IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LVGC Partners, LP, and Lebanon Valley Golf Club, Inc., Appellants	:	
v.	:	No. 238 C.D. 2008 Argued: September 10, 2008
Jackson Township Board of Supervisors	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY FILED: October 14, 2008

LVGC Partners, LP, and Lebanon Valley Golf Club, Inc. (collectively referred to as LVGC) petition for review of the January 10, 2008, order of the Court of Common Pleas of Lebanon County (trial court). The trial court affirmed the decision of the Jackson Township Board of Supervisors (the Board), which declined to accept LVGC's proposed curative amendment to a zoning ordinance and dismissed LVGC's land use appeal. We now affirm.

LVGC are the owners of certain property located along Golf Road just north of Kreider Road, within Jackson Township (the Township), Lebanon County, Pennsylvania. The property has been used as a golf course for approximately fifty-five years.

On December 4, 2006, LVGC submitted a preliminary plan application for their proposed development of the property into 302 housing units, including 237 townhouses, a garden apartment complex containing sixty units and fifty-eight single

family homes. The proposed development was named "Exeter Creek." At the time of the submission of the preliminary plan, LVGC's property was zoned as R-1 (Low Density Residential) and had been zoned as R-1 since approximately 1982. Under this R-1 zoning classification, the proposed townhouses and the garden apartment complex were allowed only as special exceptions.

On December 18, 2006, the Board enacted Ordinance No. 5-2006, which re-zoned certain properties that were previously zoned as A-1 (Low Density Agricultural) and R-1 to the A-2 (High Density Agricultural) classification. LVGC's property was included in this rezoning, which did not permit townhouses or garden apartment complexes either by special exception or as of right.

By letter dated January 16, 2007, LVGC notified the Board that they were challenging the substantive validity of the new ordinance. With the letter, LVGC submitted a "Landowner Curative Amendment" to the Board for approval. The amendment sought, *inter alia*, to have the zoning classification of their property returned to R-1 so that they could move forward with their development plans.

Subsequently, a hearing before the Board was scheduled and held on April 25, 2007. LVGC presented one witness, Jonathan Byler, who testified that he was the owner of Lebanon Valley Golf Club, Inc., and LVGC Partners, LP. Mr. Byler testified that the newly enacted zoning ordinance, No. 5-2006, caused the value of the property to be reduced "tremendously." (R.R. at 12a). He also testified that the property was not conducive to the growing of crops and had been used as a golf course for almost six decades. Mr. Byler testified that he had previously met with water and sewer authorities to discuss the future development of the property. He testified that he did not have the proposed preliminary plan for the property with him at the hearing, but that the preliminary plan had been previously submitted to the

Township. (R.R. at 16a). Mr. Byler testified that the situation was a unique hardship because the feasibility of the property as a golf course was presently questionable.

When the hearing was opened for public comment, Michael Burkhart testified that he resided near the golf course property and had documents that had been prepared by the Lebanon Valley Conservation District that he wished to present. Mr. Burkhart testified that he had personally requested and obtained the documents from the agency. Mr. Burkhart testified that the documents indicated that LVGC's property was described as "prime farm land" and was of a good quality soil for high yield crop production. (R.R. at 17a-19a). Alice Oskam, another neighbor to LVGC's property, testified that she believed that the property could be used for raising sheep and goats. Denise Lehman testified that she was in favor of the rezoning. The Board then asked counsel to make closing comments.[1] After closing comments, the Board went into recess. After the recess, the Board voted unanimously to decline LVGC's proposed curative amendment.

Subsequently, on May 29, 2007, LVGC filed a land use appeal with the trial court. The parties briefed the issues and presented oral argument. On January 10, 2008, the trial court issued its decision, affirming the Board's decision to decline to adopt LVGC's proposed curative amendment and dismissing LVGC's land use appeal.

The trial court noted that, at the hearing before the Board, LVGC did not present the testimony of any expert witness, did not submit a copy of the future development plan for the property and did not identify or move for the admission of a letter from the Lebanon County Planning Department indicating that the zoning

[1] Counsel for LVGC did not make any closing comments. (R.R. at 23a).

change was contrary to its recommendation. Additionally, the trial court noted that the Township's interest in preserving agricultural lands was a legitimate governmental interest according to 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).[2] Thus, the trial court concluded that while the effect of the new ordinance was not to directly preserve agricultural land, it did convert areas into agricultural lands and such action was legitimately within the municipality's power.

Additionally, the trial court noted that, even if it agreed with LVGC, it did not have the power to order the Board to approve their curative amendment. The trial court indicated that if it had found the ordinance invalid, for whatever reason, it then had a duty to review the plans and specifications submitted with the challenge to the validity in order to determine which elements should be approved, so as to permit the landowner to proceed with the proposed development. In the present matter, however, the trial court noted that LVGC's proposed preliminary plan for the residential development was never introduced at the hearing and never made part of the record. Further, the trial court concluded that LVGC had failed to present evidence establishing that the new ordinance was arbitrary, capricious or not related to the inherent police power. Finally, the trial court concluded that LVGC had failed to meet their burden by failing to establish that their property was rendered useless through the "mere unqualified testimony" of Mr. Byler, the owner of the property. (Trial Court Opinion at 6). LVGC then filed the present appeal with this Court.

[2] This Section provides that zoning ordinances may include "provisions to promote and preserve prime agricultural land, environmentally sensitive areas and areas of historic significance." 53 P.S. § 10603(c)(7).

On appeal,[3] LVGC argue that the Board erred as a matter of law and abused its discretion because ordinance No. 5-2006 is unreasonable and not substantially related to the inherent police power it purports to serve. LVGC also argue that the Board erred when it failed to adopt their curative amendment. LVGC request that this Court find the ordinance to be unconstitutional and approve their proposed curative amendment, thus returning their property to the R-1 status. We disagree with each of these arguments by LVGC.

First, LVGC argue that newly enacted ordinance is unconstitutional because the A-2 classification is intended to protect only those areas where environmental conditions are most conducive to agricultural operations and which will produce high crop yields. They contend that their property is not agricultural and is inappropriate for a high crop yields because it has been used as a golf course for almost six decades, consists of shale and is hilly. Additionally, they argue that the Lebanon County Planning Department recommended against adopting the A-2 classification for their property and found the re-zoning of the land "unnecessary." (LVGC's Brief at 7). LVGC argue that such a recommendation from that agency indicates that the ordinance is not related to the health, welfare or safety of the community. LVGC further argue that the rezoning was based on a "whim of the Board in an effort to thwart development." Id.

---

[3] Where the trial court takes no additional evidence, our scope of review is limited to determining whether the governing body abused its discretion or committed an error of law. G.M.P. Land Company, Inc. v. Board of Supervisors of Hegins Township, 457 A.2d 989 (Pa. Cmwlth. 1983). An abuse of discretion occurs if the Board's findings are not supported by substantial evidence. Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id.

Section 601 of the MPC provides that the governing body of each municipality may enact, amend and repeal zoning ordinances to implement comprehensive plans and to accomplish any of the purposes of the act. 53 P.S. § 10601. Further, zoning ordinances should reflect the policy goals of the statement of community development objectives and give consideration to the character of the municipality, the needs of the citizens and the suitability and special nature of particular parts of the municipality. See Section 603(a) of the MPC, 53 P.S. § 10603(a). Section 604(3) of the MPC provides that the provisions of zoning ordinances shall be designed to "preserve prime agriculture and farmland considering topography, soil type and classification, and present use." 53 P.S. § 10604(3).

LVGC have not set forth any evidence, other than rhetoric, to support their conclusion that the Board acted arbitrarily or capriciously in enacting the new ordinance. Before the Board, LVGC presented only lay testimony from Mr. Byler, who testified that the value of the property had decreased "tremendously" and opined that the land was not conducive to crop growing as it was hilly and consisted of shale. (R.R. at 12a). Mr. Byler testified that LVGC had expended "considerable sums regarding pursuing the development of the property," but did not have an actual estimate in front of him.[4] (R.R. at 14a). Mr. Burkhart, a resident of the local community, testified before the Board and presented documents obtained from the Lebanon Valley Conservation District that indicated that LVGC's property was described as "prime farm land" and was of a good quality soil for high yield crop production. (R.R. at 17a-19a). Mr. Burkhart testified that he possessed "soil maps"

[4] Mr. Byler later indicated that LVGC spent "certainly in excess of one hundred thousand dollars" pursuing development of the property. (R.R. at 14a).

which contained information about the types of soils, slopes and suitability for agriculture on LVGC's property. (R.R. at 18a).

Ultimately, the Board acted in a manner as to preserve agricultural land and such action is specifically allowed under the MPC. Although LVGC may not agree with the new ordinance, they have failed to produce evidence to support their argument that the Board abused its discretion or erred as a matter of law in enacting the same. Thus, LVGC's argument that the Board erred in enacting the ordinance is without merit.

Next, LVGC argue that the Board erred when it failed to adopt or accept their proposed curative amendment. They argue that the Board "forged ahead with its Ordinance" and later denied their proposed curative amendment despite the recommendations from the Lebanon County Planning Department. (LVGC's Brief at 14).

Section 609.1(c) of the MPC, added by Act of June 1, 1972, P.L. 333, as amended, 53 P.S. § 10609.1(c), provides that if the governing body determines that a validity challenge has merit it "**may** accept a landowner's curative amendment, **with or without revision**, or **may adopt an alternative amendment** which will cure the challenged defects. (Emphasis added). It further provides that "[t]he governing body shall consider the curative amendments, plans and explanatory material submitted by the landowner . . . ."[5] Id.

---

[5] Section 609.1(c) further provides that the governing body shall consider the following:

> (1) the impact of the proposal upon roads, sewer facilities, water supplies, schools and other public service facilities; (2) if the proposal is for a residential use, the impact of the proposal upon regional housing needs and the effectiveness of the proposal in providing housing units of a type actually available to and affordable by classes

(Footnote continued on next page…)

The Board conducted a hearing with regard to LVGC's allegation that the ordinance was invalid, heard the evidence placed before it by LVGC and reached a unanimous decision to decline acceptance of LVGC's proposed curative amendment. Although LVGC may have wanted the Board to accept their proposed curative amendment, they have not set forth evidence to show that the Board erred or abused its discretion in declining to accept the same. LVGC have not produced any evidence to support their allegation that the Board failed to consider their curative amendment. LVGC may argue that the Board should have accepted their curative amendment, but

(continued…)

> of persons otherwise unlawfully excluded by the challenged provisions of the ordinance or map; (3) the suitability of the site for the intensity of use proposed by the site's soils, slopes, woodland, wetlands, flood plains, aquifers, natural resources and other natural features; (4) the impact of the proposed use on the site's soils, slopes, woodlands, wetlands, flood plains, natural resources and natural features, the degree to which these are protected or destroyed, the tolerance of the resources to development and any adverse environmental impacts; and (5) the impact of the proposal on the preservation of agriculture and other land uses which are essential to public health and welfare.

they have not produced evidence showing that the MPC requires that the governing body is mandated to or must accept such proposals. Thus, we cannot say that the Board erred in declining to accept LVGC's proposed curative amendment.

Accordingly, the order of the trial court is affirmed.

____
JOSEPH F. McCLOSKEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LVGC Partners, LP, and Lebanon Valley Golf Club, Inc., Appellants	:	
v.	:	No. 238 C.D. 2008
Jackson Township Board of Supervisors	:	

O R D E R

AND NOW, this 14th day of October, 2008, the order of the Court of Common Pleas of Lebanon County is affirmed.

____
JOSEPH F. McCLOSKEY, Senior Judge