

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL

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|---------------------------|---|------------------|
| DORI DIANNA and MICHAEL | : | |
| STEPHENSON, | : | |
| Appellants | : | |
| | : | |
| vs. | : | No. CI-09-01856 |
| | : | |
| BOARD OF COMMISSIONERS OF | : | |
| MANHEIM TOWNSHIP, | : | STATUTORY APPEAL |
| Appellee | : | |
| | : | |

OPINION AND ORDER

BY: MILLER, J.
February 9, 2012

Before the Court is the local agency appeal of Dori Dianna and Michael Stephenson from a decision of the Board of Commissioners (“Board”) of Manheim Township (“Township”) granting the request of Intervenors High Family Partnership I, LP and TCCC-Lancaster Holdings, LP for permission to place fill in the 100-year floodplain under Section 305.1.L of the Floodplain Ordinance of Manheim Township – 1998 (Ordinance No. 1998-28, 12/14/98, as amended).¹ For the reasons that follow, the appeal is granted, the Board’s approval of Intervenors’ request is vacated, and the matter is remanded to the Board for further action consistent with this Opinion.

¹ This matter was originally assigned to the Honorable Jeffery D. Wright for disposition. By Judge Wright’s Order dated February 7, 2012, it was reassigned to the undersigned.

The property involved in this appeal consists of two parcels (the “Premises”): An 84.4 acre tract located at 1418 Harrisburg Pike, Manheim Township, Lancaster County, Pennsylvania;² and a 5.33 acre tract which adjoins the first tract and is located on the south side of Farmingdale Road. Intervenors are the developers of a proposed commercial development known as the Crossings at Conestoga Creek, which was approved as a conditional use under the Township’s Zoning Ordinance. A portion of the Premises is located in the 100-year floodplain, as designated under the Township’s Floodplain Ordinance, and part of the development, as proposed, would encroach on the floodplain.

In connection with the proposed development, but prior to receiving the conditional use approval, Intervenor High Family Partnership I, LP,³ requested permission to place fill in an area of the Premises located within the 100-year floodplain. Consideration of that request, made on April 25, 2007, was postponed pending the outcome of the conditional use application. The conditional use was approved by the Board of Commissioners on April 14, 2008.⁴ Among the conditions attached to the conditional use approval was the requirement that Intervenors obtain permission to adjust the delineated floodplain (*i.e.*, place fill in an area of the Premises located

² The majority of the 84.4 acre tract is located in Manheim Township; a small portion is located in East Hempfield Township.

³ High Family Partnership I, LP, was the original applicant for approval of the proposed development project as a conditional use under the Zoning Ordinance of Manheim Township. During the pendency of the conditional use proceedings before the Board of Commissioners, High Family Partnership I, LP transferred its equitable interest in the Premises to TCCC-Lancaster Holdings, LP. High Family Partnership I, LP has continued to act as agent for TCCC-Lancaster Holdings, LP. There are no averments that would call into question the transfer of interest to TCCC-Lancaster Holdings, LP or the agency relationship between TCCC-Lancaster Holdings, LP and High Family Partnership I, LP. The court is satisfied that TCCC-Lancaster Holdings, LP has sufficient legal and equitable interest in the Premises and in the conditional use approval to proceed with the request for permission under the Floodplain Ordinance *and* that High Family Partnership I, LP has sufficient authority under the law of agency to act on its behalf.

⁴ Appellants filed an appeal from the Board’s approval of the conditional use application, which was docketed in the Court of Common Pleas of Lancaster County at No. CI-08-05450. The appeal was denied, and the conditional use approval affirmed, by this court’s Opinion and Order of November 7, 2011. Appellants’ appeal of this court’s action to the Commonwealth Court of Pennsylvania was timely filed and is pending.

within the 100-year floodplain) in accordance with Section 305.1.L of the Township's Floodplain Ordinance. The April 25, 2007 request for permission was reviewed by the Township and ultimately denied.⁵

On November 3, 2008, Intervenors made a new request to the Township under Section 305.1.L of the Floodplain Ordinance. The Board of Commissioners considered the new request at public meetings on November 8, 2008, December 8, 2008 and January 12, 2009. At the conclusion of the January 12, 2009 meeting, Intervenors' request was approved by a vote of 3 – 2. On January 20, 2009, the Township issued a letter memorializing the Board's approval and enumerating 18 conditions applicable to the permission granted under Section 305.1.L of the Floodplain Ordinance. This timely appeal followed.

Appellants raise five issues in their Notice of Appeal;⁶ they address three issues in the Brief filed in support of their appeal: a) Intervenors failed to satisfy the mandatory requirements of the Township's Floodplain Ordinance; b) the Board of Commissioners failed to determine compliance with the standards and criteria in Sections 305.1.L and 305.2 of the Floodplain Ordinance; and c) the Board of Commissioners lack authority to modify any provision of the Floodplain Ordinance because the Ordinance itself does not provide for modifications or waivers of its requirements.^{7, 8} After reviewing the briefs submitted by Appellants, the Board and

⁵ The April 25, 2007 request was considered by the Board of Commissioners at public meetings on June 18, 2008, July 14, 2008 and September 8, 2008.

⁶ The issues raised in Section V of the Notice of Appeal are: a) Intervenor High Family Partnership I, LP lacks standing to make the underlying request under the Floodplain Ordinance; b) Intervenors failed to meet the mandatory provisions of Section 305.1.L of the Floodplain Ordinance; c) the Board of Commissioners failed to determine compliance with certain standards and criteria in Section 305.2 of the Floodplain Ordinance; d) the Floodplain Ordinance does not provide for modifications or waivers of mandatory requirements; e) Intervenors did not request modifications in writing consistent with the Pennsylvania Municipalities Planning Code; and f) the Board of Commissioners acting in its adjudicative capacity should have appointed an independent hearing examiner.

⁷ Any issues not addressed in Appellants' Brief are deemed waived by the court. Accordingly, the court will not address Appellants' allegations regarding standing or the adjudicative actions of the Board of Commissioners (issues (a) and (f) in the Notice of Appeal). Issue (e) is really an aspect issue (d). See note 5, *supra*.

Intervenors, the court agrees with the characterization of the last issue as the threshold issue for

⁸ Section 305 of the Township's Floodplain Ordinance provides, in pertinent part:

SECTION 305 USES ALLOWED BY SPECIFIC PERMISSION OF THE BOARD OF COMMISSIONERS (Amended by ordinance 2001-10, 10/29/01)

1. The following uses are permitted in the designated 100-year floodplain areas when granted specific permission by the Board of Commissioners and when done under and in accordance with the provisions of the Clean Streams Law of Pennsylvania – Act 394 of 1937, as amended; the Rules and Regulations of the Pennsylvania Department of Environmental Protection; and all other provisions of this Ordinance and other applicable ordinances or regulations:

...

L. Placing of fill to raise a portion of a lot above the 100-year floodplain elevation, provided the same meets all of the following:

- (1) The surface area and volume of the 2-, 5-, 10-, 25-, 50-, and 100-year floods must be greater than or equal to the existing surface area and volume of the corresponding flood, measured within the lot upon which the fill is placed.
- (2) No fill shall be placed within a designated FEMA 100-year floodway.
- (3) The surface area and volume of the 2-, 5-, 10-, 25-, 50-, and 100-year floods must be greater than or equal to the existing surface area and volume of the corresponding flood, measured within the lot upon which the fill is placed.

...

2. Standards and Criteria for Specific Permissions: In deciding upon the allowance of specific uses permitted by Section 305, The Board of Commissioners shall determine that, in addition to all other requirements, the following standards and criteria have been complied with:

...

- D. That the proposed facility needs a waterfront or floodplain location.
- E. That available alternative locations not subject to flooding for the proposed use do not exist.

...

K. That archeological or historic sites and structures, endangered or threatened species of animals or plants, high quality wildlife habitats, scarce vegetation types, and other irreplaceable land uses will not be degraded or destroyed.

this court's consideration. As stated in Appellants' Reply Brief: ". . . Intervenor and the Township acknowledge the request for specific permission did not meet the requirements of the [Floodplain] Ordinance. The issue for this Court is whether the Township may modify the terms of the Floodplain Ordinance, and, if so, did the Township follow proper procedures." Appellants' Reply Brief, p. 2.

Municipal floodplain management regulations are authorized by Section 202 of the Flood Plain Management Act,⁹ 32 P.S. § 679.202. The Act is silent, however, on whether, or how, a municipality's floodplain management regulations may be waived, varied or modified in the face of a specific request for permission to take some act provided for in such regulations. Section 203 of the Act, 32 P.S. § 679.203, provides that the adoption and administration of municipal floodplain regulations are governed by the provisions of the Pennsylvania Municipalities Planning Code ("MPC").¹⁰ The MPC speaks with great specificity to the permissibility of, and procedures for, waivers, variances and modifications in the context of municipal subdivision and land development and zoning ordinances, see MPC Sections 503, 512.1, 603 and 910.2, 53 P.S. §§ 10503, 10512.1, 10603 and 10910.2, but does not address waivers, variances or modifications to a floodplain ordinance that is separate from, not an article or provision of, a zoning or subdivision and land development ordinance. And that is the case here.

The Township's Floodplain Ordinance, as presently enacted, is a standalone Ordinance. Unlike the majority of flood plain management ordinances that have undergone court review,¹¹ it is not part of the Township's Zoning Ordinance; neither is it part of the Township's Subdivision

⁹ Act of October 4, 1978, P.L. 851, No. 166, 32 P.S. §§ 679.101 – 679.601 (the "Act").

¹⁰ Act of July 31, 1968, P.L. 805, No. 247, re-enacted December 21, 1988, P.L. 1329, No. 170, as amended, 53 P.S. §§ 10101-11202.

¹¹ A relatively small number, especially when compared to the number of zoning and subdivision/land development ordinances that have been subject to judicial review.

and Land Development Ordinance (“SALDO”). It does not incorporate by reference any waiver, variance or modification provisions of the Township’s Zoning Ordinance or SALDO; it does not incorporate any of the waiver, variance or modification standards or procedures of the MPC. Like the Act, the Floodplain Ordinance is silent on whether, or how, its requirements may be waived, varied or modified.

After review of the arguments advanced by the parties, and based on the court’s independent research, the court concludes that there is not an extensive body of Pennsylvania case law addressing the administration of flood plain management regulations; certainly not when compared to the body of case law that has evolved on other MPC related issues, such as conditional uses, special exceptions, variances, standards of judicial review, the imposition and calculation of review fees, SALDO waivers, etc. Beyond that limited (and here irrelevant) body of case law that recognizes the constitutionality of flood plain management regulations, and that they do not *ipso facto* result in a *de facto* taking, there seem to be no cases which address waivers, variances or modifications to flood plain management regulations that are not part of a zoning ordinance,¹² the issue presented here. Reluctant as it is to do so, the court concludes that the absence of statutory direction and case law makes the issue here one of first impression.

The Board and Intervenors take a position on this issue that, at first glance, is appealing in its apparent logic and pragmatism:

The Township adopted the Floodplain Ordinance, pursuant to the Flood Plain Management Act, 32 P.S. § 679.101, *et seq.* Under Section 203 of the Flood Plain Management Act, the adoption **and administration** of floodplain management regulations by municipalities shall be governed by Pennsylvania Municipalities Planning Code 53 P.S. § 10101, *et seq.* (“MPC”), or other applicable enabling legislation. 32 P.S. § 679.203. The Floodplain Ordinance is silent as to its administration. (Citation omitted.) As demonstrated by the

¹² Or a SALDO. Although the court found no cases construing flood plain ordinances that were part of a SALDO, theoretically they could be. It seems to be the more typical municipal government practice, however, to make flood plain management regulations part of the zoning ordinance.

Township’s treatment of the Request for specific permission as mere agenda items for the commissioners’ consideration, the Township administers the Floodplain Ordinance in a manner consistent with the administration of subdivision/land development plans under MPC and its own [SALDO].

...

As stated above and as is its right under the Flood Plain Management Act, specifically Section 203 (32 P.S. § 679.203), the Township administers the Floodplain Ordinance in a manner that is consistent with the sections of the MPC governing subdivision and land development and its own SALDO.

Brief of Appellee, Board of Commissioners of Manheim Township, in Opposition to Statutory Use Appeal, p.p. 3-4 and 6 (emphasis in original). As stated by Intervenors,

[c]ontrary to Appellants’ claims, the Board was entitled to interpret the Ordinance to permit the alternatives proposed by Appellant, and did so properly. As the Appellants note, the Floodplain Ordinance is a stand-alone ordinance and is not part of the Township’s [SALDO]. However, it was reasonable for the Board to interpret the Floodplain Ordinance to allow for the same modification procedure as described in the SALDO, where no procedure was otherwise provided in the Ordinance.

...

Although the Floodplain Ordinance is not part of the SALDO or the Township Zoning Ordinance, it was nevertheless entirely reasonable for the Board to allow for a modification of its terms. Both the SALDO and the Zoning Ordinance allow for the modification of their strict requirements in certain situations, but provided different procedures for seeking such a modification. Compliance with the Floodplain Ordinance is part of the land development process where a portion of a proposed project is to be located in the floodplain. As such, the Board acted appropriately in following the modification procedure set forth in the SALDO when considering [Intervenors’] proposal to substitute certain improvements for literal compliance with Section 305.1.L(1).

Response Brief of Intervenors TCCC-Lancaster Holding, LP and High Family Partnership I, LP to Appellants’ Brief in Support of Appeal, p.p. 9-10 and 10-11.¹³

¹³ Although the Board and Intervenors cite to the statutory and practical application of the MPC to matters involving flood plain regulations, it is worth noting that Appellants brought this appeal under the Local Agency Law, 2 Pa. C.S.A. §§ 5551-5555 and 751-754, and Local Rule 29 (Local Agency and Administrative Agency Appeals other than Land Use Appeals), not under Article X-A of the MPC, 53 P.S. §§ 11001-A-11006-A, and Local

Both the Board and Intervenors suggest that the unwritten rules of custom and practice are sufficient in the absence of legislative direction. This court finds that they are not. The umbrella of the MPC does not supply the missing legal link; it provides different standards for SALDO waivers and zoning variances, and those reading the Floodplain Ordinance should not have to guess which standard should apply. Neither will the court. A legislative enactment cannot be “so vague that persons ‘of common intelligence must necessarily guess at its meaning and differ as to its application.’ ” *Fabio v. Civil Service Commission of the City of Philadelphia*, 414 A.2d 82, 84 (Pa. 1980), quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926).

While this is not a “void for vagueness” challenge, the court is mindful of the rules of statutory construction that pertain to such inquiries. *See generally Fabio, supra.*, at 84-85, and the sources cited therein. True, an enactment is sufficiently specific “if it contains the general principles to be followed and leaves the details of ministerial acts in the hands of those charged with the duty of [administration],” *Dixon v. Pennsylvania Crime Commission*, 347 F. Supp. 138, 144 (E.D. Pa. 1972), *quoted in Atlantic-Inland, Inc. v. Board of Supervisors of West Goshen Township*, 410 A.2d 380, 382 (Pa. Commonwealth 1980); but, at least to this court, creating out of whole cloth the legal standard and procedure to modify a duly enacted ordinance provision goes beyond the “ministerial acts” that are properly placed in the hands of administrative staff.

Granted that compliance with flood plain management regulations is often involved in land development projects, as is compliance with zoning, subdivision, land development,

Rule 27 (Land Use Appeals), and neither the Board nor Intervenors moved to strike the appeal on that basis. In light of Section 203 of the Act, 32 P.S. § 679.203, the court concludes that this appeal should have been brought under the MPC and Local Rule 27. This technical defect is not fatal here. It was not raised by any party, the matter has been fully briefed and pending since the appeal was filed in 2009, no party is prejudiced by any substantive or procedural differences between general local agency and land use appeals, and the court sees no reason to dismiss *sua sponte* on a technical basis an appeal that raises issues of great significance to the parties involved.

building code and other myriad municipal enactments that come into play when land is disturbed and improvements are constructed; granted, too, that the concept of a modification procedure for the Floodplain Ordinance is a reasonable one, consistent with the MPC's recognition of SALDO waivers and zoning variances; granted, further, that the Township's use of the SALDO waiver standard and procedure as the mechanism to request modifications of the Floodplain Ordinance provisions is not *per se* unreasonable.¹⁴ That is why the position advanced by the Board and Intervenor is, on its face, so appealing. However, the absence of a duly enacted ordinance provision that specifies the objective legal standard for waivers, variances or modifications to the Floodplain Ordinance is fatal, and to the extent the Board's January 20, 2009 approval of Intervenor's November 3, 2008 request under Floodplain Ordinance Section 305.1.L reflects modifications to the Floodplain Ordinance, it must be vacated.

Given the court's disposition of the threshold issue, it need not reach the issue of whether Intervenor and the Township followed the proper procedures to modify the Floodplain Ordinance. The Ordinance containing no such procedures, there is no objective standard against which to measure compliance. Nor is the court in a position to consider the substance of Intervenor's request under Section 305.1.L and whether the standards and criteria of Section 305.2 were satisfied even without the modifications to the provisions of the Floodplain Ordinance which the court has found to be impermissible. Those modifications provide a backdrop that the court cannot separate from the content of Intervenor's request or the terms and conditions of the Board's approval.

¹⁴ That question is not before the court and the court makes no observation as to whether the SALDO waiver standard or the zoning variance standard is preferable. Such policy decisions fall squarely within the purview of the municipality's legislative prerogative.

Although the court finds the Floodplain Ordinance contains no standard or procedure for modifying its terms, requiring the Board's January 20, 2009 approval of Intervenor's November 3, 2008 request under Floodplain Ordinance Section 305.1.L to be vacated, the court believes the matter should be remanded to the Board. While the court cannot separate the modifications from Intervenor's request and the Board's approval, Intervenor and the Township may be able to do so. To the extent that Intervenor's instant request accords with the Floodplain Ordinance regulations as written, the permissions allowed by Section 305.1.L, and the standards and criteria for considering requests for specific permission enumerated in Section 305.2, it may be that some aspects of the Board's approval will withstand the defects identified herein. If that is the case, the Board can approve Intervenor's November 3, 2008 request in a manner consistent with the Floodplain Ordinance and this Opinion.¹⁵ If Intervenor's November 3, 2008 request cannot be granted without impermissible modifications to the Floodplain Ordinance, it will have to be denied.

Accordingly, the court enters the following order:

¹⁵ As to any such approval, the court agrees with the Board and Intervenor that the well-established standard of great deference generally accorded to a municipality's interpretation of its own ordinances would apply. *See, generally, In re Thompson*, 896 A.2d 659, 669 (Pa. Commonwealth 2006), and cases cited therein, *Montgomery Crossing Associates v. Township of Lower Gwynedd*, 758 A.2d 285, 288 (Pa. Commonwealth 2000), and cases cited therein; and *Borough of Milton v. Densberger*, 719 A.2d 829, 831-832 (Pa.Cmwlth.1998), and cases cited therein. *See, also*, Section 1921(c)(8) of the Statutory Construction Act of 1972, 1 Pa. C.S.A. §§ 1501-1991, 1 Pa. C.S.A. § 1921(c)(8).

