IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY PENNSYLVANIA

JAMES and PENNIE VANDERLIN, Husband and Wife; DAVID and SUSAN STAIB, Husband and Wife; JAMES and ROBIN MOTHERSBAUGH, Husband and Wife; CHUCK and KAREN SMITH, Husband and Wife; JUDEE ROBINHOLT; JOHN SANSO; HELEN DGIEN; DONOVAN and JEAN TAYLOR, Husband and Wife; ROBERT and TINA SHOLES, Husband and Wife; DANIEL and NANCY LOCKHARD, Husband and Wife; DON and BARB HOOVER, Husband and Wife; WILLIAM and DORIS ENTZ, Husband and Wife; DANIEL and GAIL THOMPSON, Husband and Wife; RICHARD AND LOIS BITTNER, Husband and Wife; GEORGE MILLER; MICHAEL LOGUE; EDWARD and MELODY BREMME, Husband and Wife,	:	**No. 01-01232**
Appellants	:	
vs.	:	**CIVIL ACTION - LAW**
CITY COUNCIL OF THE CITY OF WILLIAMSPORT; and CITY OF WILLIAMSPORT,	:	
Appellees	:	**Zoning and Planning Appeal**

OPINION AND ORDER

This matter is an appeal from Williamsport City Council's (hereinafter "Council") passage of Ordinance No. 5849, which rezoned an approximately three (3) acre portion of the south side of the 1400 block of West Fourth Street ("the subject

area") from an R2 (residential) district to a CC (commercial) district. The ordinance was approved on July 5, 2001.

The Appellants are a group of citizens who reside in the 1400 and 1500 block of West Fourth Street and other areas of the City of Williamsport (hereinafter "the City").

In order to understand the case, it is necessary to summarize the factual history that led up to this appeal. In the mid 1990's, Centura Development Company, Inc., by and through its principal Keith Eck, began acquiring properties in the subject area. Mr. Eck now owns ten (10) of the sixteen (16) properties in the rezoned area. Mr. Eck also has made arrangements to purchase the remaining six (6) properties in the subject area. Mr. Eck has intervened in the appeal under the name of Eck Realty Company (hereinafter collectively referred to as "Intervenor").

Intervenor, in partnership with Marvin R. Troutman, plans to develop a fourteen (14) screen movie theater in a commercially zoned district which is adjoining and south of much of the subject area. Although the Intervenor has sufficient land in the commercial district to develop the theater, he would like to use the rezoned area to accommodate parking for the theater project. Apparently, by utilizing the rezoned area for parking, the Intervenor can obtain parking closer to the theater. Further, by moving the parking area into the rezoned property, the Intervenor would be able to utilize some of the commercial land he owns just east of the theater for restaurants or other businesses which, he believes, would enhance the theater project. Thus, Intervenor contends that the rezoning would increase the value or potential profitability of the project in order to allow him to obtain the financing he needs to develop this project.

At the public hearing held before Council on June 21, 2001, Intervenor had David Mease appear with him. Mr. Mease is the Vice President of L.J. Mellon Company, the lending institution utilized by Intervenor for this project. Mr. Mease indicated that the lending institution requested Intervenor to obtain the zoning change to assure that they would loan Intervenor the amount of money he was seeking for this project. The inference conveyed by Mr. Mease was that his institution might not be willing to loan Intervenor the necessary monies without the proposed expansion of the project utilizing the rezoned or subject area for theater parking.

This appeal is the third time the matter has been before the Lycoming County Court of Common Pleas. In 1999, Intervenor sought a variance, which would have permitted him to tear down a number of homes he owned in the subject area, to build a parking lot in the 1400 block of West Fourth Street. Since this area was residentially zoned, Intervenor needed a variance to proceed. The Williamsport Zoning Hearing Board granted this variance. The grant of the variance was appealed by the Appellants in this matter, and their appeal was sustained by President Judge Clinton W. Smith in an Opinion and Order dated January 25, 2000 in case number 99-01670. Judge Smith found that the Intervenor did not meet the requirements for a variance, and he reversed the Williamsport Zoning Hearing Board's grant thereof.[1]

On May 11, 2000, Council approved a land development plan ("LDP") for the theater complex submitted by Intervenor. The LDP included plans to locate a commercial access-way over the subject residential area. Council approved this plan.

[1]In footnote 4 of his Opinion, President Judge Smith indicated the denial of the variance would not necessarily thwart the theater project. He found the evidence showed the additional 263 parking stalls could be built further down in the CC district, although it would require some of the patrons to walk 2,000 feet to reach the theater.

This approval was appealed by the same group of citizens, who are appellants in this case. The Appellants contended that Council's action in approving the plan was erroneous as a matter of law because the access-way would violate the zoning of the R2 district[2] in which it was to be located. In an Opinion and Order dated October 11, 2000, Judge Dudley Anderson found that the zoning ordinance did not permit the use that the Intervenor requested. Thus, Judge Anderson overturned the approval based on an error of law. See Vanderlin et al vs. City of Williamsport, et al, Lyc. Cty. No. 00-00,938.[3]

On or about May 17, 2000, Intervenor filed a Petition to Rezone. This petition led to a duly noticed public hearing, which was held before Council on November 9, 2000. The Appellants appeared and voiced their opposition to this proposed rezoning. By a vote of 5-2, Council voted against rezoning the subject area

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Judge Smith noted the developer could also avoid the need for a variance by moving the theater further down on the property or to a nearby area, or by constructing a theater with twelve screens rather than fourteen.

[2]An R2 residential zone is primarily a one family attached and two family dwelling district. Some of the structures in the R-2 district are rental units.

[3]In their brief, The Appellants state:

> As is evident from the record, the access way onto West Fourth Street which was disallowed was not the only access way proposed or possible. In addition to access via West Fourth street, Council has specifically approved the conveyance of three tracts to enable access to the complex along an existing alley leading to West Third Street, and at least two other possible access ways were discussed at various stages of the process, including the dedication of an existing roadway leading from Rose Street in the vicinity of Vine avenue and extending to Cemetery Street southward and into the complex.

Appellant=s Brief, p. 2.

from R-2 residential to CC commercial.[4] No motion was made at this time by any member of Council to reconsider this issue.

On or about May 14, 2001, the Intervenor filed another application requesting the same rezoning which had been denied on November 9, 2000.[5] This request led to a duly noticed public hearing before Council on June 21, 2001. As on November 9, 2000, Appellants appeared and spoke against the proposed zoning ordinance and the Intervenor, his attorney, individuals involved with and associated with the theater project, and various private citizens spoke in favor of the rezoning.

After listening to all the presentations and speakers, Council voted 4-2 in favor of the ordinance. However, because one council member was absent on June 21, 2001, Council was required to reschedule the vote. Once again, Council scheduled a duly noticed public haring, which was held on July 5, 2001. Many of the citizens who spoke on June 21, 2001 appeared and, again, stated their positions to Council. Intervenor was also present with his attorney and answered the questions of council members. Intervenor indicated that his financing letter of intent was premised upon the proposed rezoning. At the end of the meeting, Council voted 4-2 in favor of the rezoning.[6] By virtue of this vote, Council approved the ordinance rezoning the subject area from R2 to CC commercial. This decision of Council is the subject of the appeal before this Court.

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[4]In voting against the proposed rezoning in November 2000, several Council members commented on the importance of protecting residential neighborhoods. These comments can be found in Tab 4, Exhibit D of the certified record.

[5]The Appellants contend that Mr. Eck did not accompany the application with a Second Petition to Rezone, as required by Section 1321.02(c) of the Williamsport Zoning Ordinance.

[6]One member of council who was present on June 21, 2001 was unavailable on July 5, 2001. The council member who could not attend the meeting of June 21 was present for the July 5 meeting.

The record before the Court, which has been agreed upon by the parties, consists of videotapes of the November 9, 2000, June 21, 2001 and July 5, 2001 public hearings before Williamsport City Council.[7] The certified record also consists of a letter from the Lycoming County Planning Commission regarding the proposed amendment dated April 24, 2001, Tab 1.; the May 7, 2001 Williamsport Planning Commission meeting minutes, Tab 2; the notice of public hearing dated June 7, 200l, Tab 3; a letter from J. Michael Wiley (former counsel for Appellants) to Williamsport City Council dated June 20, 2001, Tab 4; the June 21, 2001, City Council meeting minutes, Tab 5; the Ordinance adopted July 5, 2001 that rezoned the tract in question, Tab 6; and the preliminary site plan for the theaters, Tab 7.[8]

The Appellants raise three issues in their appeal. First, they contend that the zoning amendment is illegal spot zoning. Next, they claim that Council failed to comply with the requirements of 53 P.S. Section 10603(j) in that the zoning amendment was not consistent with the City's Comprehensive Zoning Plan, and the City failed to amend its Comprehensive Plan in accordance with the rezoning as required by 53 P.S. Section 10603(j). Finally, Appellants assert that Council did not have the authority to act on June 21, 2001 or July 5, 2001, because Intervenor's second application for rezoning did not include a petition and/or Council did not follow Roberts Rules of Order in hearing the second application in that it involved the identical tract of land and as such amounted to a reconsideration of the first vote against re-zoning. Appellants contend that Section 37 of Roberts Rules of Order governs Council's actions and, in

7 The November 9, 2000 decision of Council is not at issue in this appeal. However, the parties agreed to include the tape of this public hearing as part of the record to aid the Court in its understanding of this case.

[8]With agreement of counsel for all parties, the Court has included in the record of this case a zoning map marked Tab 8, which includes the street numbers of the lots in the rezoned area, and Tab 9, a copy of George

order to consider Intervenor's re-submitted application, Section 37 requires a motion for reconsideration to be made by a council member who voted with the prevailing side on the same date the vote to be reconsidered was taken.

APPELLANT'S BURDEN OF PROOF

In reviewing the briefs submitted by the parties, there is no disagreement as to the Appellant's Burden of Proof in this case. Since the Court has taken no additional testimony, our scope of review is limited to whether the Zoning Board clearly abused its discretion or committed an error of law. Bidwell v. Zoning Board of Adjustment et.al, 4 Pa.Commw.Ct. 327, 331, 286 A.2d 471, 473 (1972). Further, it is undisputed that a zoning ordinance is presumed to be valid and constitutional, and that the burden of proof of proving otherwise is upon the person challenging the ordinance. Id.

An allegation that a zoning ordinance or amendment thereto constitutes spot zoning raises a constitutional challenge. Therefore, the Appellants must prove the ordinance's provisions are clearly "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." Id. If the validity of the legislation is fairly debatable, the legislative judgment must be allowed to control. Id. The Court may not substitute its judgment for that of the local agency unless the agency manifestly abused its discretion. Nascone v. Ross Township Zoning Hearing Board, 81 Pa.Commw.Ct. 482, 473 A.2d 1141 (1984). The fact the Court may have decided the matter differently does not permit the Court to reverse the action of the local agency.

Miller's deed for 1481 and 1483 West Fourth Street. George Miller is one of the named appellants in this case. 1481 and 1483 West Fourth Street are west of the subject area.

See Cohen v. Philadelphia Zoning Board of Adjustment, 3 Pa.Cmwlth.Ct. 50, 55, 276 A.2d 352,355 (1971).

With all these above principles in mind, the Court must assess the record to determine if Appellants have met their burden of showing that the zoning involved in this case is discriminatory spot zoning.

DISCUSSION

I. Constitutionality of the Zoning Ordinance

Zoning is the application of legislative power to the promotion of the public interest. Spot zoning is a form of discriminatory zoning. The Pennsylvania Supreme Court has defined spot zoning as "[a] singling out of one lot or a small area for different treatment from that accorded to similar surrounding land indistinguishable from it in character, for the economic benefit of the owner of that lot or to his economic detriment." Mulac Appeal, 418 Pa. 207, 210, 210 A.2d 275, 277 (1965). The Pennsylvania Supreme Court has noted that spot zoning is unconstitutional because it treats similar pieces of property differently, and therefore, is discriminatory. See Schubach v. Silver, 461 Pa. 366, 382 n. 13, 336 A.2d 328, 336 n.13 (1975). Where an assessment of the various factors pertinent to an alleged example of spot zoning shows that the zoning is discriminatory, it will be held invalid unless the apparent discrimination can be justified. See R. Ryan, Pennsylvania Zoning Law and Practice, Section 3.4.9.

In Plymouth Tp. v. Montgomery County, 109 Pa.Cmwlth.Ct. 200, 531 A.2d 49 (1987), allocatur denied, 520 Pa. 622, 554 A.2d 513 (1988), the Commonwealth Court invalidated a challenged township's zoning as spot zoning and noted:

> The key point is that when a municipal governing body puts on blinders and confines its vision to just one isolated place or problem within

> the community, disregarding a community-wide perspective, that body is not engaged in lawful zoning, which necessarily requires that the picture of the whole community be kept in mind while dividing it into compatibily related zones by ordinance enactments. In other words, legislating as to a spot is the antithesis of zoning, which necessarily functions within a community-wide framework.... [Z]oning, to be valid, must be in accordance with a rational and well considered approach to promoting safety, health and morals and a coordinated development of the whole municipality. The classic statement of the same principle is in Haar, In Accordance with a Comprehensive Plan, 68 Harv. L. Rev. 155 (1985), in which Professor Haar pointed out that the essence of sound zoning – as distinguished from spot zoning – is zoning enacted or a comprehensive and well considered basis.

109 Pa.Cmwlth. p. 17-18, 531 A.2d at 57; see also, Knight v. Lynn Tp. Zoning Hearing Board, 130 Pa.Cmwlth. 617, 558 A.2d 1371 (1990).

The Court has carefully reviewed the videotapes, the maps and diagrams of the area, and the rest of the record submitted by the parties. The zoning to the east of the rezoned parcels is a continuation of the CC (commercial) zoning. The existing commercial zones east and south of the rezoned area total 51 acres. The zoning to the north and west of the rezoned area is R2 residential. The R2 residential zones total 86 acres.

The rezoned area is approximately three (3) acres on the south side of West Fourth Street.[9] It includes parcels 1411-1479 West Fourth Street. The zoning south of the rezoned area is CC (commercial) and this is the land owned by the Intervenor where the theater complex will be developed. The Intervenor purchased many of the parcels in the rezoned area while it was still residentially zoned, and he now owns ten (10) of the sixteen (16) properties in this area. The Intervenor has reached agreements with the remaining six (6) property owners in the rezoned area to purchase their property.

The parcel directly west of the rezoned area is 1481 West Fourth Street, which is owned by Appellant George Miller. Mr. Miller's property is also partially bordered on the south by the CC district. The zoning to the south of the remaining R2 district west of the rezoned area then changes from CC to O, which is an open space district used for recreation such as ball fields. The change from CC to O occurs at some point along the southern border of Mr. Miller's parcel at 1481 West Fourth Street.

Although the Intervenor argues there is a difference between the R2 districts on the north side of West Fourth Street and west of 1481 West Forth Street as compared to the rezoned area[10], the property at 1481 West Fourth Street is indistinguishable in character from the rezoned area. Therefore, similar properties are being treated differently in this case.

Moreover, it does not appear that such different treatment is justified. The most significant problem that the Court sees with the enacted zoning ordinance is that it does not proceed from a community-wide planning perspective or approach but, rather, is accomplished for the economic benefit of the Intervenor.[11] Quite clearly, the Intervenor can develop the movie theater complex in the commercial district as it existed prior to the zoning changes. The reality of the situation is that the Intervenor pursued the rezoning of the subject R2 area because it will provide additional space for

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[9]The north side of West Fourth Street is not involved in the rezoning.

10 The Intervenor asserts that West Fourth Street is a natural boundary and therefore the properties on the north side of the street are different from those on the south side of the street for zoning purposes. The proffered difference between the rezoned area and the R2 parcels west of 1481 West Fourth Street is that the rezoned area is abutted to the south by a commercial district and these R2 parcels are abutted to the south by an open/recreational district.

11 The Court believes the more logical boundary is where it was before the rezoning of the subject area. The rezoning can create the incongruous result that the homes across the street from the rezoned area could now be facing commercial establishments such as a bar or tavern. The R2 area just to the west of the rezoned area, but on the south side of West Fourth Street still remains residential under the current scheme. The parcels to the immediate

the Intervenor to develop other commercial uses, such as restaurants or stores, which may enhance the profitability of the planned complex.

A theme running through the history of this case has been an implied threat by the Intervenor that he would take the project somewhere else if he could not obtain what he wanted. Desiring to see this project developed, Council has tried to accommodate the Intervenor, first by approving a variance over the R2 area, then by approving a land development plan that allowed a commercial access-way over the R2 area,[12] and now by rezoning the subject R2 area to commercial.

The Court finds the amendment to the zoning ordinance, which changed the subject area from R2 to commercial zoning, is illegal spot zoning. Pennsylvania courts have clearly stated that property cannot automatically be rezoned commercial simply because it rests on the border of a commercial zone. Schubach v. Zoning Board of Adjustment, 440 Pa. 249, 254, 270 A.2d 397, 400 (1970); see also Mulac Appeal, 418 Pa. 207, 211, 210 A.2d 275, 277 (1965)(the Pennsylvania Supreme Court rejected an argument that rezoning was proper in an area containing both residential and commercial properties, because the area was zoned residential and the commercial parcels were pre-existing nonconforming uses). As previously discussed, the Court does not believe there is a significant way to distinguish the property of Mr. Miller, just to the west of the rezone area, or the property on the north side of West Fourth Street from the rezoned area. The Court also believes that this rezoning cannot be justified as contributing to the public health, safety and general welfare because, in reality, the

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west of the rezoned area would face the possibility now of having commercial establishments on their block by virtue of the zoning amendment.

12 As previously stated, both the variance and the land development plan were found unlawful by the Court of Common Pleas in prior actions. See opinions of President Judge Clinton W. Smith and Judge Dudley Anderson.

rezoning proposed by Intervenor and approved by Council was created to increase the profitability to the Intervenor. The City approved the theater project some time ago. The Intervenor has 15 acres of commercial land to develop this project, which can accommodate the proposed theater and parking therefor. The Intervenor has simply decided that the project can be more profitable if he uses the rezoned land to create parking closer to the movie theater, freeing up other land in the commercial zone to develop other stores or restaurants near the theater complex. This point was also noted in the Opinion issued on January 25, 2000 by President Judge Clinton W. Smith, in which he stated:

> …Centura would apparently have no parking problem if it merely reduced the number of screen to twelve. Clearly, Centura has other options, but is insisting on building a parking lot in the residential area merely because that would be the most profitable alternative. Centura has every right to try to maximize its profits, but may not do so by running roughshod over the City's zoning ordinance.

Vanderlin v. City of Williamsport Zoning Hearing Board, Lycoming County No. 99-01,670, at pp. 10-11 (1/25/00, Smith, P.J.)

The Court is not criticizing the Intervenor for wanting to make as much profit as possible from his project. This is the natural incentive of free enterprise. However, the Court cannot say this understandable desire is akin to the public health, safety and general welfare of the community. It is also difficult for the Court to speak to the implied threat that the Intervenor may not be able to obtain the necessary financing for the project if the rezoning is not approved. This project has now been in development for several years. The City municipal agencies cannot make zoning decisions predicated on financing discussions, which are in the private realm of a developer. Thus, the Court thinks it is clear that this rezoning is being done solely for the economic benefit of the

Intervenor, who owns substantial land in the subject area, and is not based on a community wide approach to planning which is the essence of zoning. See Boyle Appeal, 179 Pa.Super. 318, 317 (1955)("Where a small parcel of land is classified differently from all the surrounding area for no apparent reason or purpose except to favor the owner, it is referred to as 'spot zoning` and is invalid because it is discriminatory.")[13]

While there is certainly commercial development to the south and west of the subject area, there is no evidence that the property in question could not be used for a residential purpose. See Schubach v. Silver, 461 Pa. 366, 383, 336 A.2d 328, 336 (1975)(the rezoned tract in question in that case was not economically feasible to develop as detached residential property); Mulac Appeal, 418 Pa. 207, 211 (1965)(the property in question could be used, albeit not as profitably, for residential purposes). In fact, the record in the instant case shows that a community organization known as LNDC had offered to buy and rehabilitate the property owned by the Intervenor as residential properties.[14]

There is also significant evidence in the record that the rezoning differs from the City's Comprehensive Plan. Jerry Walls, the Executive Director of the Lycoming County Planning Commission, sent a letter dated April 24, 2001 to the City officials. In this letter against approval of the proposed rezoning, Mr. Walls comments:

> The proposed zoning classification is inconsistent with the City Comprehensive Plan, adopted September 1, 1994 by Williamsport City

13 The Court is not trying to be critical of the members of Council in our reaching the decision that this matter involved spot zoning. The Court has no doubt that their motivation springs from their sincere desire to see the theater project finally developed because they believe the project would be beneficial for the City and the people of Williamsport.

14 In discussing the Intervenor's prior request for a variance, Judge Smith described the neighborhood as including "some lovely old Victorian homes." Vanderlin v. City of Williamsport Zoning Hearing Board, 99-01,670, Opinion and Order, at p. 9(1/25/00, Smith, P.J.).

> Council, Future Land Use Plan (Map 4) which depicts the subject property as MR-Medium Density Residential. This category is described in the Plan as single family detached, twins and townhouses. . .

Certified Record, Tab 1. Likewise, Kevin McJunkin, also from the Lycoming County Planning Commission, spoke to this issue at the public hearing of June 21, 2001, and noted for council that the future land use plan shown on the City Comprehensive Plan for this area of West Fourth Street calls for residential zoning. Thus, he indicated that the rezoning was inconsistent with the Comprehensive Plan.[15]

In conclusion, as previously stated, the Court is not trying to impugn the motives of the Intervenor or Council in this decision. The theater project appears to be a fine project for the City. While the Court does not believe that the theater project should be achieved with the benefit of spot zoning, it is hopeful the project will finally go forward as promised by the Intervenor. It is obvious that the project has the support of the City Officials, and there appears to be public support for the project as well. It would also seem that the Intervenor has a number of options to meet the problems he foresees. It is clear that no one, including the Appellants, oppose the development of this project.

However, in light of our conclusion that the zoning ordinance in questions is an example of discriminatory spot zoning, the Court finds that the ordinance is

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15 At the public hearing on November 9, 2000, the Intervenor presented comments from Bruce Babbit, a Certified Planner, who he hired to review the matter. Mr. Babbit opined that the rezoned area had become a transitional area, which was not desirable as a residential neighborhood. He felt the rezoning proposed by the Intervenor was generally consistent with the Comprehensive Plan. He also felt the rezoning would simply be an extension of existing commercial zone.

On November 9, 2000, council voted against the rezoning of the subject area. Mr. Babbit did not appear at the 2001 hearing. The Court feels it is problematic to find that the subject area is a transitional area. The Intervenor owned ten (10) out of the sixteen (16) properties in the area and he had little interest in developing the residential aspects of the properties. Therefore, it does not appear that there is a natural progression of this area from residential to a commercial orientation.

unconstitutional. Thus, the Court will grant the zoning appeal filed by the Appellant citizens.

Accordingly, the following Order is entered.[16]

ORDER

AND NOW, this ___ day of March, 2002, the Court grants the zoning appeal filed by the Appellants and finds the amendment to the zoning ordinance is unconstitutional spot zoning.

By the Court,

_____
Kenneth D. Brown, Judge

cc: J. David Smith, Esquire
Douglas Engelman, Esquire
John Zurich, Esquire
J. Michael Wiley, Esquire
Press (5)
Work file
Gary Weber, Esquire (Lycoming Reporter)

16 In light of this disposition, the remaining two issued raised by Appellants are not discussed.