

COPY

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

BRUCE PETRIE, GINGER PETRIE,
LAWRENCE OPTHOF, MARGARET
OPTHOF, FRANK PALUMBO, ROBERT
McKELLIN and CYNTHIA McKELLIN,
Appellants

vs.

LOWER SAUCON TOWNSHIP,
Appellee

and

BETHLEHEM LANDFILL COMPANY,
Intervenor

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) NO. C0048CV2023-335
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) LAND USE APPEAL
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COURT OF COMMON PLEAS
CIVIL DIVISION
NORTHAMPTON COUNTY, PA

APPELLANTS' BRIEF IN SUPPORT OF LAND USE APPEAL

**PROCEDURAL CHALLENGE TO ADOPTION OF
LOWER SAUCON TOWNSHIP ORDINANCE NO. 2022-02**

AND NOW, Come Appellants, Bruce Petrie, Ginger Petrie, Lawrence Opthof, Margaret Opthof, Frank Palumbo, Robert McKellin and Cynthia McKellin, by and through Counsel, and respectfully submit the following in support of the above-captioned Notice of Appeal - Procedural Challenge to Lower Saucon Township Ordinance No. 2022-02:

I. HISTORY AND FACTS OF THE CASE

On October 5, 2022, Bethlehem Landfill Company submitted to Lower Saucon Township (hereinafter referred to as “Township”) a Request for Zoning Ordinance Amendments - Map Amendment and Text Amendments. The Application sought to rezone lands to the east, northeast, and a very small portion west adjacent to the existing Bethlehem Landfill from Rural Agricultural (RA) to Light Industrial (LI); and adopt text amendments creating a natural resources mitigation alternative for industrial development in the LI Zoning District exempting landfills and waste disposal facilities from Site Plan approval process/requirements of the Zoning Ordinance. Bethlehem Landfill Company, by this Application, sought to extend the life of its existing landfill by 20 to 30 years by adding an area of approximately 275.70 acres. Draft language to amend the Zoning Ordinance and Zoning Map were provided by the Applicant. (See Exhibit Appendix Exhibit 1.)

Lower Saucon Township Council, upon receipt of the Request, authorized the scheduling of a Public Hearing and consideration of adoption of the requested “Proposed Ordinance” and in an attempt to comply with the requirements of the Pennsylvania Municipalities Planning Code, the Township undertook the following:

A. NORTHAMPTON COUNTY LAW LIBRARY FILING

On November 14, 2022, Stacy Werkheiser, Administrative Assistant, Lower Saucon Township, transmitted to Lisa Mann, Northampton County Law Librarian, an email attaching a "Proposed Ordinance" and notification of a Hearing by Lower Saucon Township Council on December 7, 2022. The materials relative to the Northampton County Law Library filing were part of the Certification of Record and were identified as "Law Library submissions from LST pre-adoption." (See Exhibit Appendix Exhibit 3.)

The Ordinance provided by Stacy Werkheiser on November 14, 2022, contained text but neither Exhibit "A" or "B" identifying the parcels of land to be rezoned nor the new Zoning Map were attached. This Proposed Ordinance was made available for public inspection at the Northampton County Law Library.

On November 17, 2022, Mark Hudson, Township Manager, transmitted an email to the Northampton County Law Librarian wanting her to know that the meeting was moved to December 21, attaching again the same Proposed Ordinance, again omitting Exhibits "A" and "B." Each of these transmittals in the upper left-hand corner were designated: "10/27/2022 - Advertisement Version."

On November 23, 2022, Mark Hudson, Township Manager, again transmitted an email to the Northampton County Law Librarian notifying that the draft Ordinance was amended "to say December 21" and attaching an "updated draft Ordinance." This email

attached an Ordinance referred to as “11/17/2022 - DRAFT,” attaching the two (2) maps (Exhibits “A” and “B”) omitted in the previous emails.

Neither of the emails transmitted by Mark Hudson were ever received by the Northampton County Law Library.

On February 8, 2023, Lisa Mann, Northampton County Law Librarian, testified before the Honorable Edward D. Reibman in the above-captioned matter. Her testimony and exhibits have been docketed in the Office of the Prothonotary and are appended to this Brief. (See Exhibit Appendix Exhibit 2.)

Mann testified that it is her responsibility with regard to Ordinances and proposed Ordinances from municipalities to date-stamp them, give them a number that is computer generated, and file them “in the file that is available to the public.” She indicated that she has two (2) separate files, one file for proposed Ordinances and one file for adopted Ordinances.

Mann testified that she did, in fact, receive the November 14 transmission with the attached exhibit containing the “10/27/22 - Advertisement Version” without maps, however received no other communications from Lower Saucon Township until the email of January 3, 2023, reflecting enactment of Ordinance No. 2022-02 on December 21, 2022. The uncontradicted testimony of the Law Librarian was that she received the two (2) emails from Stacy Werkheiser, being the “10/27/22 - Advertisement Version” and the final Ordinance as adopted.

Note that the record reveals that the proposed Ordinance, “10/27/22 - Advertisement Version” which was the only proposed Ordinance available for public inspection was not attested to be a true and correct copy of the proposed Ordinance for consideration. Section 610(a)(2) of the Pennsylvania Municipalities Planning Code requires an attested copy of the proposed Ordinance to be filed with the Northampton County Law Librarian; neither the Ordinance submitted by Stacy Werkheiser on November 14, 2022 nor the proposed Ordinance submitted by Mark Hudson on November 17, 2022 (not received) contained an attestation.

B. LEGAL NOTICE - PUBLICATION

In addition to filing of a Proposed Ordinance in the Northampton County Law Library, a municipality proposing to adopt an amendment to the Zoning Ordinance or Zoning Map, in order to comply with the Public Notice requirements of the Second Class Township Code and Pennsylvania Municipalities Planning Code, is required to publish Legal Notice in a newspaper of general circulation. Section 610(a) and Section 107 of the Pennsylvania Municipalities Planning Code provide the details and requirements thereof.

The Certification of Record - "Newspaper (Express Times) Submission From LST" reflects a Legal Notice published in The Express-Times on November 28, 2022 and December 5, 2022. The advertisement consists of a notice for Public Hearing on December 21, 2022. Note that the Legal Notice contains the "title" of the Ordinance but not "a brief summary, prepared by the Municipal Solicitor and setting forth all of the provisions in reasonable detail." In fact, only the title of the Ordinance appeared, no summary. The Notice also indicates: "A copy of the full text may be viewed at the Lower Saucon Township Municipal Building during normal business hours," but makes no reference to maps. The Legal Notice advises where the meeting is going to be held "Town Hall" but does not provide an address of the Lower Saucon Township Municipal Building nor identify normal business hours. The Legal Notice does not contain a provision that copies of the proposed Ordinance may be examined without charge or obtained for a

charge not greater than the cost thereof. Note that each of the above are required by the Pennsylvania Municipalities Planning Code Section 610(a).

Note also that the Legal Notice itself does not identify where the 275.70 acres of land to be rezoned are located, i.e.: no tax parcels, no addresses, no Deed Book references, and no maps. (See Exhibit Appendix Exhibit 4.)

C. THE EXPRESS-TIMES - ORDINANCE FILING REQUIREMENT

The Pennsylvania Municipalities Planning Code Section 610(a) provides that if the full text of the Ordinance is not published, “a copy thereof shall be supplied to a newspaper of general circulation in the municipality at the time the public notice is published.” From the Certification of Record, “Newspaper (Express Times) Submission from LST,” it appears that the maps, i.e. Exhibits “A” and “B,” to the Proposed Ordinance were not attached to any of the communications submitted to The Express-Times.

The Township did provide legal notice to the owners of all of the property being the subject of rezoning, i.e. Bethlehem Landfill Company itself and the owners of property with which it had an Agreement of Sale to acquire, however no direct mail notice or email notice was sent to any adjoining property owners or those in the neighborhood. The subject property was posted per certification by the Township Manager.

On December 21, 2022, a Public Hearing was, in fact, conducted at which time only Lower Saucon Township residents were permitted to speak and then their comments were limited to three (3) minutes.

A timely Appeal was filed by adjacent property owners and residents of Lower Saucon Township with a substantial interest in the adoption of the aforesaid Ordinance inasmuch as the Ordinance has an adverse and direct effect upon their respective

property interests and property rights, including but not limited to their peaceful enjoyment and use of their property.

In addition to the procedural issues highlighted above, a series of issues, including the fact that the rezoning was contrary to the recommendation of the Lower Saucon Township Environmental Advisory Council, contrary to the Lower Saucon Township Comprehensive Plan, violative of the Environmental Rights Clause of the Pennsylvania Constitution, Article I, Section 27, and violative of an existing Scenic and Conservation Easement, a covenant running with the land encumbering the subject property, in violation of the municipality's public trust. Since these issues along with others have been raised in collateral litigation now pending before this Court, we will focus herein on just simply the procedural adoption issues. See *Bruce Petrie, et al. vs. Lower Saucon Township Zoning Hearing Board and Lower Saucon Township*, No. C0048CV2023-1779, docketed March 21, 2023, as an Appeal from the Lower Saucon Township Zoning Hearing Board who declined to commence a Hearing on a Substantive Validity Challenge to the adoption of Lower Saucon Township Ordinance No. 2022-02 and issued a Deemed Decision in lieu thereof.

At this juncture, it would be remiss not to point out, as disclosed in the Certification of Record "LST Council Minutes From 10/19 through 12/21", that Township Council during the pendency of its consideration regarding adoption of this Ordinance were actively engaged in negotiations with the Applicant pertaining to a Host

Municipal Agreement (providing substantial funding to the municipality) and also authorized negotiations to release Conservation Easements encumbering the lands to be rezoned so as to allow for a landfill where Scenic and Conservation Easements recorded in the Recorder of Deeds would prevent any development. (See Minutes of 10/19/22 Page 10; Minutes of 11/16/22 Page 4 et seq.)

Currently, in addition to the above-captioned litigation, the Substantive Validity Challenge referred to above is pending before this Court, and the Bethlehem Landfill Company's Conditional Use Application pursuant to Ordinance No. 2022-02, is the subject of continuing multi-day Hearings which are unlikely to have concluded by the time this case is argued.

II. ISSUES

- A. DID LOWER SAUCON TOWNSHIP FAIL TO STRICTLY COMPLY WITH THE STATUTORY PROCEDURES REQUIRED TO ADOPT A ZONING ORDINANCE AND ZONING MAP AMENDMENT AS REQUIRED BY THE PENNSYLVANIA MUNICIPALITIES PLANNING CODE AND SECOND CLASS TOWNSHIP CODE?

Suggested Answer: "YES"

- B. IF APPELLANTS HAVE MET THE BURDEN OF PROVING THAT LOWER SAUCON TOWNSHIP FAILED TO STRICTLY COMPLY WITH THE STATUTORY PROCEDURE FOR ADOPTION OF A ZONING ORDINANCE AND ZONING MAP AMENDMENT, IS THE COURT OBLIGATED TO FIND ORDINANCE NO. 2022-02 VOID AB INITIO?

Suggested Answer: "YES"

III. ARGUMENT

A. GOVERNING STATUTES

It is well established in the Commonwealth of Pennsylvania that a municipal ordinance is void at its inception if the governing body fails to strictly comply with the procedural requirements of the Pennsylvania Municipalities Planning Code. 42 Pa. C.S.A. §5571.1(e).

The Judicial Code specifically provides as follows:

§ 5571.1. Appeals from ordinances, resolutions, maps, etc.

(a) Applicability; court of common pleas.—

- (1) This section shall apply to any appeal raising questions relating to an alleged defect in the process of or procedure for enactment or adoption of any ordinance, resolution, map or similar action of a political subdivision.
- (2) An appeal pursuant to this section shall be to the court of common pleas.

(b) Appeals of defects in statutory procedure.—

- (1) Any appeal raising questions relating to an alleged defect in statutory procedure shall be brought within 30 days of the intended effective date of the ordinance.

(d) Presumptions.— Notwithstanding any other provision of law, appeals pursuant to this section shall be subject to and in accordance with the following:

- (1) An ordinance shall be presumed to be valid and to have been enacted or adopted in strict compliance with statutory procedure. ...
- (3) An ordinance shall not be found void from inception unless the party alleging the defect in statutory procedure meets the burden of proving the elements set forth in subsection (e).

(e) Burden of proof.— Notwithstanding any other provision of law, an ordinance shall not be found void from inception except as follows:

(1) In the case of an appeal brought within the 30-day time limitation of subsection (b), the party alleging the defect must meet the burden of proving that there was a failure to **strictly comply** with statutory procedure. (Emphasis added.)

(g) Definitions.— As used in this section, the following words and phrases shall have the meanings given to them in this subsection:
“Statutory procedure.” The preenactment and postenactment procedures prescribed by statute or ordinance in adopting an ordinance.

With the above in mind, we now turn to the preenactment procedures prescribed by the Pennsylvania Municipalities Planning Code and Second Class Township Code in adopting a Zoning Ordinance amendment.

Section 609(b)(1) of the Pennsylvania Municipalities Planning Code provides that, before voting on the enactment of an amendment, the governing body shall hold a public hearing thereon, pursuant to public notice. 53 P.S. 10610.

“Public notice” is defined in Section 107 of the Pennsylvania Municipalities Planning Code as:

Notice published once each week for two successive weeks in a newspaper of general circulation in the municipality. Such notice shall state the time and place of the hearing and the particular nature of the matter to be considered at the hearing. The first publication shall not be more than 30 days and the second publication shall not be less than seven days from the date of the hearing. 53 P.S. 10107.

Section 610(a) of the Pennsylvania Municipalities Planning Code provides as follows:

(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: (Emphasis added.)

(1) A **copy thereof shall be supplied to a newspaper of general circulation** in the municipality at the time the public notice is published. (Emphasis added.)

(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. (Emphasis added.)

The Second Class Township Code, 53 P.S. 66601, provides the procedure for enactment of Township Ordinances and contains the specific provisions regarding public notices:

- (a) Public notices shall include either the full text or a brief summary of the proposed ordinance which **lists the provisions in reasonable detail** and a reference to a place within the township where copies of the proposed ordinance may be examined. (Emphasis added.)
- (a.1) If the full text is not included, **a copy shall be supplied to the publishing newspaper** when the notice is published, and an attested copy shall be filed within thirty days after enactment in the county law library or other county office designated by the county commissioners... (Emphasis added.)

B. CASE LAW APPLICATION

As Judge Simpson of the Commonwealth Court observed in *Davis-Haas vs. Exeter Township Zoning Hearing Board*, 166 A.3d 527 (Pa. Comm. 2017), where a challenge to procedural validity of an Ordinance is filed within thirty (30) days of Ordinance's effective date, challenger must only prove that municipality failed to strictly comply with statutory procedures, not that prejudice resulted from such failure.

If a published notice fails to satisfy the statutory requirements, the fact that members of the public appeared at the hearing does not breathe life into an otherwise void ordinance. The right of the public to participate in the enactment of municipal ordinances requires that municipalities strictly follow the prescribed notice procedures in order to validate any ensuing legislation. Statutory publication requirements are mandatory and ordinances adopted without strict compliance are void. *Lower Gwynedd Township vs. Gwynedd Properties*, 591 A.2d 285 (Pa. 1991). The principles set forth in this Supreme Court case have clearly been adopted by the Legislature in the Judicial Code, 42 Pa. C.S.A. 5571.1.

Although Township and the Landfill will argue that Appellants had actual notice of the new Ordinance, as the Supreme Court stated in *Schadler vs. Zoning Hearing Board of Weisenberg Township*, 850 A.2d 619 (Pa. 2004):

The procedural requirements for the enactment of a law are nonwaivable, and when the lawfulness of the enactment is in question, the law is either void or not void, without regard to the identity of the

challenger. Meanwhile, finding the notice of an individual litigant to have any bearing on the litigant's ability to challenge the law in the circumstances of this case would lead to the absurd result of a single township ordinance being valid with respect to some citizens and simultaneously invalid with respect to others. (Emphasis added.)

If a published notice fails to satisfy the statutory requirements, the fact that members of the public, or even the Appellants themselves, appeared at the Hearing does not breathe life into an otherwise void Ordinance. *Fierst vs. William Penn Mem. Corp.*, 116 A 761 (Pa. 1933). The fundamental shared public right to participate in proceedings involving adoption of Ordinances is the right that has been protected by our Supreme Court and Legislature.

As any Municipal Solicitor will tell you, drafting of a Municipal Ordinance and the advertising procedures required are not complicated. The statutes set forth above provide a very simple outline as to that which is required. In this case, the failures could very well have resulted from the fact that the Solicitor's fingerprints are nowhere to be found. Nowhere in the Certification of Record is it revealed that the Solicitor drafted the Legal Notice or the Ordinance. An Administrative Assistant and Township Manager were responsible for notices, postings, and communications to both the Northampton County Law Library and The Express-Times.

When viewed through the filter of that which is required for strict compliance with the statutory requirements, the following flaws and deficiencies are revealed:

1. Published Legal Notice failed to include the full text of the Zoning Map/ Zoning Ordinance amendments but rather just the “title” that failed to set forth all of the provisions in reasonable detail as required by statute, i.e. advertisement failed to identify the location of the lands being rezoned.

2. Published Legal Notice, in lieu of full text, did not contain a “brief summary prepared by the Solicitor.”

3. Published Legal Notice failed to strictly comply with the requirement that it contain “a reference to a place within the community where copies of the proposed ordinance or amendments may be examined without charge or obtained for a charge not greater than the cost thereof.” Note that the advertisement only indicated that it “may be viewed” without any reference to copying. Note also that it merely referred to the municipal building during normal business hours without providing a location or designation of business hours.

4. Published Legal Notice states that “a copy of the **full text** may be viewed at the Lower Saucon Township Municipal Building during normal business hours,” but makes no reference to maps reflecting the area to be rezoned.

5. A full copy of the proposed Ordinance was not supplied to a newspaper of general circulation, i.e. The Express-Times, insofar as the Ordinance that appears to have been provided does not contain identification of the lands to be rezoned, i.e. missing Exhibits “A” and “B,” or addresses, tax identification, Deed Book reference, or metes and bounds descriptions thereof.

6. That a copy of the proposed Ordinance received by the Northampton County Law Library and made available for public inspection did not identify the lands to be rezoned, attach Exhibits “A” or “B,” or provide addresses, tax identification, Deed Book reference, or metes and bounds descriptions.

7. That the proposed Ordinance submitted to the Northampton County Law Library for public inspection was not “attested” as a true and correct copy of the proposed Ordinance being the subject of the Public Hearing and proposed adoption.

8. That the published Legal Notice did not contain either the full text of the proposed Ordinance but rather just its “title.” The Notice failed to contain a brief summary prepared by the Municipal Solicitor “setting forth all of the

provisions in reasonable detail,” i.e. the title was published, but no summary, no indication that the Municipal Solicitor drafted the Legal Notice, and the advertisement specifically failed to set forth the location of lands to be rezoned which would be implicit in the requirement that the provisions of the Ordinance be set forth “in reasonable detail.” The statute clearly indicates that the title is insufficient; the Pennsylvania Municipalities Planning Code specifically requires: “the title **AND** a brief summary ...” (Emphasis added.)

None of the above deficiencies are “minor deficiencies,” and collectively constitute a failure to strictly comply with the statutory procedures. Appellants are not “splitting hairs;” rather, the combined inadequacies rendered the Ordinance adoption procedure fatally defective. The procedure set forth in the Municipalities Planning Code is mandatory and obligatory and that failure to meet these requirements render the Ordinance enactment null and void. See *Valianatos vs. Zoning Hearing Board of Richmond Township*, 766 A.2d 903 (Pa. Comm. 2001).

“The precedents of the Supreme Court have been consistent in holding that statutory publication requirements are mandatory and that ordinances adopted without strict compliance are void. The public’s interest in the legislative process demands no less, and appellee has presented no valid reason to abandon the rule.” *Lower Gwynedd Township vs. Gwynedd Properties, supra*. (See also *Diefenderfer vs. Palmer Township Board of Supervisors*, 127 A.3d 881 (Pa. Comm. 2014).

IV. CONCLUSION

For all of the foregoing reasons, Appellants respectfully submit that the Court enter an Order declaring Lower Saucon Township Ordinance No. 2022-02 null and void ab initio.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gary Neil Asteak", written over a horizontal line.

GARY NEIL ASTEAK, ESQUIRE

ID: 19233

726 Walnut Street

Easton, PA 18042

(610) 258-2901

asteaklaw@gmail.com

Attorney for Appellants