

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

THOMAS STRECK and DARLENE) No. 2010-C-4036
ADONIZIO, h/w; GERALD KRONK and)
KAREN KRONK, h/w; PETER H. KELLS;)
RONALD MOYER and CONSTANCE)
MOYER, h/w; JOSEPH CASTAGNA and)
KIMBERLY CASTAGNA, h/w,)
Appellants)
vs.) LAND USE APPEAL
LOWER MACUNGIE TOWNSHIP)
BOARD OF COMMISSIONERS,)
Appellee)
and)
DAVID M. JAINDL and)
JAINDL REALTY, LP,)
Intervenors) ASSIGNED TO:
The Honorable Michele A. Varricchio

Appearances:
Donald W. Miles, Esq.
for Appellants

Peter F. Lehr, Esq.
for Appellee

Joseph A. Zator, II, Esq.
for Intervenors

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CIVIL
LEHIGH COUNTY, PA

MEMORANDUM OPINION

MICHELE A. VARRICCHIO, Judge

AND NOW, this 31st day of August, 2011, before the Court for consideration is the Appeal from the July 1, 2010 adoption and enactment of Ordinance Number 2010-06 (Ordinance) by Lower Macungie Township Board of Commissioners (Commissioners). Thomas Streck and Darlene Adonizio, h/w, Gerald Kronk and Karen Kronk, h/w, Peter H. Kells, Ronald

Moyer and Constance Moyer, h/w, and Joseph Castagna and Kimberly Castagna, h/w, (Appellants) challenge the procedural validity of the adoption and enactment of the Ordinance by Commissioners.

Notice of the within Appeal was filed by Appellants with this Court on August 13, 2010 and on August 18, 2010, David M. Jaindl and Jaindl Realty, L.P. (Jaindl) intervened in the matter. Commissioners filed the Record on September 24, 2010 and a Supplemental Record on November 4, 2010.

Appellants filed an emergency motion to stay a related appeal before the Zoning Hearing Board of Lower Macungie Township pending the outcome of the above captioned matter.¹ This Court granted the stay. Argument on the emergency motion was held February 23, 2011; this Court lifted the stay on March 2, 2011.

Brief of Appellants was filed May 5, 2011 and Briefs of Commissioners and Jaindl were each filed June 6, 2011. Oral argument was held on June 20, 2011.

A Memorandum of Understanding (MOU), entered into by Lower Macungie Township (Township) and Jaindl, was discussed by Commissioners at its regularly scheduled public meeting on April 15, 2010. Attached to the MOU is a proposed zoning ordinance as well as subdivision and land development ordinance (SALDO) amendments. Commissioners held a special public meeting on April 29, 2010, which was advertised in East Penn Publishing group of newspapers on April 21, 2010. The MOU was adopted by Township at the April 29, 2010 meeting.

Township's Planning Commission discussed the Ordinance at its May 11, 2010 and June 8, 2010 public meetings, which were advertised in East Penn Publishing group of newspapers on

¹ In a separate but related action before the Zoning Hearing Board, Appellants challenged the substantive validity of the Ordinance pursuant to § 909.1(a)(1) of the Municipalities Planning Code.

December 23, 2009. Lehigh Valley Planning Commission reviewed the amendments and provided Township with its review by letter dated May 28, 2010 and Township's Planning Commission ultimately recommended the adoption and enactment of the amendments by letter dated June 24, 2010.

Commissioners adopted the Ordinance at the July 1, 2010 public meeting. On May 28, 2010, Township mailed individual notices to land owners of property located within the area sought to be rezoned by the Ordinance identified in accordance with the real estate tax records. Said notices indicated the date, time and location of the hearing and stated that the full text of the amendments was available at Township's offices and on Township's website. A public notice of the meeting was advertised in East Penn Publishing group of newspapers on June 9, 2010 and June 16, 2010. Said notice states:

PUBLIC NOTICE

Notice is hereby given that the Lower Macungie Township Board of Commissioners will consider for possible adoption an Ordinance amending the Township Zoning Ordinance entitled Zoning Ordinance/Map Amendment. This proposed amendment, of which this Notice is a summary proposes the following: establish four new zoning districts: Highway Industrial-Spring Creek (HI-SC), Commercial-Spring Creek (C-SC), Agricultural Protection Overlay (APO), and Urban Residential Overlay (UO); provide within these new zoning districts uses permitted by right, uses permitted by condition, uses permitted by special exception, and accessory uses; provide for regulations within these new zoning districts covering lot area, lot width, building coverage and height, minimum yard requirements, and off-street parking, along with other additional standards; amend the official Zoning Map, including the rezoning of lands to these new zoning districts and/or the Urban Residential District; add a definition of a "fast food restaurant;" amend the definition of "warehouse and whole trade" to become the new definition of "warehouse, wholesale, storage or distribution use;" revise requirements regarding signs; provide for conditions for warehouse, wholesale, storage or distribution use; amend the requirement that applicants provide security services to shopping centers; repeal requirements regarding traffic impact

studies; repeal any conflicting ordinances, resolutions or parts thereof; provide for severability of parts of this ordinance deemed to be invalid; and provide for an effective date. The Board of Commissioners will consider the foregoing Ordinance at a hearing to be held during the Boards' public meeting on July 1, 2010 at 7:00 p.m. at the Lower Macungie Township Municipal Building, 3400 Brookside Road, Macungie, Pennsylvania. Copies of the full text of this Ordinance are available to any interested party for inspection and/or copying at the Township Municipal Building, or for inspection during normal business hours at the offices of this newspaper and the Lehigh County Department of Law. All interested parties are invited to attend this hearing.

Sometime between June 21, 2010 and June 24, 2010, Township also posted 57 notices around the perimeter of the area sought to be rezoned by the Ordinance. Said notices indicated the date, time and location of the hearing, and stated that the full text of the amendments was available at Township's offices and on Township's website.

The Ordinance as adopted on July 1, 2010 states verbatim in its own summary title:

AN ORDINANCE AMENDING LOWER MACUNGIE TOWNSHIP ZONING ORDINANCE OF 1998 BY ESTABLISHING FOUR NEW CLASSES OF ZONING DISTRICTS: HIGHWAY INDUSTRIAL-SPRING CREEK (HI-SC), COMMERCIAL-SPRING CREEK (C-SC), AGRICULTURAL PROTECTION OVERLAY (APO), AND URBAN RESIDENTIAL OVERLAY (UO); PROVIDING FOR USES PERMITTED BY RIGHT, USES PERMITTED BY CONDITION, USES PERMITTED BY SPECIAL EXCEPTION, ACCESSORY USES, LOT AREA, WIDTH, BUILDING COVERAGE AND HEIGHT REGULATIONS AS WELL AS MINIMUM YARD REQUIREMENTS, OFF-STREET PARKING AND ADDITIONAL STANDARDS FOR USES WITHIN NEW CLASSES OF ZONING DISTRICTS; AMENDING THE OFFICIAL ZONING MAP, INCLUDING THE REZONING OF LANDS WITHIN THE AGRICULTURAL PROTECTION (AP) DISTRICT TO THE URBAN RESIDENTIAL (U) DISTRICT AND DELINEATION OF APO AND UO DISTRICTS; PROVIDING A NEW DEFINITION OF "FAST FOOD RESTAURANT" AND AMENDING THE DEFINITION OF "WAREHOUSE AND WHOLE TRADE" TO BECOME THE NEW DEFINITION OF "WAREHOUSE, WHOLESAL,

STORAGE OR DISTRIBUTION USE”; PROVIDING FOR CONDITIONS FOR WAREHOUSE, WHOLESALE, STORAGE OR DISTRIBUTION USE; AMENDING THE REQUIREMENT THAT APPLICANTS PROVIDE SECURITY SERVICES TO SHOPPING CENTERS; AMENDING PROVISIONS REGARDING SIGNS PERMITTED IN VARIOUS ZONING DISTRICTS; REPEALING SECTION 1605 REGARDING TRAFFIC IMPACT STUDIES; REPEALING ORDINANCES, RESOLUTIONS OR PARTS THEREOF IN CONFLICT HEREWITH; PROVIDING FOR SEVERABILITY OF PARTS OF THIS ORDINANCE DEEMED TO BE INVALID; AND PROVIDING FOR AN EFFECTIVE DATE.

Three issues are set forth in Appellants’ brief, which are set forth as follows:

1) Did Township act arbitrarily, capriciously and in an abuse of discretion by a *de jure* enactment of these zoning amendments after Township had months before effected a *de facto* adoption of those amendments via its “Memorandum of Understanding” with Jaindl (an agreement which was not court-approved or part of any settlement of litigation between them), i.e., an exercise of unlawful “contract zoning”?

2) Were the published public notices, the posted public notices, and the mailed public notices of the proposed enactment of these zoning amendments defective under the requirements of Sections 609 and 610 of the Pennsylvania Municipalities Planning Code, rendering the amendments null and void?

3) Did Township act arbitrarily, capriciously and in an abuse of discretion by enacting these zoning amendments without contemporaneously amending the Township’s comprehensive plan, with which these amendments were generally inconsistent?

The threshold requirements for enacting a zoning ordinance are set forth in Section 609(b) of the Municipalities Planning Code (MPC), which provides:

(b)(1) Before voting on the enactment of an amendment, the governing body shall hold a public hearing thereon, pursuant to public notice. In addition, if the proposed amendment involves a zoning map change, notice of said public hearing shall be conspicuously posted by the municipality at points deemed sufficient by the municipality along the tract to notify potentially interested citizens. The affected tract or area shall be posted at least one week prior to the date of the hearing.

(2)(i) In addition to the requirement that notice be posted under clause (1), where the proposed amendment involves a zoning map change, notice of the public hearing shall be mailed by the municipality at least 30 days prior to the date of the hearing by first class mail to the addresses to which real estate tax bills are sent for all real property located within the area being rezoned, as evidenced by tax records within the possession of the municipality. The notice shall include the location, date and time of the public hearing. A good faith effort and substantial compliance shall satisfy the requirements of this subsection.

53 P.S. § 10609(b).

Additionally, Section 610(a) of the MPC sets forth the requirements for publication, advertisement, and availability of ordinances, which provides:

(a) Proposed zoning ordinances and amendments shall not be enacted unless notice of proposed enactment is given in the manner set forth in this section, and shall include the time and place of the meeting at which passage will be considered, a reference to a place within the municipality where copies of the proposed ordinance or amendment may be examined without charge or obtained for a charge not greater than the cost thereof. The governing body shall publish the proposed ordinance or amendment once in one newspaper of general circulation in the municipality not more than 60 days nor less than 7 days prior to passage. 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).

These notice provisions are mandatory and if a township fails to comply with the requirements then the appropriate zoning enactment is null and void. These requirements are to be strictly applied and mere substantial compliance is insufficient. Valianatos v. Zoning Hearing Bd. of Richmond Twp., 766 A.2d 903 (Pa.Cmwlth. 2001); Lower Gwynedd Twp. v. Gwynedd Properties, Inc., 591 A.2d 285 (Pa. 1991).

Here, the public notice was a good faith effort by Commissioners to comply with the relevant provisions of the MPC, however the notice failed to include “all the provisions in reasonable detail” as mandated by Section 610(a). The provisions of the Ordinance are summarized in the summary title of the Ordinance and are set forth in reasonable detail in the Table of Contents of the Ordinance. Both indexes were available to Township at the time that the matter was published for purposes of notice requirements.

Township did not publish the summary title of the Ordinance in total even though it was available at the time. In fact, the summary title of the Ordinance is nearly identical to the public notice. All but approximately twenty-five words of the summary title are included in the public notice. The public notice did not include the identity of the Township ordinance to be amended, that is, Zoning Ordinance of 1998 and the identity of the particular section to be repealed in regard to traffic impact studies; Section 1605. More importantly, the public notice is misleading in its omissions. It states that the Ordinance would establish four new zoning districts while the Ordinance references four new classes of zoning districts. Additionally, while the notice stated that the Ordinance would be “AMENDING THE OFFICIAL ZONING MAP, INCLUDING THE REZONING OF LANDS”, it omitted the identity of the location of the rezoning of lands. The title summary of the Ordinance continues and states “WITHIN THE AGRICULTURAL

PROTECTION (AP) DISTRICT TO THE URBAN RESIDENTIAL (U) DISTRICT AND
DELINEATION OF APO AND UO DISTRICTS.”

The Table of Contents of the Ordinance provides a readily available simple outline of all of the provisions of the Ordinance in reasonable detail. Nevertheless, certain sections of the Table were not included in the public notice. While the Ordinance sets forth the purpose of the newly created zoning districts, the public notice fails to summarize the purpose of these new classes of zoning districts. Informing the public of the purpose of the new class of zoning district is significant for the public to have a full understanding of the proposal and what will be discussed at the public hearing. At a minimum, Commissioners could have summarized the purpose of each of the four new zoning districts to meet the requirements of Section 610(a).

There are other provisions of the Ordinance that were not included in the notice to the public summary. The public notice fails to mention the uses specifically excluded in the Commercial – Spring Creek District. The public notice only identifies the Agricultural Protection Overlay District and the Urban Residential Overlay District. There are no provisions provided for in the public notice as to either of these newly created zoning districts. Meanwhile, the Ordinance identifies nine particular provisions. The provisions excluded from the public notice as to the Agricultural Protection Overlay District include its purpose, applicability, authorized infrastructure, and applicability of SALDO. The missing provisions in regard to the Urban Residential Overlay District include its purpose, applicability, active residential community, special provisions for access drives and driveways, and dimensional requirements and ponds.

Because the Court finds that the published notice is defective, this Court does not reach Appellants remaining arguments.

For the reasons expressed above, this Court finds that Ordinance Number 2010-06 is
invalid.

BY THE COURT:

A handwritten signature in black ink, appearing to read "M. Varricchio", written over a horizontal line.

Michele A. Varricchio, J.