

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY
COMMONWEALTH OF PENNSYLVANIA
CIVIL DIVISION

KMRD, L.P.,

Appellant

vs.

ZONING HEARING BOARD OF
THE TOWNSHIP OF FORKS,

Appellee,

vs.

FORKS TOWNSHIP,

Intervenor.

C-48-CV-2008-5549

EMIL GIORDANO
JUDGE
MAY 12 2009 10:52 AM

Appearances: John A. VanLuvanec, Esq., and Kellie A. McGowan, Esq., Attorneys for Appellant; Steven N. Goudsouzian, Esq., Attorney for Intervenor.

OPINION

This matter comes now before this Honorable Court after a hearing on the appeal from the decision of the Forks Township Zoning Hearing Board, filed by KMRD, L.P., Appellant herein. Based upon the evidence presented on February 3, 2008, the record, briefs of the parties, and applicable law, this Court hereby enters the following Opinion and Order.

I. Factual & Procedural Background

KMRD, L.P., hereinafter referred to as "Appellant," is a developer seeking to develop a piece of land in Forks Township pursuant to the Forks Township Zoning Ordinance enacted on January 8, 1983. However, since January 8, 1983, Forks Township enacted entirely new zoning

ordinances in 1986, 1988, 2001, and 2006. Accordingly, Appellant sought to have a hearing before the Zoning Hearing Board of Forks Township, hereinafter referred to as "Appellee," in order to find all four of the 1986, 1988, 2001, and 2006 zoning ordinances declared void *ab initio*. In preparation for the hearing, Appellant sought discovery from Appellee stretching back twenty-five years related to the enactment of all four zoning ordinances. In response, Appellee supplied Appellant with a 15 page affidavit supported by over 300 pages of documents, all related to the passage of the most recent (2006) zoning ordinance.

A hearing was held before Appellee on February 18, 2008. At the hearing, Appellant was directed to first present evidence and argument regarding the most recent (2006) zoning ordinance, before arguing the validity of the preceding ordinances. After presentation of evidence and argument, Appellee found that the 2006 zoning ordinance was valid and therefore deemed the validity of the prior ordinances to be moot. Appellant thereafter filed a land-use appeal on June 6, 2008 and a Motion for Presentation of Additional Evidence on July 29, 2008. This Court denied Appellant's Motion for Presentation of Additional Evidence on November 14, 2008. Consequently, Appellant was required to proceed with a hearing on the merits of its appeal regarding the 2006 zoning ordinance. The sole issue before this Court is whether the 2006 Forks Township Zoning Ordinance was properly enacted. Appellant's sole challenge to the validity of the 2006 ordinance is in regard to whether proper notice of the new ordinance was given under Section 610(a) of the Pennsylvania Municipalities Planning Code. This matter is now before this Honorable Court.

II. Applicable Standard of Review

It is well-settled that where a trial court hears any additional evidence on the merits of a land-use appeal, the trial court must make its own findings of fact and proceed with *de novo* review. Mitchell v. Zoning Hearing Bd. of the Borough of Mount Penn, 838 A.2d 819, 826 (Pa. Cmwlth. 2003) (“[w]here the trial court took any additional evidence on the merits . . . it must determine the case *de novo*, making its own findings of fact based on the record made before the board as supplemented by the additional evidence; this Court must then determine on appeal whether the trial court, not the board, committed an error of law or an abuse of discretion.”).

III. Findings of Fact

In the case at hand, the parties have presented evidence to this Court, particularly in the form of exhibits representing the 2006 ordinance and the public notice that was published prior to the enactment of the 2006 ordinance. The presentation of this additional evidence requires this Court to proceed with *de novo* review of the merits of the land use appeal.

Accordingly, this Court makes the following findings of fact:

1. Forks Township enacted a new zoning ordinance on February 16, 2006, hereinafter referred to as the “2006 Ordinance.”
2. Forks Township previously enacted zoning ordinances on January 2, 2001; July 7, 1988; and October of 1986.
3. Forks Township began reviewing studies and surveys in preparation for a new zoning ordinance on or about May 12, 2004.
4. Forks Township continued to review the 2006 Ordinance throughout 2004 and 2005 and into 2006.

5. Public notice of the proposed 2006 Ordinance was given by publication in the Easton Express on January 9, 16, 17, and 24 of 2006.
6. The public notice served to notify the public of two public hearings, to be held on January 24, 2006 and February 7, 2006.
7. The public notice, in its entirety, read as follows:

Forks Township
Northampton County, Pennsylvania

NOTICE

The Forks Township Board of Supervisors will hold a Public Hearing on Ordinance No. 296, the proposed New Forks Township Zoning Ordinance. The Hearing will be held on Tuesday, February 7, 2006 at the Forks Township Municipal Building at 1606 Sullivan Trail. The meeting will begin at 7 p.m. There will be an informal open house starting 30 minutes before the meeting.

The proposed new Zoning Ordinance primarily regulates the uses of land and structures, with differing standards in different zoning districts as shown on the Zoning Map. The Ordinance will serve as Chapter 200 of the Codified Ordinances of Forks Township. The proposed Ordinance addresses the following major subject areas: Zoning Map, Purposes, Administration, Definitions, Zoning Districts, Allowed uses in each Zoning District, Dimensional Requirements such as heights, lot sizes and setbacks, Cluster Housing Options, Common Open Space Provisions, Additional Requirements for Specific Uses, Environmental Protection, Off Street Parking and Loading, Signs, Nonconformities, General Regulations, and provisions of approval of Conditional Uses by the Board of Supervisors, and Special Exception Uses by the Zoning Hearing Board

A copy of the proposed Ordinance is available for review at the Township Building at 1606 Sullivan Trail on regular business days between 8 a.m. and 4:30 p.m. Copies of all or portions of the Ordinance will be made available for purchase at the cost of reproduction. Persons who wish to purchase a complete copy of the Ordinance are asked to call the Township Offices at 610-252-0785 in advance.

If any person with a disability wishes to request that special accommodations be made by the Township to allow their participation at the meeting, they are asked to contact the Township Manager at 610-252-0775 at least one business day in advance.

The proposed New Zoning Ordinance will be considered for adoption at the Board of Supervisors meeting on Thursday, February 16, 2006, after 7:30 p.m. at the Forks Township Municipal Building, 1606 Sullivan Trail.

Karl H. Kline, Esquire
Karl Kline P.C.
2925 William Penn Highway
Suite 301
Easton, PA 18045-5283
Township Solicitor

8. The notice as printed in paragraph 7 above was published on four occasions as specified in paragraph 5 above, except that the first two publications advertised the first public meeting that was held on January 24, 2006.
9. A public hearing was held by Forks Township on January 24, 2006, in further consideration of the proposed 2006 Ordinance.
10. Dennis Benner, a representative of KMRD, was present at the January 24, 2006 meeting and inquired about the Farmland Preservation District in which KMRD owned property.
11. A public hearing was also held on February 7, 2006 as stated in the public notice.
12. The 2006 Ordinance was considered and adopted by the Board of Supervisors on February 16, 2006 after 7:30 pm as stated in the public notice.
13. Pursuant to the public notice, copies of the ordinance were available at the township office.

14. A copy of the entire 2006 Ordinance was supplied to the Easton Express on January 4, 2006.
15. A copy of the entire 2006 Ordinance was supplied to a law library in Northampton County prior to adoption.
16. On April 17, 2007, KMRD filed an application with the Forks Township Zoning Hearing Board challenging four ordinances, including the 2006 Ordinance on procedural grounds.
17. KMRD's initial procedural challenge consisted of nearly every possible violation of the Municipalities Planning Code, copied verbatim from the statutes, and encompassing eighteen separate issues.
18. KMRD's initial procedural challenge was addressed to four entire ordinances, stretching over a period of twenty years.
19. In response to KMRD's initial challenge, the Township provided a sixteen-page affidavit supported by 331 pages of documentation addressing every one of KMRD's challenges.
20. After receiving the Township's response, KMRD dropped seventeen of the eighteen issues and proceeded solely on the issue of whether the public notice of the proposed 2006 Ordinance was sufficient.
21. The Zoning Hearing Board heard KMRD's challenge on March 24, 2008, at which time KMRD presented evidence related to the public notice given prior to the adoption of the 2006 Ordinance.

22. At the March 24, 2008 hearing, the Zoning Hearing Board denied KMRD's challenge to the 2006 zoning ordinance, and dismissed the challenges to prior ordinances as moot.
23. KMRD then filed this land use appeal on June 5, 2008.

IV. Discussion

In order to overturn the 2006 Ordinance, KMRD bears the burden of proving clearly and unmistakably that the 2006 Ordinance was unconstitutional or, in this case, unconstitutionally enacted due to alleged insufficient notice. See Bilbar Const. Co. v. Board of Adjustment of Easttown Tp., 141 A.2d 851, 855 (Pa. 1958). Furthermore, "ordinances are presumed to be constitutional, and a heavy burden is placed on a person who challenges the constitutionality of an ordinance." Commonwealth v. Asamoah, 809 A.2d 943, 945 (Pa. Super. 2002).

In this case, KMRD challenges the validity of the 2006 Ordinance based on its argument that failure to print the entire ordinance in a newspaper was a violation of the Municipalities Planning Code, and thus the 2006 Ordinance is unconstitutional. This Court disagrees with KMRD.

The statute at issue provides, in pertinent part:

Proposed zoning ordinances and amendments shall not be enacted unless notice of proposed enactment is given in the manner set forth in this section . . . Publication of the proposed ordinance or amendment shall include either the full text thereof or the title and a brief summary, prepared by the municipal solicitor and setting forth all the provisions in reasonable detail. If the full text is not included: (1) A copy thereof shall be supplied to a newspaper of general circulation in the municipality at the time the public notice is published. (2) An attested copy of the proposed ordinance shall be filed in the county law library or other county office designated by the county commissioners, who may impose a fee no greater than that necessary to cover the actual costs of storing said ordinances.

53 P.S. § 10610(a).

This Court fails to see how notice was insufficient. As stated above, the Township published public notice four times in the manner set forth by the statute. Although the full text of the ordinance was not advertised in the newspaper due to the prohibitive cost (testimony reveals that the cost would have been approximately \$55,000 per entire publication), a copy was supplied to the Easton Times at the time the public notice was published in compliance with subsection one of Section 10610. In compliance with subsection two of Section 10610, the Township made copies of the proposed ordinance available at the Forks Township Municipal Building as well as at a Northampton County Law Library, at the cost of reproduction.

Accordingly, the Township clearly complied with the plain language requirements of 53 P.S. § 10610(a). Consequently, KMRD's challenge to the 2006 Ordinance based on insufficient notice is without merit.

KMRD has failed to meet its burden of showing that insufficient notice was provided prior to the adoption of the 2006 Ordinance. Moreover, under the plain language of the Municipalities Planning Code, this Court must DISMISS KMRD's land use appeal.

WHEREFORE, this Court enters the following Order:

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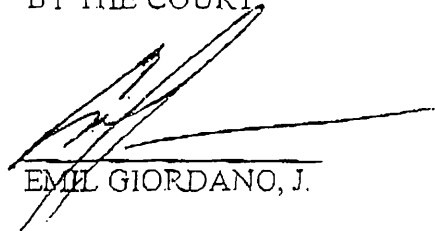
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CLERK OF COURT
EMIL GIORDANO, J.

ORDER

AND NOW, this 3 day of March, 2009, this Honorable Court hereby ORDERS and DECREES the following for the reasons set forth in this Honorable Court's OPINION attached hereto:

- 1. KMRD's land use appeal is hereby DISMISSED WITH PREJUDICE.

BY THE COURT:



EMIL GIORDANO, J.