

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WD North Huntingdon Investors, Ltd. :  
 :  
 v. : No. 1344 C.D. 2007  
 :  
 North Huntingdon Township Board : Argued: February 12, 2008  
 of Commissioners, The Colony Park :  
 Company, Southwest Subway, Inc., :  
 and Green Star Trading Company :  
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 Appeal of: The Colony Park :  
 Company, Southwest Subway, Inc., :  
 and Green Star Trading Company :

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: May 15, 2008

Colony Park Company (Colony Park) appeals from an order of the Court of Common Pleas of Westmoreland County (trial court), which granted WD North Huntingdon Investors, Ltd.'s (Investors) appeal with respect to vertical and horizontal curve modifications. We affirm.

Investors filed a Subdivision and Land Development Application (Application) on June 6, 2005 seeking to subdivide and develop a nine acre tract of land (Property) along Norwin Avenue and Route 30 in North Huntingdon Township. The Property is located in the C-1 and C-1A Commercial Districts. The Application sought to subdivide the property into five separate and distinct

lots. The Investors also sought site-plan approval to construct a Walgreens Drug Store and a Jiffy Lube Oil Change facility on two of the five proposed lots. Investors requested modification of two provisions of the North Huntingdon Township Subdivision and Land Development Ordinance (Ordinance) relating to vertical and horizontal curves in the proposed roads.

Following final review by the Township of North Huntingdon Board of Commissioners (Board) at its meeting of January 18, 2006, the Application was denied. The Board determined that the plan failed to comply with the Ordinance pertaining to vertical curves and horizontal curves, and did not contain the requisite number of parking spaces. Reproduced Record (R.R.) at 446a-447a, 463a-466a.

Investors filed an appeal with the trial court. At which point, Colony Park, Southwest Subway, Inc., and Green Star Trading Company (collectively, Intervenor) intervened. The trial court determined that the Board abused its discretion in refusing to grant the requested modification pertaining to vertical and horizontal curve requirements because substantial evidence was presented that literal compliance with the Ordinance is not possible due to the physical conditions of the Property. The trial court also determined that the Board should have reviewed the Investors' alternate parking plan to address the issue of parking spaces. By order and opinion dated January 12, 2007, the trial court reversed the Board's denial of the Investors' request for certain modifications of the vertical and horizontal curve requirements of the Ordinance. The trial court remanded the matter to the Board for consideration of the number of parking spaces required.<sup>1</sup>

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<sup>1</sup> From this decision, Intervenor filed a notice of appeal with this Court, which was quashed, without prejudice, on the basis that the appeal was interlocutory.

On April 12, 2007, the Board approved Investors' amended site plan and parking requirement proposal. On May 2, 2007, the Board filed a Notice of Approval Upon Remand with the trial court, notifying the trial court of the same. By order dated June 22, 2007, the trial court entered its opinion dated January 12, 2007 as a final order. Colony Park then filed the instant appeal.<sup>2</sup>

Colony Park raises the issue of whether a township board of commissioners retains the authority and discretion to deny approval of proposed land development and subdivision plans that require modifications to the road geometry requirements of the township's subdivision and land development ordinance, notwithstanding the opinion of certain township staff or consultants that such deficient plans were "acceptable," where evidence of record shows that the proposed plans would create a substantial negative impact on existing traffic conditions, generate specified traffic safety hazards and conflicts, and would therefore be contrary to the public interest.

To begin, Section 512.1 of the Pennsylvania Municipalities Planning Code<sup>3</sup> (MPC) provides the standard for the Board's consideration of modifications to the Application. Section 512.1 provides:

- (a) The governing body or the planning agency, if authorized to approve applications within the subdivision

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<sup>2</sup> Where the trial court takes no additional evidence, our scope of review in a land use appeal is limited to determining whether the local governing body committed an error of law or an abuse of discretion. In re Thompson, 896 A.2d 659 (Pa. Cmwlth. 2006), petition for allowance of appeal denied, 591 Pa. 669, 916 A.2d 636 (2007). A governing body abuses its discretion when its findings of fact are not supported by substantial evidence. Id. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id.

<sup>3</sup> Act of July 31, 1968, P.L. 805, as amended, added by Section 40 of the Act of December 21, 1988, P.L. 1329, 53 P.S. §10512.1.

and land development ordinance, may grant a modification of the requirements of one or more provisions if the literal enforcement will exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not be contrary to the public interest and that the purpose and intent of the ordinance is observed.

In deciding whether to grant a modification pursuant to Section 512.1(a) of the MPC, the governing body's duty is to actively oppose schemes of development unreasonably proposed and conceived, but likewise, its duty is to sanction well planned development. Ruf v. Buckingham Township, 765 A.2d 1166, 1169 (Pa. Cmwlth. 2001); Raum v. Board of Supervisors of Tredyffrin Township, 370 A.2d 777, 781 (Pa. Cmwlth. 1976). Further, where literal enforcement of a requirement under the subdivision and land development ordinance will frustrate the effect of the improvements designed to implement other requirements, grant of a waiver is proper under Section 512.1(a) of the MPC. Ruf; Levin v. Township of Radnor, 681 A.2d 860 (Pa. Cmwlth. 1996).

According to Section 701.1 of the Ordinance, if any mandatory provisions of the Ordinance are shown by the applicant, to the satisfaction of the Board “to be unreasonable, to cause undue hardship, or that an alternate standard can provide equal or better results,” the Board “may grant a modification to that provision.” R.R. at 63a. The hardship must be suffered directly by the property in question and a modification may be granted provided it will not be contrary to the public interest and the purpose and intent of the Ordinance is maintained. Sections 701.1 and 701.3 of the Ordinance. R.R. at 63a-64a.

The mandatory provisions of the Ordinance at issue in this matter are those relating to vertical and horizontal curves. Section 406.5 of the Ordinance, which pertains to vertical curves, provides:

Vertical curves shall be used in all changes of GRADES. The minimum vertical curve shall be one hundred-fifty (150) feet in length for ARTERIAL STREETS, one hundred (100) feet in length for COLLECTOR STREETS and fifty (50) feet in length for MINOR COLLECTOR STREETS and RESIDENTIAL STREETS. Vertical curves shall be increased twenty (20) feet in length for each one percent (1%) of GRADE change exceeding three percent (3%).

R.R. at 31a. Section 407.3 of the Ordinance, which pertains to horizontal curves, provides:

A tangent shall be required between curves; however, a long radius curve shall be preferred in all cases to a series of curves and tangents. A minimum tangent of one hundred (100) feet shall be required between reverse curves.

Id.

Here, the overwhelming, undisputed evidence in the record establishes that due to the unique topography of the Property, the Investors cannot comply with the curve requirements without violating other provisions of the Ordinance. Given the unique physical condition of the Property, literal enforcement of the curve requirements would be unreasonable and cause undue hardship.

Investors proposed an alternative plan to comply with the intended purpose of the curve provisions, while still complying with the remaining provisions of the Ordinance. The Township's planning and zoning director, Allen M. Cohen, acknowledged that the alternate design was legally sufficient and acceptable. R.R. at 331a, 425a. The Township's engineer, Jeffrey D. Bradshaw, opined that proposed horizontal and vertical curves lengths were acceptable given the proposed site conditions and constraints. R.R. at 332a, 424a, 889a, 914a. The

Township's traffic engineer, Michael Babusci, acknowledged and confirmed the functionality and reasonableness of Investors' Application. R.R. at 780a.

Contrary to Colony Park's assertions, Investors' request for a modification was reasonable and not contrary to the public interest. Colony Park's public interest concerns are premised on allegations concerning the impact of anticipated traffic. The public interest considerations given by Colony Park were not relied upon by the Board in actually denying the application. The Board denied Investors' Application because it did not meet the technical requirements of Section 406.5 and 407.3 of the Ordinance, not because it was contrary to public interest. R.R. at 446a-447a, 463a-466a. Nevertheless, an increase in traffic alone is insufficient to justify the refusal of an otherwise valid land use. Goodman v. Board of Commissioners of the Township of South Whitehall, 411 A.2d 838 (Pa. Cmwlth. 1980); Valley Run, Inc. v. Board of Commissioners of Swatara Township, 347 A.2d 517 (Pa. Cmwlth. 1975). For these reasons, we conclude that the Board did not abuse its discretion in ultimately approving Investors' Application.

Accordingly, the order of the trial court is affirmed.

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JAMES R. KELLEY, Senior Judge

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**ORDER**

AND NOW, this 15th day of May, 2008, the order of the Court of Common Pleas of Westmoreland County, at No. 1161 of 2006, dated June 22, 2007 is AFFIRMED.

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JAMES R. KELLEY, Senior Judge