

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert J. Kasper and Jeanette E. :
Kasper, Clarence Toigo and Mary P. :
Toigo, Lane I. Thrush and :
Shippensburg Area Development :
Corporation :
 :
 :
v. : No. 1598 C.D. 2007
 : Argued: April 8, 2008
Southampton Township :
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 :
Appeal of: Clarence Toigo and Mary P. :
Toigo, Lane I. Thrush, and :
Shippensburg Area Development :
Corporation :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE FLAHERTY

FILED: April 30, 2008

Robert J. Kasper and Jeanette E. Kasper, Clarence Toigo and Mary P. Toigo, Lane I. Thrush and Shippensburg Area Development Corporation (Appellants) appeal from an order of the Court of Common Pleas of Cumberland County (trial court) which dismissed Appellants' appeal challenging procedurally the validity of the Southampton Township Zoning Ordinance adopted on November 22, 2004 (Ordinance or 2004 Ordinance). Also before our court is Southampton Township's (Township) motion to dismiss Appellants' appeal as

moot or, alternatively, because all issues on appeal have been waived. We dismiss Appellants' appeal as moot.

In the spring of 2004, the Township Board of Supervisors (Board) directed the Township engineer to hire a paid consultant to prepare the first draft of the Ordinance. The Board then submitted the proposed Ordinance to the Cumberland County Planning Commission (Commission) for comment on June 16, 2004. The Commission made its recommendations by letter dated July 15, 2004.

On July 12, 2004, the Board adopted a resolution creating a Township Planning Committee (Committee) as an advisory body. The resolution provided in pertinent part as follows:

The membership of the Planning Committee shall be each elected Supervisor, the appointed Township Engineer to serve as Engineering advisor, and the Solicitor to the Board of Supervisors or an attorney appointed by the Board of Supervisors to serve as legal advisor.

Board Resolution, July 12, 2004, at 1; Reproduced Record (R.R.) at 157a.

On July 15, 2004, the Committee held a public hearing on the proposed Ordinance. Over the next month, the Committee held three more meetings to accept public comment.¹ After considering public comment and the suggestions of the Commission, the Committee suggested several changes to the proposed Ordinance.

¹ All of the meetings held by the Committee in relation to the proposed Ordinance were duly advertised.

On August 17, 2004, at the close of a public meeting of the Committee, the Committee voted unanimously to recommend the proposed Ordinance and zoning map to the Board along with their proposed changes.

On August 23, 2004, the Board accepted the proposed Ordinance and zoning map along with the suggested changes from the Committee. The Board directed that a copy of the proposed Ordinance be filed in the Cumberland County Law Library (Law Library). Such filing with the Law Library was completed on August 26, 2004. The Board also voted to hold a public meeting regarding the proposed Ordinance on September 16, 2004.² At the meeting of September 16, 2004, public comment on the proposed Ordinance was heard. On September 27, 2004, the Board held another public meeting at which it approved several zoning changes requested and some text changes to the proposed Ordinance. On October 11, 2004, a final public meeting was held, during which, various additional text changes to the proposed Ordinance were approved.

On November 10, 2004, the final draft of the proposed Ordinance, incorporating the changes approved by the Board, was delivered to the Sentinel and News Chronicle for public inspection. Thereafter, the Sentinel and News Chronicle advertised notice of the Board's intention to adopt the proposed Ordinance. The Ordinance was adopted at a Board meeting on November 22, 2004. On December 20, 2004, an attested copy of the Ordinance, as adopted, was delivered to the Commission and the Law Library.³

² The meeting of September 16, 2004, was properly advertised in two papers of general circulation. The advertisement informed the public that copies of the proposed Ordinance were available for inspection at the Township offices, the Law Library and the newspaper.

³ After the proposed Ordinance was submitted to the Commission in June of 2004, there were four separate revisions to the Ordinance made in response to comments by the public at the Committee and Board meetings. There were also changes approved by the Board at the meetings **(Footnote continued on next page...)**

On December 22, 2004, Appellants filed a land use appeal from the Board's decision to adopt the Ordinance. The appeal was brought pursuant to the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §§10101 – 11202. Appellants alleged that the Board failed to follow the proper procedural requirements in enacting the Ordinance.

On December 4, 2006, the trial court held a hearing on the matter and briefs were later submitted. The trial court found that, with regard to the errors alleged under Section 603 of the MPC, the Township's expert witness was credible and convincing when he opined that the Ordinance, as enacted, was generally consistent with the comprehensive plan. The trial court further found that, with regard to the errors alleged under Section 607 of the MPC, the Township strictly complied with the requirements of that section of the MPC. The trial court determined that even though the original draft of the Ordinance was prepared by the Township engineer and a consultant, the proposed Ordinance was prepared by the Committee, as the Committee had carefully considered the draft Ordinance and obtained input from the public as well as the Township engineer, its consultant and solicitor, and the Committee made several revisions based upon that input before adopting the Ordinance as its own. The Committee then recommended the proposed Ordinance to the Board. The trial court further stated that the proposed Ordinance that was recommended to the Board was not identical to the Ordinance submitted to the Commission, however, it contained only minor changes, including some which were made to comply with what the Commission recommended. The

(continued...)

of September 27 and October 11, 2004. None of the revisions were submitted to the Commission for review.

trial court determined that there was no requirement in the MPC that each revision must be submitted to the Commission, only that the proposed Ordinance be submitted to the Commission at least 45 days prior to its enactment. Such requirement was met.

The trial court also addressed Appellants' contention that the Ordinance violated Section 610 of the MPC, 53 P.S. §10610, with respect to publication. The trial court determined that:

[T]he public was adequately informed of the substance of the new zoning ordinance and given ample opportunity to comment upon it. To void the ordinance because of an inconsequential procedural defect would be a surreal elevation of form over substance. We are satisfied that the case at bar would qualify as an exception to the strict compliance rule. Therefore, we will deny appellants' request to declare the ordinance to be void.

Trial Court Opinion, July 24, 2007, at 8. The trial court dismissed Appellants' challenge to the validity of the Ordinance. Appellants appealed to our court.

Appellants contend that the trial court erred in finding that the Township did not violate §607 of the MPC, 53 P.S. §10607, when the testimony established that: (1) the draft Ordinance was not prepared by the Committee; (2) the Committee did not submit recommendations and explanatory materials to the Board and (3) the Township did not submit the final draft of the Ordinance to the Commission for review and comment. Additionally, Appellants claim that the trial court erred in not invalidating the Ordinance after it found that the Township failed to comply with §610(a)(2) of the MPC by not filing an attested copy of the proposed Ordinance with the Law Library prior to enactment; that the trial court erred in finding that the amendments made to the draft Ordinance by the Board

were not “substantial changes” necessitating a re-advertisement of the draft Ordinance prior to adoption, as required by §610(b) of the MPC; and that the trial court erred in finding that, pursuant to §603(j) of the MPC, the enacted Ordinance was “generally consistent” with the adopted comprehensive plan.

Also before our court, the Township filed a motion requesting that Appellants’ appeal be dismissed as moot or, alternatively, that all issues on appeal have been waived because of Appellants’ alleged failure to timely file the Statement of Matters Complained of on Appeal as required by Section 1925(b) of the Rules of Appellate Procedure.

First, we will address the Township’s motion to dismiss this appeal as moot. The Township argues that this case is now moot because, subsequent to the trial court’s order upholding the 2004 Ordinance, the 2004 Ordinance was repealed by the Township effective December 17, 2007 and replaced with a new Township zoning ordinance, ordinance No. 2007-03, which was enacted on that same date (2007 Ordinance).

An issue becomes moot due to an intervening change in facts or law, such as when an ordinance being challenged is repealed and a new ordinance is enacted. In re Christopher J.F. Gross, 476 Pa. 203, 209, 382 A.2d 116, 119 (1978). An actual controversy must exist at all stages of review, not just at the time the original action is filed, and it is well established that our appellate courts will not decide issues that are moot. Id. When an appeal involves a challenge to a zoning ordinance that is later amended in such a way that cures the defect, the appeal is moot. Crawford v. Redevelopment Auth., 418 Pa. 549, 557, 211 A.2d 866, 870 (1965); Paradise Materials, Inc. v. Paradise Township, 676 A.2d 1314, 1317 (Pa. Cmwlth. 1996).

Appellants did not allege that development plans were modified or abandoned as a result of the 2004 Ordinance, nor have they ever alleged any substantive individual harm as a result of the 2004 Ordinance. Thus, now that the 2004 Ordinance has been repealed, Appellants no longer have any basis to challenge the procedural defects in its enactment or alleged inconsistency with the Township's comprehensive plan.

However, Appellants allege that there is a real, practical effect depending on whether the 2004 Ordinance is found to be valid or invalid. Specifically, the trial court here has found that the 2004 Ordinance is valid. Thus, if there were a procedural challenge to the 2007 Ordinance, jurisdiction in that appeal would lie with the Board because the 2007 Ordinance would be considered a subsequent ordinance. Whereas, if the 2004 Ordinance were found to be invalid, jurisdiction would lie with the trial court because the 2007 Ordinance would be considered an original ordinance. See Section 909.1(a)(2) of the MPC, added by the Act of December 21, 1988, P.L. 1329, 53 P.S. §10909.1(a)(2),.

The issues raised concerning the 2007 Ordinance, however, are speculative. Those issues do not change the fact that the 2004 Ordinance has been repealed as we address it at this stage of review. Once the 2004 Ordinance was repealed, Appellants' appeal became moot. As stated previously, an actual controversy must exist at all stages of review. In re Christopher J.F. Gross. Speculation upon the possibility of a future controversy does not equate to an actual controversy. In considering such, we must find that the possibility of a procedural challenge to the 2007 Ordinance, does not amount to an actual controversy.

Accordingly, Appellants' appeal is dismissed as moot.⁴

JIM FLAHERTY, Senior Judge

⁴ As we find that Appellants' appeal is moot, we need not address either the procedural issue of the Pa. R.A.P. 1925 (b) statement being untimely or the merits of the controversy.

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ORDER

AND NOW, this 30th day of April, 2008, Southampton Township's motion is granted and the above-captioned appeal is dismissed as moot.

JIM FLAHERTY, Senior Judge