

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

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

NO. C-48-CV-2023-00335

v.

LOWER SAUCON TOWNSHIP,
Appellee

and

BETHLEHEM LANDFILL COMPANY,
Intervenor

FILED
2023 MAY -8 P 3:45
COURT OF COMMON PLEAS
CIVIL DIVISION
NORTHAMPTON COUNTY, PA

ORDER AND REASONS

AND NOW, this 8th day of May, 2022, upon consideration of the Procedural Validity Challenge to Lower Saucon Township Ordinance No. 2022-02, filed by Appellants on January 13, 2023, it is hereby **ORDERED** and **DECREED** that Appellants’ Procedural Challenge is **GRANTED** and Lower Saucon Township Ordinance No. 2022-02 is held to be void *ab initio*.

STATEMENT OF REASONS

1. This matter was assigned to the Honorable Abraham P. Kassis by Order of Court dated February 15, 2023. Appellants filed a brief in support of their Land Use Appeal on March 29, 2023. Appellee, Lower Saucon Township (“Township”), and Intervenor, Bethlehem Landfill Company (“BLC”), filed a joint brief in opposition on April 17, 2023. All parties participated in oral argument held on April 17, 2023.

2. Appellants filed a challenge to the procedural validity of Lower Saucon Township Ordinance No. 2022-02, which had been passed by Appellee/Township at the conclusion of a public

hearing held on December 21, 2022. Appellants asserted that the Township failed to meet the necessary statutory requirements prior to enacting the Ordinance.

3. As the matter before the Court is a procedural challenge, we note the following procedural history: on October 5, 2022, Bethlehem Landfill Company submitted a request to Lower Saucon Township to amend the Township's Zoning Ordinance to rezone approximately 275 acres adjacent to BLC's existing landfill from Rural Agricultural (RA) to Light Industrial (LI). BLC also sought additional text amendments to allow a greater portion of land designated for natural resource protection to be utilized for industrial purposes in the LI district, and to exempt landfills or waste disposal facilities from the Township's site plan approval process. See Appellant Exhibit 1.

4. The map and text amendments were presented to the Lower Saucon Township Council at the October 19, 2022 Council meeting. See Appellee Exhibit A. During the October 19, 2022 meeting, Township Council voted to prepare the proposed map and text amendments for review and public hearing. Council also voted to include an additional amendment to change landfills from a Special Exception Use to a Conditional Use in the LI District. See Appellee Exhibit C. Public hearing regarding the proposed ordinance was originally scheduled for December 7, 2022, however, at the Council meeting on November 16, 2022, the public hearing was rescheduled to December 21, 2022. See Appellee Exhibit B, C.

5. The map and text amendments were presented to the Lower Saucon Township Planning Commission on October 27, 2022, and the Planning Commission voted to recommend approval. See Appellee Exhibit D. On November 15, 2022, the Lower Saucon Township Environmental Advisory Committee voted to recommend that Council reject both the rezoning and the natural resource mitigation alternative as contained in the proposed ordinance. See Appellee Exhibit E.

6. The Lehigh Valley Planning Commission reviewed the map and text amendments at meetings held on November 15 and November 17, 2022. By letter dated November 18, 2022, the Lehigh Valley Planning Commission noted that the proposed amendments do not align with regional planning policies, and that the areas subject to the rezoning contain significant natural resources. See Appellee Exhibit F.

7. On November 14, 2022, Stacy Werkheiser, Administrative Assistant for the Township, emailed the Proposed Ordinance to the Northampton County Law Librarian, Lisa Mann,¹ including a notification of hearing for December 7, 2022. See Appellee Exhibit K. Ms. Mann testified that she received the November 14 email with the proposed ordinance and that she stamped the printout with a date and filed number, and placed it in the file to be available to the public. See Appellants Exhibit 2; N.T. 2/8/23 at 4-6. The proposed ordinance provided to Ms. Mann on November 14, 2022, and made available to the public, did not contain the amended maps and did not include an attestation. Id.; Appellee Exhibit K. Ms. Mann testified that she did not receive further communications or other versions of the proposed ordinance from the Township until she received the adopted ordinance from Ms. Werkheiser on January 3, 2023. N.T. 2/8/23 at 7. See Appellee Exhibit U.

8. On November 17, Mark Hudson, Township Manager, emailed Ms. Mann to advise that the public hearing was rescheduled from December 7 to December 21, 2022. See Appellee Exhibit K; Appellants Exhibit 3. The November 17 email attached the same version of the proposed ordinance as had been sent by Ms. Werkheiser, identified as “10/27/22 – Advertisement Version” and omitting the exhibits/maps. Id. On November 23, 2022, Mr. Hudson emailed Ms. Mann, stating that the previous draft ordinances provided to the Law Library incorrectly included the wrong public hearing date (December 7 instead of December 21). See Appellee Exhibit L. The

¹ We note that all emails from the Township were addressed to “Lynn Mann,” however did include at Lisa Mann’s correct email address of lmann@northamptoncounty.org.

November 23, 2022 email included updated attachments, identified as “11/17/2022-DRAFT,” and included two maps. Id. The draft emailed on November 23, 2022 did not include an attestation. Id. Ms. Mann testified that she did not receive this email. N.T. 2/8/23 at 11.

9. On November 28, 2022 and December 5, 2022, the Township published notice of the December 21, 2022 public hearing in the Express-Times newspaper. See Appellee Exhibit H. The legal notice, with a copy of the text of the proposed ordinance, identified as “10/27/22 – Advertisement Version” was emailed to the Express-Times on November 18, 2022. Id. On November 23, 2022, the Township emailed the Express-Times a corrected version of the text of the proposed ordinance, identified as “11/17/2022-DRAFT.” See Appellee Exhibit I. Neither submission included the exhibits/maps as part of the proposed ordinance. See Appellee Exhibit H-I.

10. On November 18, 2022, the Township mailed notice of the proposed zoning changes to the owners of the seven parcels subject to the rezoning, which included five parcels owned by the Bethlehem Landfill Company, and two parcels owned by Dennis and Christine Hahn. See Appellee Exhibit J. Notices were also posted at the subject properties themselves. Id.

11. Public Hearing on the proposed ordinance was held on December 21, 2022. See Appellee Exhibit S. At the conclusion of the hearing, Council voted 3-2 to enact the zoning ordinance.

12. On January 3, 2023, Stacy Werkheiser emailed the adopted ordinance, No. 2022-02, to the Northampton County Law Library. See Appellee Exhibit U.

13. Appellants initiated the instant appeal on January 13, 2023.

14. The relevant provision of the Judicial Code states:

(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.

42 Pa.C.S.A. § 5571.1.

15. Where a challenge to the procedural validity of an ordinance is filed within thirty days of the ordinance's effective date, a challenger must only prove that the municipality failed to strictly comply with statutory procedures, not that prejudice resulted from such failure. Davis-Haas v. Exeter Twp. Zoning Hearing Bd., 166 A.3d 527 (Pa. Cmwlth. 2017).

16. The statutory procedures for the valid enactment of a zoning ordinance are set forth in the Municipalities Planning Code at Sections 609-610.² Here, Appellants assert that the Township failed to strictly comply with the notice and publication requirements of Section 610:

(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

² We note that Appellants have not asserted that the Township failed to comply with the procedural requirements of Section 609, which includes provisions for mailing notices, posting notices, and submissions to planning agencies.

text thereof or the title and a brief summary, prepared by the municipal solicitor and setting forth all the provisions in reasonable detail. If the full text is not included:

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

(2) An attested copy of the proposed ordinance shall be filed in the county law library or other county office designated by the county commissioners, who may impose a fee no greater than that necessary to cover the actual costs of storing said ordinances.

53 P.S. § 10610.

17. With regard to the notice published in the Express-Times, Appellants note the following deficiencies: (1) the notice provided only the title of the proposed ordinance and failed to identify the lands being rezoned; (2) the notice did not include either the full text or a brief summary prepared by the solicitor “setting forth all the provisions in reasonable detail”; (3) the notice did not include “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”; and (4) the notice references the ability to review text amendments but does not refer to the ability to review proposed map amendments.

18. In response, the Township and BLC argue that the notice published in the Express-Times on November 28, 2022 and December 5, 2022 satisfied the above-cited statutory requirements. The published notices were as follows:

The Lower Saucon Township Council will hold a public hearing for the consideration of and possible adoption and enactment of Ordinance No. 2022-02, “AN ORDINANCE OF THE TOWNSHIP OF LOWER SAUCON, NORTHAMPTON COUNTY, PENNSYLVANIA, AMENDING AND REVISING THE CODE OF THE TOWNSHIP OF LOWER SAUCON BY AMENDING CHAPTER 180 (ZONING) TO REVISE THE ZONING MAP BY CHANGING APPROXIMATELY 275.70 ACRES OF LAND FROM AN RA ZONING DESIGNATION TO AN LI ZONING DESIGNATION, REVISING SECTION 180-79.1 TO ADD “LANDFILLS AND WASTE DISPOSAL FACILITIES USE TO THE LIST OF USES REQUIRING CONDITIONAL USE APPROVAL IN THE LI ZONING DISTRICT, REVISING SECTION 180-80B TO REMOVE THE LANDFILLS AND WASTE DISPOSAL FACILITIES USES FROM THE LIST OF USES REQUIRING SPECIAL EXCEPTION APPROVAL, REVISING SECTIONS 180-101 AND 180-109F TO EXEMPT LANDFILLS AND WASTE DISPOSAL FACILITIES FROM THE SITE PLAN APPROVAL PROCESS AND REQUIREMENTS IF THE USE WILL REQUIRE LAND DEVELOPMENT APPROVAL UNDER THE LOWER SAUCON TOWNSHIP SUBDIVISION AND LAND DEVELOPMENT ORDINANCE AND A PERMIT FROM THE PENNSYLVANIA

DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND ADDING SECTION 180-109G TO PROVIDE FOR A NATURAL RESOURCE MITIGATION ALTERNATIVE IN THE LI DISTRICT WHEN APPROVED IN WRITING BY THE COUNCIL OF LOWER SAUCON TOWNSHIP; AND REPEALING ALL OTHER ORDINANCES AND PARTS OF ORDINANCES IN CONFLICT WITH THE PROVISIONS CONTAINED HEREIN. THIS ORDINANCE CONTAINS SIGNIFICANT, SUBSTANTIVE CHANGES TO THE LOWER SAUCON TOWNSHIP ZONING MAP AND ZONING REGULATIONS, AND SHOULD BE REVIEWED IN ITS ENTIRETY FOR A COMPREHENSIVE UNDERSTANDING OF ITS PROVISIONS.” on Wednesday, December 21, 2022, at 6:30 p.m. at Council’s regular business meeting to be held at Town Hall, 3700 Old Philadelphia Pike, Bethlehem, PA 18015. A copy of the full text may be viewed at the Lower Saucon Township municipal building during normal business hours. Mark Hudson, Township Manager.

See Appellee Exhibit H.

19. With regard to the specificity of the above notice, there is no dispute that the notice does not contain the full text of the proposed ordinance, and therefore required “the title and a brief summary, prepared by the municipal solicitor and setting forth all the provisions in reasonable detail.” The published notice contains only the title of the proposed ordinance, and not a summary thereof, as required by § 10610(a). BLC and the Township argue that the title of the ordinance is sufficiently detailed to satisfy the summary requirement, and rely on Streck v. Lower Macungie Twp. Bd. of Comm'rs, 58 A.3d 865 (Pa. Cmwlth. 2012) for the standard of how detailed a summary must be.³ However, the published notice in Streck did include a plain language summary reviewing the provisions of the proposed ordinances changes. Here, there is no summary included in the published notice,⁴ and the title of the proposed ordinance does not make it apparent to a reader that, at a minimum, the proposed changes involve rezoning agricultural land for industrial use. As noted by the Court in Streck, although the MPC does not require the summary to explain the purpose of

³ We note that in Streck, the only procedural deficiency found by the trial court in invalidating the ordinance at issue therein was the alleged lack of reasonable detail in the summary within the published notice.

“[The] trial court did not find that any of these steps [of Section 6109a)] were omitted. Stated otherwise, the Township strictly complied with each of these procedural requirements. Cf. [Hawk v. Eldred Twp. Bd. of Supervisors, 983 A.2d 216, 220 (Pa. Cmwlth. 2009)] (noting that measures taken by the township to publicize its ordinance and to invite public input did not strictly comply because, inter alia, it made the text of the ordinance available on the internet but not at a specific ‘place within the municipality,’ such as the library).” 58 A.3d at 876.

⁴ Section 610 also requires that the summary be prepared by the solicitor. Here, there is no summary, and it is impossible to make an evidentiary determination from the record as to who prepared the notice for publication, although we note that the notice bears the name of Mark Hudson, Township Manager, not the Township’s solicitor.

the proposed amendments, it is important to identify the content of the proposed amendment, rather than just identifying technical section numbers. Id. at 878. The Court further noted, “[t]he summary gave the reader notice that there would be a major rezoning of land located within the Township, and it advised any citizen interested in more information on where to obtain a free copy of the new zoning map and the complete text of [the ordinance].” Id. The instant notice additionally failed to state that both the text and map were available for public examination without cost, and confusingly stated that the public hearing would be held at the address identified as “Town Hall,” while stating that the text amendments could be viewed at the “municipal building.”

20. Based on the foregoing, the Court finds that the Township failed to strictly comply with the requirements of 53 P.S. § 10610(a) in enacting Zoning Ordinance No. 2022-02.

21. Section 610(a)(1) of the MPC further requires, if the full text of a proposed ordinance is not published, a copy of the proposed ordinance be “supplied to a newspaper of general circulation in the municipality at the time the public notice is published.” 53 P.S. § 10610(a)(1). The record reflects that on November 18, 2022, the Township emailed the text of the proposed ordinance to the Express-Times in conjunction with the request to publish the legal notice. See Appellee Exhibit H. However, the email included the incorrect version of the proposed ordinance, and further did not include the exhibits/maps that were part of the zoning amendment. On November 23, 2022, the Township emailed the Express-Times a corrected version of the text of the proposed ordinance, but still did not include the exhibits or maps identifying the parcels that would be affected by the rezoning covered in the proposed ordinance. See Appellee Exhibit I.

22. BLC and the Township argue that 53 P.S. § 10610(a)(1) does not require that maps be included in the submission to the newspaper. However, we note that the text of the ordinance refers to the maps as being “attached hereto and incorporated herein” which leads to the necessary conclusion that the text of the ordinance is incomplete without the inclusion of the maps. Further,

the text of the ordinance, in the absence of the maps, does not otherwise identify the specific lands subject to rezoning and the public would not be able to ascertain which land would be affected without reference to the maps.

23. Based on the foregoing, the Court finds that the Township failed to strictly comply with the requirements of 53 P.S. § 10610(a)(1) in enacting Zoning Ordinance No. 2022-02.

24. Lastly, Section 610(a)(2) of the MPC requires, if the full text of a proposed ordinance is not published, that “[a]n attested copy of the proposed ordinance shall be filed in the county law library or other county office designated by the county commissioners, who may impose a fee no greater than that necessary to cover the actual costs of storing said ordinances.” 53 P.S. § 10610(a)(1). The record reflects that the only email actually received by the Law Librarian with regard to the proposed ordinance was the November 14, 2022 email from Stacy Werkheiser.⁵ See Appellee Exhibit K; N.T. 2/8/23 at 4-6. This email included both an incorrect version of the proposed ordinance, and the incorrect date for the public hearing, as it was later moved from December 7 to December 21, 2022. See Appellee Exhibit K. This email also did not include the maps/exhibits which were part of the proposed ordinance, and it was not an attested copy. Id. Thus, the only version of the proposed ordinance that was made available to the public at the Northampton County Law Library was incomplete, later amended to update the hearing date, and unattested.

25. We cannot agree with the Township/BLC that the above was sufficient to satisfy the statutory requirements regarding the availability of the proposed ordinance. In particular, the attestation requirement of Section 610(a)(2) cannot be considered an irrelevant requirement when

⁵ The Township/BLC argue that the subsequent email from Mark Hudson on November 23, 2022, corrected any deficiencies, by including the correct version of the proposed ordinance, identifying the correct hearing date, and attaching the exhibits/maps. See Appellee Exhibit L. However, the testimony of Ms. Mann, the law librarian, was that she never received this email. N.T. 2/8/23 at 7, 11. Therefore, this correct version of the ordinance, along with the correct hearing date, were not available to the public at the law library. We additionally note that even if the November 23, 2022 email had been received and properly filed in the law library, the proposed ordinance was still not an “attested copy” as clearly required by MPC Section 610(a)(2).

the legislature explicitly and unambiguously requires that “an attested copy of the proposed ordinance” be filed with the county law library or similar government office, while simultaneously not requiring the same of the copy provided to the newspaper. The Township failed to strictly comply with the requirements of 53 P.S. § 10610(a)(2) in enacting Zoning Ordinance No. 2022-02.

26. The argument by the Township/BLC that the public had sufficient constructive notice, as demonstrated by high public turnout at the December 21, 2022 hearing and organized opposition, is similarly unavailing. It is clear that the standard of strict compliance with statutory procedures is not reduced by actual or constructive notice to affected parties. See Davis-Hass, *supra*.⁶ As noted in Davis-Haas, because the challenge was filed within thirty days, the Appellants are not required to demonstrate any prejudice; they can sustain their burden by demonstrating that a statutory requirement was not met. Here, the Township did not strictly comply with the statutory procedures prior to adopting Lower Saucon Township Ordinance No. 2022-02, as addressed above, and the Ordinance is held to be void *ab initio*.

BY THE COURT:


_____,
ABRAHAM P. KASSIS, J.

⁶ In Davis-Haas, the Commonwealth Court affirmed the invalidating of a zoning ordinance on procedural grounds arising from deficiencies similar to those raised herein, despite argument that the affected landowner had actual notice of the zoning change at issue. “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.” Id. at 551 (citing Lower Gwynedd Twp. v. Gwynedd Properties, Inc., 591 A.2d 285, 287 (Pa. 1991)).