[J-96-2012]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

CAROL STUCKLEY, JANE AND JOHN JOHNSON, GENE EPSTEIN, KRIS RILEY, JOHN MELSKY, RUTH ANN MELSKY-MOORE, OTTO SCHNEIDER, GERTRUDE SCHNEIDER, JAMES DEFALCO, PAM FITZPATRICK, TAYLOR BAUDELEY, LEO FITZPATRICK, RACHEL BAUDELEY, FRANCES BIELSKI, NICK SEIBEL, EDWIN BIELSKI, AND THERESA PARRILLA	: No. 17 MAP 2012 : : Appeal from the order of the : Commonwealth Court at No. 758 CD 2010 : dated 03/17/2011, reconsideration denied : 5/20/2011, affirming the order of the Bucks : County Court of Common Pleas, Civil : Division, at No. 2009-03461-19-5 dated : 03/25/2010.
v.	: ARGUED: September 12, 2012
ZONING HEARING BOARD OF NEWTOWN TOWNSHIP AND BOARD OF SUPERVISORS OF UPPER MAKEFIELD TOWNSHIP	
v.	
TOLL BROTHERS, INC., DOLINGTON LAND, LLP, TOLL PA XIII LP, LEO HOLT,	
Intervenors	
APPEAL OF: TOLL BROTHERS, INC, DOLINGTON LAND, LLP, AND TOLL PA XIII LP,	
Intervenors	

OPINION

MR. JUSTICE EAKIN **DECIDED: October 30, 2013**

We granted allowance of appeal to determine whether the repeal of an ordinance moots any challenges to that ordinance, whether the Commonwealth Court may issue an opinion on the merits of certain issues where it subsequently remands the case for a determination of mootness on another issue, and whether parties to a hearing can continue a challenge to a zoning ordinance once the original challenger has withdrawn.

Because "parties to a hearing" are distinct from "party appellants," unless the former have taken steps to become party appellants, we find they cannot continue the challenge. Accordingly, we reverse the decision of the Commonwealth Court permitting parties to the hearing to continue the challenge brought by the original party appellant, and we dismiss the attempted challenge.

On October 25, 2006, Upper Makefield, Wrightstown, and Newtown Townships amended their jointly enacted Joint Municipal Zoning Ordinance No. 1983. Leo Holt, a property owner affected by this amendment, properly appealed to the Zoning Hearing Board of Newtown Township, alleging substantive and procedural defects in the enactment. As a result, Holt became a "party appellant" pursuant to 53 P.S. § 10913.3.[1]

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[1] The Municipalities Planning Code (MPC) provides:

> Appeals under section 909.1(a)(1), (2), (3), (4), (7), (8) and (9) may be filed with the board in writing by the landowner affected, any officer or agency of the municipality, or any person aggrieved. Requests for a variance under section 910.2 and for special exception under section 912.1 may be filed with the board by any landowner or any tenant with the permission of such landowner.

Id.

At the first hearing on Holt's appeal, some neighboring property owners appeared and were designated "parties to the hearing" pursuant to 53 P.S. § 10908(3).[2] See Newtown Township Zoning Hearing Board Findings In re Application of Holt, 3/5/09, at 2. The neighbors called several witnesses to testify at that and subsequent hearings.

On June 6, 2007, before final action on the appeal was taken, Holt withdrew his challenge. Holt being the only party who had filed an appeal, the Board terminated the proceedings. Following Holt's withdrawal, the Townships repealed Ordinance No. 1983 in its entirety and enacted a new ordinance to cure any prior procedural defects. Ordinance No. 2007 was enacted June 18, 2007.

The ordinance Holt had challenged was reenacted verbatim in Ordinance No. 2007,[3] and the neighbors sought to continue Holt's challenge, filing a writ of mandamus with the trial court, asking it to compel the Board to either continue hearings or render findings on Holt's appeal. On December 11, 2008, the trial court declined to compel the Board to continue the hearings, but ordered it to make written findings on Holt's challenge.

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[2] Section 10908(3) provides:

> The parties to the hearing shall be the municipality, any person affected by the application who has made timely appearance of record before the board, and any other person including civic or community organizations permitted to appear by the board. The board shall have power to require that all persons who wish to be considered parties enter appearances in writing on forms provided by the board for that purpose.

Id.

[3] Holt had challenged §§ 401.1(A)-(D), (G)(1)(c)-(d) of amended Ordinance No. 1983. The sections had the same reference numbers in Ordinance No. 2007.

On March 5, 2009, the Board issued findings. Determining the MPC distinguishes party appellants from parties to the hearing, and that the only "party appellant" had withdrawn, the Board found the neighbors did not have the right to continue the challenge. Id., at 2-8. The Board noted none of the individuals attempting to continue the challenge had filed an application as required by the MPC — in order to pursue the action, a party must "[be] aggrieved … and … file the required written application with reasons[.]" Id., at 3 (emphasis omitted).

The neighbors appealed to the trial court, and Toll Brothers, developing land in the impacted district, intervened. The court reversed the findings of the Board, finding no distinction between party appellants and parties to the hearing, and instructed the Board to permit the neighbors to continue Holt's challenge. Trial Court Opinion, 3/25/10, at 9. Toll Brothers appealed the trial court's order, but subsequently filed an application to dismiss the appeal and vacate the order as moot on the grounds the ordinance challenged by Holt had been repealed and Ordinance No. 2007 had never been specifically challenged. The Commonwealth Court accepted the application but did not vacate the lower court's order. Rather, it opted to address the issue of mootness along with the merits.[4]

The Commonwealth Court affirmed the trial court's decision, finding the MPC does not specifically state the rights of parties to the hearing are contingent on the existence of the party appellant remaining in the action. The court also found the repeal and reenactment of the subsequent ordinance, which was substantially the same as the original ordinance, did not render the challenge moot. However, the court

[4] Toll Brothers' initial request to vacate the trial court's decision as moot was denied. Toll Brothers filed a motion for reconsideration, which was granted. See Stuckley v. Zoning Hearing Board of Newtown Township, No. 758 C.D. 2010, unpublished memorandum at 3-4 (Pa. Cmwlth. filed March 17, 2011).

remanded to the Board to determine whether the matter was moot in light of a third ordinance, Ordinance No. 2010, enacted June 23, 2010, after Toll Brothers' appeal was filed, which Toll Brothers argued cured the substantive defects originally challenged by Holt. Here, Toll Brothers appeals the decision of the Commonwealth Court.

Toll Brothers argues there was no justiciable case or controversy before the trial court or the Commonwealth Court because Ordinance No. 1983, the subject of the original challenge, had already been repealed. Toll Brothers also argues, because the case was potentially moot pending the remand, the Commonwealth Court's opinion was an improper advisory opinion. In the alternative, Toll Brothers argues, even if we are to find this case was justiciable, it should prevail because the neighbors never filed their own application to challenge any ordinance.

The Statutory Construction Act provides:

> Whenever a statute is repealed and its provisions are at the same time reenacted in the same or substantially the same terms by the repealing statute, the earlier statute shall be construed as continued in active operation. All rights and liabilities incurred under such earlier statute are preserved and may be enforced.

1 Pa.C.S. § 1962. This Court has applied the same principle:

> It is true that pending proceedings not fully consummated would normally fall with the repeal of the laws under which they were begun; but this result is not brought to pass where, as here, those laws are substantially re-enacted by the repealing act itself. In such cases the proceedings may be continued and concluded under the new law, subject, of course, to such modifications as it provides.

Kraus v. City of Philadelphia, 109 A. 226, 230 (Pa. 1919); see also In re Earned Income Tax Ordinance of Wilkes-Barre, 222 A.2d 499, 502 (Pa. Super. 1966). Thus, the repeal of an ordinance does not necessarily moot any challenges to that ordinance where it has been reenacted in substantially the same form.

Holt challenged §§ 401.1(A)-(D) and 401.1(G)(1)(c)-(d) of Ordinance No. 1983. These sections were reenacted verbatim in Ordinance No. 2007 with the same section numbers. Furthermore, the Board stated in the preamble to Ordinance No. 2007 the purpose of the reenactment was "to cure any possible procedural or other errors that may have occurred in the enactment" of the original ordinance. Ordinance No. 2007, at 2. Thus, the reenactment did not alter the substance of the ordinance, and Holt's rights and privileges regarding his challenge to the initial ordinance continued despite the reenactment. Thus, had Holt wanted to continue his challenge after Ordinance No. 1983 was repealed and replaced with Ordinance No. 2007, he could have done so. The question becomes whether the neighbors, as parties to the hearing rather than party appellants, could also do so following Holt's withdrawal.

The MPC governs challenges to zoning ordinances and creates at least two categories of participants that may be involved when an ordinance is challenged. Section 10913.3 of the MPC, entitled "Parties appellant before the board," establishes that a "landowner affected, any officer or agency of the municipality, or any person aggrieved" may become a party appellant by filing a written appeal with the board. 53 P.S. § 10913.3. Section 10916.1(c)(1) requires a party to file a written request that the board hold a hearing on a challenge, specifying the "reasons for the challenge[,]" and, in some cases, attach appropriate paperwork. Id., § 10916.1(c)(1). A 30-day time limitation applies to the filing. Id., § 10914.1.[5]

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[5] Section 10914.1 provides:

> (a) No person shall be allowed to file any proceeding with the board later than 30 days after an application for development, preliminary or final, has been approved by an appropriate municipal officer, agency or body if such proceeding is designed to secure reversal or to limit the approval in any manner unless such person alleges and proves that he had no notice, knowledge, or reason to believe that such approval had been given. If (continued…)

Section 10908(3) permits others to participate as "parties to the hearing":

> The parties to the hearing shall be the municipality, any person affected by the application who has made timely appearance of record before the board, and any other person including civic or community organizations permitted to appear by the board. The board shall have power to require that all persons who wish to be considered parties enter appearances in writing on forms provided by the board for that purpose.

Id., § 10908(3).

The neighbors and the Upper Makefield Township Board of Supervisors argue a landowner who participates as a "party to the hearing" has the right to continue an active challenge to a zoning ordinance even if the original appellant withdraws its appeal. Upper Makefield Township concedes the MPC includes separate definitions for "party appellants" and "parties to the hearing," but asserts, once the entities are granted party status of either kind, the MPC treats all "parties" the same. Upper Makefield Township's Brief, at 17.

The Commonwealth Court has held an individual must do more than simply sign a petition in support of a challenge to establish the right to continue where that

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(…continued)

> such person has succeeded to his interest after such approval, he shall be bound by the knowledge of his predecessor in interest. The failure of anyone other than the landowner to appeal from an adverse decision on a tentative plan pursuant to section 709 or from an adverse decision by a zoning officer on a challenge to the validity of an ordinance or map pursuant to section 916.2 shall preclude an appeal from a final approval except in the case where the final submission substantially deviates from the approved tentative approval.
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> (b) All appeals from determinations adverse to the landowners shall be filed by the landowner within 30 days after notice of the determination is issued.

Id.

challenge is later withdrawn by the party appellant. Frank v. Mobil Oil Corporation, 296 A.2d 300, 303 (Pa. Cmwlth. 1972). In Frank, the court found:

> It well may be that numerous persons interested in this matter ... allowed their colors to be carried by the [original appellants], on the assumption that [the original appellants] would carry the battle to its conclusion. When the [original appellants] struck their colors, no one was left on the field, and the period for an appeal from the [zoning board decision] ... had long since passed.

Id., at 304. The court went on to suggest it would be "sound procedure to require that protestants who are interested in the case and wish to be considered 'parties' file with the zoning board at the hearing a short form which 'enters' their appearance in the case[,]" but "[a]ppearance as a witness does not necessarily make the person a party to the proceeding." Id., at 303-04 (citation omitted). We agree.

The neighbors argue Frank is not on point because, in the instant case, the neighbors did enter their appearances and were recognized as "parties to the hearing." They argue it was Frank that led to the requirement parties enter their appearance in order to participate in a hearing. The reasons a board may, in its option, require a written appearance are many, including identifying witnesses, their interest, and residence, as well as for notice purposes; it does not bespeak full party status. We must disagree that participating in a challenge as "parties to the hearing" confers the right to continue that challenge when the original challenger withdraws.

There are clear distinctions between "parties to the appeal" and "parties to the hearing." The former must be aggrieved by the ordinance; the latter need only be "affected by the application" (namely, the aggrieved party's challenge). The latter therefore cannot exist without the former. The former must file a written appeal, state specific reasons for the challenge, and may be required to provide documentation; the latter need file no reasons for their interest or document how they are "affected"; at most, they may have to fill out an appearance form if the board chooses to require one.

Indeed, a party to the hearing need not support the parties to the appeal at all. They can speak in favor of the challenge or against the challenge. By definition their interest is in the process, not the specifics of the challenge itself. There is nothing in the statute that requires parties to the hearing to identify their sentiments — in fact, they need not take sides at all. The parties to the hearing cannot be denied the ability to provide input, but providing input is not the same as a challenge any more than being a witness makes one a litigant. The status of party to the hearing merely means they can be heard — it does not mean they can settle or preclude settlement of an appeal taken by someone else. It gives them a voice, not a vote.

To hold otherwise would preclude any meaningful ability to settle such cases. If Holt and the Townships reached a settlement resolving his challenge, it could not be implemented if the neighbors had the ability to prolong the litigation — what reason would the township have to accommodate Holt if it resolves nothing? If a resolution in principle is possible between all the formal parties, the ability of non-parties to keep up the fight is a concept foreign to our jurisprudence.

To the extent that some cases have failed to distinguish between "parties to the appeal" and "parties to the hearing," inferring that status as the latter confers the right to appeal, such inferences are disapproved. See, e.g., Weston v. Zoning Hearing Board of Bethlehem Township, 994 A.2d 1185 (Pa. Cmwlth. 2010).

The neighbors could have filed their own challenge pursuant to § 10916.1(b), just as Holt did; they did not. They identified no issues and lack the right to continue the challenge when Holt withdrew. The trial court erred when it ordered the Board to issue findings on the challenge after it had been withdrawn. Thus, the Commonwealth Court's order must be reversed. Because mere parties to a hearing have no right to continue a challenge where the party appellant has withdrawn its challenge, it is not

necessary to examine the relevance of the third ordinance, passed after Holt withdrew his initial challenge.

Toll Brothers also asks this Court to find the Commonwealth Court issued an impermissible advisory opinion, arguing the court erred in discussing the merits of one issue before remanding a question of mootness based on another issue.

An advisory opinion is one issued despite the lack of a justiciable case or controversy between the parties to an appeal. See Pennsylvania Public Utility Commission v. County of Allegheny, 203 A.2d 544, 546 (Pa. 1964). Where the issues in a case are moot, any opinion issued would be merely advisory and, therefore, inappropriate. Department of Environmental Resources v. Jubelirer, 614 A.2d 204, 212-13 (Pa. 1992) (citations omitted).

In the present case, the Commonwealth Court first determined the neighbors could continue the challenge. The court then found the challenge was not moot based on the reenactment of a second, substantially similar statute, as discussed above. The court then discussed Toll Brothers' alternative argument for mootness — that the substantive defects alleged by Holt were cured with the enactment of the third ordinance. It was necessary for the court to first determine whether parties to the hearing could bring a challenge in the first place, before determining whether that challenge was moot on other grounds. While, for reasons discussed above, we disagree with the Commonwealth Court's determination the neighbors could continue the challenge without Holt, that issue was a proper case or controversy before the court at the time and, thus, its opinion was not an improper advisory opinion.[6]

[6] We need not reach the question of the impact of Ordinance No. 2010 on the neighbors' challenge, the subject of the Commonwealth Court's remand, because we dismiss the challenge on other grounds.

The Commonwealth Court's order is reversed. Jurisdiction relinquished.

Mr. Justice McCaffery and former Justice Orie Melvin did not participate in the consideration or decision of this case.

Mr. Chief Justice Castille and Madame Justice Todd join the opinion.

Mr. Justice Saylor files a concurring opinion.

Mr. Justice Baer files a concurring opinion in which Mr. Justice Saylor joins.