Section 308. Also, with respect to the south parcel, which consists of 9 acres and has a lot width of 114 feet, Howell claims he is entitled to a variance from the minimum lot width of 150 feet because such lot was created due to the placement of Old Church Road.

We agree with the Board, however, that the variances are conditioned upon the grant of the special exception. Without the grant of the special exception, there is no need for the requested variances.

Nonetheless, with respect to the variances, the Board observed that the applicant must prove unnecessary hardship, which allows "no possibility that the property can be developed in strict conformity with the provisions of the Zoning

[5] The residential home on the north parcel does not meet the front yard setback requirement of 70 feet because it only has a 50 foot setback. Also, the rear yard setback is 30 feet whereas the Ordinance requires 50 feet.

Ordinance and a variance is, therefore, necessary to enable the reasonable use of property." Section 111.D.3.b.(ii) of the Ordinance. Here, the property is used as a residence, horse farm and to grow crops. Such uses are consistent with the area and, in addition, the only reason Howell seeks to construct a new home on the south parcel is so that the house on the north parcel can be sold. Such desire is for economic purposes only and is generally, not a legitimate basis to grant a variance.

In accordance with the above, the decision of the trial court is affirmed.

JIM FLAHERTY, Senior Judge

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O R D E R

Now, April 30, 2008, the Order of the Court of Common Pleas of Berks County, in the above-captioned matter, is affirmed.

JIM FLAHERTY, Senior Judge