

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO.	Z-07-16	:	HEARING DATES: 11/20/07
		:	12/4/07, 1/15/08, 2/5/08, 2/28/08
APPLICATION OF:	The National Parks Conservation	:	
	Association (“NPCA”) is a Non-	:	
	Profit Association.	:	
	There are individual applicants	:	
	who are nearby property owners.	:	
		:	
ORDINANCE:	No. 561 “Living History Overlay	:	
	District”	:	

OPINION AND ORDER OF THE LOWER PROVIDENCE
TOWNSHIP ZONING HEARING BOARD

The Applicants, NPCA and the individual landowners (hereinafter referred to as the “Applicants” or “Appellants”) filed an appeal challenging the validity of Ordinance No. 561-Living History Overlay District on both substantive grounds and procedural grounds. The Application was properly advertised and the property posted and a public hearing was held before the Lower Providence Zoning Hearing Board on November 20, 2007, December 4, 2007, January 15, 2008, February 5, 2008 and February 28, 2008 at the Lower Providence Township Building. All members of the Zoning Hearing Board were present, as well as the Solicitor, and Court Reporter.

FINDINGS OF FACT

1. The Applicant is NPCA and the individual property owners are as follows:

Ms. Joyce D. Chuley
19 Vaux Lane, R.D. #1
Phoenixville, PA 19460

Lawrence E. Loughlin
34 Vaux Lane, R.D. #1
Phoenixville, PA 19460

Craig Crawford
24 Vaux Lane, R.D. #1
Phoenixville, PA 19460

Joanne S. Burns
30 Valentine Lane, R.D. #1
Phoenixville, PA 19460

H. Joseph Byron, III
2 Camiel Lane, R.D. #1
Phoenixville, PA 19460

H. Joseph Byron, III
McCormick & Priore, P.C.
4 Penn Center, Suite 800
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103

2. NPCA is a non-profit association and the individuals are nearby property owners.
3. The Ordinance is No. 561, "The Living History Overlay District," (hereinafter referred to as the "Ordinance").
4. Michael D. Fiorentino, Esquire, located at Upper Mid-Atlantic Environmental Law Center and H. Peter Haveles, Jr., Esquire and Robert Rosenbaum, from the law firm of Arnold & Porter, LLP, represented the Applicant.
5. Neil Sklaroff, Esquire appeared and represented intervenor American Revolution Center ("ARC"). David C. Onorato, Esquire, represented Lower Providence Township.
6. The Appellants challenged the validity of Ordinance No. 561, "Living History Overlay District," on both procedural and substantive grounds.
7. The Lower Providence Supervisors are: Craig Dininny, Chairman, Pierre Sassu, Marie Alteri, Chris DiPaolo and Richard Brown.
8. Craig Dininny, Pierre Sassu and Marie Alteri voted in favor of the Ordinance. Chris DiPaolo and Richard Brown voted against the Ordinance.
9. In the Spring of 2007, Joseph Dunbar, acting Manager of the Township, was involved in the initial negotiations and discussions regarding the Ordinance.
10. In the Spring of 2007, Supervisor Richard Brown became involved in the Ordinance No. 561 committee.

11. The boundaries of The Living History Overlay District are the privately owned properties that are within the congressional and legislative boundary of the Valley Forge National Historical Park, bounded by U.S. 422 and immediately adjacent to the Valley Forge National Historical Park or lands otherwise owned by the National Park Service.
12. The Living History Overlay District District covers several large tracts of property each of which is over 40 acres.
13. Ordinance No. 561 encompasses 78 acres of vacant land on Pawlings Road owned by ARC.
14. The 78 acre ARC property forms a part of 1350 Pawlings Road.
15. The Parcel Number of the 78 acre ARC property is 43-00-10723-00-7.
16. During the Spring of 2007 and into July of 2007 and into August of 2007, there were several meetings between representatives of ARC and representatives of Lower Providence Township.
17. There were 12 different versions of the Ordinance.
18. During the July discussions with ARC, Supervisor Rick Brown strongly voiced his desire to have a covenant or declaration limiting total impervious coverage.
19. The total impervious coverage Supervisor Brown wanted included 15% which would include building coverage. Supervisor Brown and Supervisor DiPaolo wanted this tract of land to contain 85% open space.
20. There is a legal distinction between a declaration and a covenant.
21. Neither Supervisor Brown nor Supervisor DiPaolo understood the legal distinction between a declaration and a covenant but what they ultimately wanted was a deed restriction on the 78-acre ARC parcel running with the land in perpetuity.
22. The final version of the Ordinance, Version No. 12, never contained any covenant or declaration limiting total impervious coverage to 15%.
23. ARC never agreed with the Township to any declaration, covenant or deed restriction running with the land.
24. On July 19, 2007 the Board of Supervisors of Lower Providence Township voted 5-0 authorizing the Ordinance to be advertised as drafted and to have a hearing on the Ordinance on September 6, 2007.
25. There appeared to be additional discussions after July 19th between ARC and Township officials regarding a declaration or covenant.
26. Those discussions following the July 19th meeting did not develop any agreement between the Township and ARC regarding any covenant or declaration.

27. The three Supervisors who voted in favor of the Ordinance were satisfied with the Ordinance as advertised without any covenant or declaration contained in the Ordinance or any deed restrictions.
28. The two Supervisors who voted against the Ordinance were not satisfied with the final version of the Ordinance since it contained no covenant or declaration nor was there any agreement to any deed restriction.
29. The Ordinance which was ultimately voted on was properly advertised and made available for public review.
30. The Supervisors that testified at the hearing were Supervisors Brown and DiPaolo, who voted against the Ordinance.
31. The three Supervisors that voted in favor of the Ordinance were never subpoenaed or asked to testify before the ZHB.
32. At the time of the application challenging the validity of the Ordinance, there was never any land development plan before the Township Supervisors and no building permit had been granted or denied as it related to the Ordinance.
33. The ZHB had no land-development plan or denial or approval of any building application pertaining to Ordinance No. 561 in front of it since, again, none was granted or denied nor was any in front of the Township at the time of the hearing.
34. The ZHB voted 5-0 to deny the application on both substantive grounds and procedural grounds.
35. No ZHB member could have voiced their approval to any plan since there was never a plan in front of the Township Supervisors.
36. The only thing in front of the Township Supervisors was a concept, and they could either approve or disapprove of the concept but could not approve or disapprove of an actual plan since none was presented.

DISCUSSION AND CONCLUSIONS OF LAW

There are two major issues raised on appeal to the Zoning Hearing Board ("ZHB"): (1) a substantive challenge to the Ordinance and (2) a challenge asserting that there were procedural defects relating to the passing of the Ordinance. Additionally, at the hearing Applicant NPCA raised a conflict of interest issue relative to two of the Board Members. Each of these issues will be addressed in detail.

As a preliminary matter the ZHB's power is set forth at Section 909.1(a) of the Municipal Planning Code ("MPC"), 53 P.S. § 10909.1. The ZHB is an administrative agency created by the General Assembly

with certain limited authority, which includes rendering a final decision to a validity challenge of the Zoning Ordinance. *Joe Darrah v. Spring Garden Township ZHB*, 928 A.2d 443, 448 (Pa.Cmwlth. 2007). The issues raised were properly heard before the ZHB. The ZHB acted within its statutory authority to conduct a hearing, hear legal arguments and render a final decision. *Hopkins v. North Hopewell Twp. ZHB*, 623 A.2d 938, 944 (Pa. Cmwlth. 1993).

SUBSTANTIVE CHALLENGE

The Applicant brought before the ZHB a substantive challenge to the Ordinance passed by the Lower Providence Supervisors in a legislative capacity as spelled out in *East Lampeter v. County of Lancaster*, 744 A.2d 359, 364 (Pa. Cmwlth. 2000); *see also* 53 P.S.) § 909(b)(5). The Township Board of Supervisors (“TBS”) passed the Ordinance in a vote of 3-2. The TBS, its zoning officers or any Township official never ruled on a specific use for the property and no land-development plan or use was granted or denied. At the time of the Appeal, there was no land-development plan or application before the TBS.

The issue then before this ZHB, on a substantive challenge, is whether it could hear evidence as to that issue since there was no grant or denial of any application. The Pennsylvania Supreme Court held in *Roeder v. Borough Council of Borough of Hatfield*, 266 A.2d 691 (Pa. 1970), that a controversy is not ripe for adjudication until either someone is granted a building permit pursuant to the Ordinance or action is taken pursuant to MPC. *Id.* at 696. Since at the time of this Appeal there was not an application for a specific use for the property to be developed, this ZHB had no power to render any decision as to the substantive challenge. *East Lampeter Township vs. City of Lancaster*, 744 A.2d 359, 364 (Pa. Cmwlth. 2000); *see also City of Hermitage vs. ZHB of the City of Hermitage*, 613 A.2d 612, 613 (Pa. Cmwlth. 1992); *Pheasant Run Civic Organization v. Board of Commissioners of Penn Township*, 430 A.2d 1231, 1233 (Pa. Cmwlth. 1981).

The ZHB had no alternative but to dismiss the Appeal on substantive issues or it would have been forced to render an advisory opinion, which is outside of its authority. *Darah, supra*, 928 A.2d at 447. The ZHB voted 5-0 to dismiss the Appeal on substantive grounds, or, to put it another way, denied the application on substantive grounds.

PROCEDURAL CHALLENGES

On October 11, 2007 the Applicants filed a timely ZHB Appeal Application. On November 13, 2007 Appellant filed an Amended Appeal Application outside the thirty day appeal period. *See* 53 P.S. § 10901.1; 42 Pa.C.S. § 5571(c)(5). The ZHB heard the appeal in accordance with the holding of the Pennsylvania Supreme Court in *Glen-Geary Corporation v. Zoning Hearing Board of Dover Township*, 907 A.2d 1033 (Pa. 2006). *Glen-Geary* made clear that “a claim alleging a procedural defect affecting notice or due process rights in the enactment of an ordinance may be brought notwithstanding the provisions of Section 909.1(a)(2) and Section 5571(c)(5) [Appeal outside of the 30 day Appeal period] because if proven the ordinance would be rendered void ab initio.” *Id.* at 1035.

The procedural issue raised by the Appellant is as follows: “The terms of the declaration proffered to the Board on the eve of the hearing were not disclosed to the public. This declaration appears to have been relied upon by the Supervisors in their decision to adopt the Ordinance. As a procedural matter, proper public notice and disclosure of the terms of the Declaration should have been made. Furthermore, the procedures did not accord due process and equal protection to all parties.” (Amended Appeal Application, at 4.)

The ZHB must base its decision on competent evidence, not on suspicion which is not supported by facts. *DeCristoforo vs. Philadelphia Zoning Hearing Board of Adjustment*, 427 Pa. 150, 233 A.2d 561 (1967). During the course of the hearing, the Appellants called two of the five Supervisors, Christopher

DiPaolo and Richard Brown. Supervisor DiPaolo and Supervisor Brown voted against the Ordinance. Both Supervisor DiPaolo and Supervisor Brown were asked to discuss the declaration or covenant between the Township and ARC. Both agreed that there was never a declaration or covenant that was made part of the Ordinance. There is a legal distinction between a declaration and a covenant, but neither Mr. Brown nor Mr. DiPaolo knew what the distinction was and used the two terms interchangeably. It was really of no consequence since both seemed to be in agreement that it was not a declaration or a covenant that they desired but a deed restriction, which was not to be part of the Ordinance. They testified that they did not want such a restriction to be part of an Ordinance, so that a future Board could not change the restriction on total impervious coverage.

More important, the Township Manager, Joseph Dunbar, similarly testified that the majority of the Supervisors were satisfied with the final draft of the Ordinance, Version No. 12, which version was advertised and passed. None of the three Supervisors that voted in favor of the Ordinance were even interested in obtaining a declaration, covenant or deed restriction since they were satisfied with the contents of the Ordinance. The Ordinance was the most restrictive Ordinance relating to open space in Lower Providence history. Mr. Dunbar's testimony was supported by the fact that the three Supervisors did vote for the Ordinance and the declaration/covenant was not contained in the Ordinance.

The Applicant never produced any competent evidence that the declaration or covenant was agreed to between the Township and ARC or that it was ever part of the Ordinance.

Therefore since a covenant and declaration, as alleged by the Appellant, was never part of the Ordinance or part of any agreement, the Township complied with all the notice requirements of the MPC. *See 53 P.S. § 10610; see also Graack v. Board of Supervisors of Lower Nazareth Township, Northampton County, 330 A.2d 578 (Pa. Cmwlth. 1975).*

A public hearing was held on September 6, 2007 after public advertisement and an ample opportunity was given for everyone to be heard. Therefore, the ZHB determined that there was no procedural defect to the passing of the Ordinance. The Appeal was dismissed, or to put it in another way, the Application was denied in a vote of 5-0.

CONFLICT ISSUE

The last issue the Applicants raised was an alleged conflict of interest involving two of the ZHB members. The two ZHB members had spoken in favor of the idea or concept of having an Education Center for the Revolutionary War Educational Center in Lower Providence Township. The same reason that the substantive challenge is not ripe applies to this issue. The only thing a person could have been in favor of was an idea or concept. As discussed above, regarding the substantive challenge, there was no land development plan or application in front of the Township Supervisors and there was no land development plan or application in front of the ZHB. A person has no idea what is going to be built and where it is going to be built until a plan is actually put in front of the Township. Therefore, the only thing that the two ZHB members could have been in favor of was the concept or idea of having a Revolutionary War Educational Center in the Township. That does not constitute a conflict of interest or demonstrate any predisposition or bias regarding the issues before the ZHB.

The Applicant also orally raised an alleged conflict of interest involving a ZHB member because a printing company that does business with the Township employed the ZHB member. The ZHB member is not an owner of the company. The rule in Pennsylvania is that a municipal officer should disqualify himself from a proceeding if he has a personal or pecuniary interest that is immediate or direct. *Amerikohl Min. Inc. vs. The Zoning Hearing Board of Wharton Township*, 142 Pa. Cmwlth. 249, 597 A.2d. 219, 223 (Pa. Cmwlth. 1991), *allocatur denied*, 529 Pa. 652, 602 A.2d. 861 (1992). There also is not a conflict when at most there is a de minimis impact on the business association or the business association with the person's

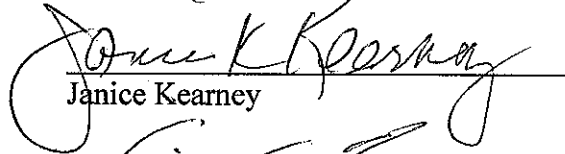
immediate family. *Id.* In this case, there is no direct or immediate impact on any business affiliation. The business is not a party nor does it own a neighboring property. Further, there is no competent evidence that the Ordinance has any impact whatsoever on the business where the ZHB member was employed.

Lastly, each ZHB member agreed to base their opinion on the facts presented and put any bias aside and follow the law in the Commonwealth. The ZHB members were within their rights and within the law not to disqualify themselves.

ORDER

The foregoing Findings, Discussion and Decision are hereby approved and ordered.

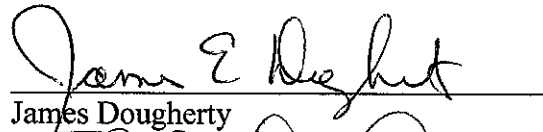
LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD



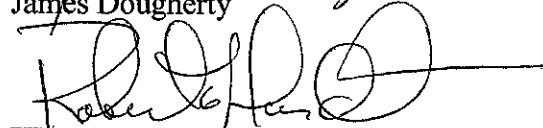
Janice Kearney



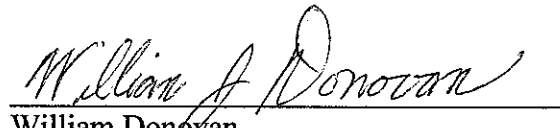
Eric Frey



James Dougherty



Robert G. Hardt



William Donovan

NOTE TO APPLICANT

There is a thirty (30) day period after the date of a decision for an aggrieved person to file an appeal in the Court of Common Pleas of Montgomery County to contest an approval or denial by the Zoning Hearing Board. If the Applicant has been granted Zoning Hearing Board approval, the Applicant may take action on said approval during the thirty (30) day appeal period; however, the Applicant will do so at his or her own risk. If the Applicant received Zoning Hearing Board approval, the Applicant must secure all applicable permits from Lower Providence Township within one (1) year of the date of the approval of the decision granting approval.