Holt v. Newtown Township Zoning Hearing Board

2005 | Cited 0 times | Supreme Court of Pennsylvania | February 7, 2005

Argued: November 1, 2004

OPINION NOT REPORTED

MEMORANDUM OPINION

In these consolidated cases abutting neighbors and owners of a property in Newtown Township appeal and cross-appeal from an order of the Court of Common Pleas of Bucks County that affirmed two decisions of the Newtown Township Zoning Hearing Board (Zoning Board) relating to an application for a use permit and a special exception and/or variance to enable construction of a single-family house. Neighbors Leo Holt and Julie Laughlin (Holt) appeal from the trial court's order to the extent that it affirmed the Zoning Board's decision that John W. Melsky was entitled to a deemed approval of his application for a use permit to construct the house. John W. Melsky and Stephen A. Melsky, Jr. (the Melskys) appeal from the trial court's affirmance of the Zoning Board's decision that John Melsky was not entitled to a special exception or a variance to construct the house on an undersized lot.[1]

I.

The Zoning Board found that Stephen and Ruth Melsky acquired a property of 1.136 acres on Stoopville Road in Newtown Township in 1950, and they located their residence there. They acquired the adjoining parcel, which was a vacant lot of 1.385 acres, in 1956; that parcel is the subject of the current dispute. Stephen Melsky died on December 2, 1998, and Ruth Melsky died on April 30, 2001. The parcels are now assets of the estate of Ruth Melsky. John W. Melsky and Stephen A. Melsky, Jr. are the surviving sons and executors of the estate, and John W. Melsky is the equitable owner of the subject property, having entered into an agreement to purchase it from the estate.

The Joint Ordinance was adopted in 1983; it applies to Newtown Township, Upper Makefield Township and Wrightstown Township. The property is in the Conservation Management district under Section 401(B) of that ordinance, which has minimum gross site area for a single-family detached home of 3 acres and a maximum gross density of 0.33 dwelling unit per acre. Reproduced Record (R.R.) 341a.[2] Section 1208(C)(1)(a) of the Joint Ordinance is found at R.R. 343a:

No nonconforming lot shall be reduced in size. An owner of a two or more contiguous nonconforming lots at the time of the effective date of this Ordinance which, when combined, would

create a lot of conforming size or which could be consolidated to minimize the nonconformity, shall be required to combine such lots.

John W. Melsky filed an application on March 7, 2002 for a use permit as required by Section 1403 of the Joint Ordinance to use the 1.385-acre vacant lot as a separate building lot upon which to construct a single-family residence. He submitted a form as advised on April 3, 2002. A notice of zoning disapproval was mailed on July 25, 2002, and John Melsky filed an appeal on August 15, 2002, along with an application for variances from Sections 401(B) and 1208(C)(1)(a) of the Joint Ordinance. In its January 3, 2003 decision, the Zoning Board found the above facts and also found that at all times the two parcels had maintained a separate and distinct character and that the Melskys intended the parcels to be separate. The Zoning Board stated that Section 1403(A) provides for use permits as part of the township's regulatory scheme applicable to buildings and construction and that "Section 4104(a) of the Municipalities Planning Code [sic]," Zoning Board decision, January 3, 2003, p. 2, requires permits to be acted upon within 90 days or a deemed approval results. The reference actually was to 53 P.S. §4104.[3] Because the use permit was not acted upon within the required time, the Zoning Board ruled that it was deemed approved.

Holt appealed to the trial court, which remanded the matter to the Zoning Board for it to render a decision on the merits of whether the Melskys were entitled to a special exception under Section 1208(C) of the Joint Ordinance and whether they were entitled to a variance from Sections 401(B) and 1208(C)(1)(a).

The Zoning Board issued a second decision on May 6, 2003 in which it quoted Section 1208(C)(1)(a), and it concluded that the Melskys were required to combine the lots as of the 1983 effective date. It noted that Section 1208(C)(2) provides for a special exception to that requirement if a nonconforming lot was held in "single and separate ownership" at the time of adoption of the ordinance. The Zoning Board quoted the definition of that term in Section 267 of the Joint Ordinance:

The ownership of a lot, tract, or parcel of land by one (1) or more persons, partnerships, corporations, or other legal entities, which is separate and distinct from the ownership of any abutting or adjoining lot, tract or parcel. "Separate and distinct" means that the lot, tract, or parcel owned does not abut or adjoin any other lot, tract, or parcel of land under the ownership or control of one (1) or more persons, partnerships, corporations, or other legal entities.

The Zoning Board concluded that under the clear and unambiguous language of Section 267 the two properties could not be designated as being held in single and separate ownership and that Section 267 did not permit such designation based upon the intent of an owner of contiguous lots. Thus it denied a special exception.

As for the application for a variance, the Zoning Board noted first that the Joint Ordinance required the subject property to be combined with the adjacent parcel, thus precluding its use as a separate

building lot. It quoted the criteria for granting variances as set forth in Section 910.2 of the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended, added by Section 89 of the Act of December 21, 1988, P.L. 1329, 53 P.S. §10910.2. The Zoning Board stated that there were no unique physical circumstances of the property and that the owner was no different from others holding a similar amount of land who were prevented from constructing more than one dwelling by the increase in minimum lot size. Referring to Hertzberg v. Zoning Board of Adjustment of City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998), the Zoning Board denied the variances, stating that there was no evidence of economic hardship to the applicant equitable owner or to the property owner, that the properties had been held and used together for over 40 years and that a variance would alter the essential character of the neighborhood. On further appeal the trial court, without taking additional evidence, affirmed both decisions.[4]

II.

In No. 638 C.D. 2004 Holt first contends that the Zoning Board erred in concluding that the deemed approval provisions of 53 P.S. §4101(a) apply to a use permit under Section 1403 of the Joint Ordinance. Holt emphasizes that Section 4104(a) refers to regulation of "construction, erection, maintenance, operation or repair of buildings, structures or devices" and to payment of a fee. Section 1403(A) of the Joint Ordinance provides that when use involves a new building or structure, application for a use permit shall be made prior to application for a building permit. Holt argues that use permit does not deal with construction, erection etc. Holt cites H.A. Steen Indus., Inc. v. Zoning Hearing Board of Borough of Folcroft, 538 A.2d 95 (Pa. Cmwlth. 1988), where the Court concluded that Section 4104(a) applied to an application for a permit to install outdoor signs. In Rodier v. Township of Ridley, 595 A.2d 220 (Pa. Cmwlth. 1991), the Court held that it applied to an application for a grading permit. Further, in Jay-Lee, Inc. v. Municipality of Kingston Zoning Hearing Board, 799 A.2d 923 (Pa. Cmwlth. 2002), the Court held that an application for an occupancy permit was covered because it concerned operation of a building. Holt notes that these cases did not involve use permits and, further, that Melsky was not required to pay a fee.

The Melskys respond, and the Court agrees, that the requirement for securing a use permit prior to a use or change of use of land, and in particular prior to securing a building permit for new construction, means that Newtown Township has established a two-step process for regulating construction -- the application for a use permit is the first step. The Melskys also assert that the Joint Ordinance does provide in Section 1405 for each participating municipality to establish permit fee schedules but that the applicant was not charged a fee even after inquiry by counsel, and the application was not rejected on this basis. The Court concludes that the Zoning Board correctly determined that the deemed approval provisions of Section 4101(a) apply to an application for a use permit under Section 1403 of the Joint Ordinance. The mere fact that a use permit is not a building permit does not mean that a use permit may not be an aspect of the regulation of construction. As noted, the Court has interpreted regulation of construction broadly. Rodier. Here, the use permit required as the initial step in any proposed construction is an integral aspect of the municipality's

regulation of construction. Consequently, the township's failure to render a decision timely resulted in a deemed approval.[5]

In the cross-appeal at No. 746 C.D. 2004, the Melskys first raise two inter-related arguments contending that the Zoning Board erred and abused its discretion in refusing to grant a special exception by erroneously applying the doctrine of "automatic merger" in this case. They note that it is undisputed that the two lots were rendered nonconforming by zoning ordinances adopted after Stephen and Ruth Melsky acquired them. They discuss cases including Tinicum Township v. Jones, 723 A.2d 1068 (Pa. Cmwlth. 1998), Jaquelin v. Zoning Hearing Board of Hatboro Borough, 558 A.2d 189 (Pa. Cmwlth. 1989), and Parkside Assocs., Inc. v. Zoning Hearing Board of Montgomery Township, 532 A.2d 47 (Pa. Cmwlth. 1987). In Tinicum, 723 A.2d at 1071, the Court stated that it was well settled that "a pre-existing lot that has been rendered undersized by the subsequently enacted zoning requirement must be permitted either as a nonconforming lot or by a variance, to avoid a confiscation of property." Further, the Court stated that the doctrine of merger of estates in land is not applicable to zoning law and that the mere common ownership of adjoining lots does not automatically establish a physical merger of those lots for the purpose of determining compliance with zoning requirements.

The Melskys note that Tinicum listed special exception as one form of relief, and the Joint Ordinance provides for a special exception to permit the use of a nonconforming lot, but Section 1208(C)(1)(a) nevertheless provides that the owner of two or more contiguous nonconforming lots shall be required to combine them. They assert that by basing its decision on Section 1208(C)(1)(a), the Zoning Board applied the doctrine of automatic merger, which has been rejected in cases such as Parkside, and they contend that the Zoning Board erred by placing the burden on the applicant as to whether two adjoining lots had been integrated.[6] In a separate brief on the cross-appeal Holt counter-states the question as whether the decision denying the request for a special exception should be affirmed because the subject property does not meet the definition of a "lot" under the Joint Ordinance. Holt argues that the definition of "single and separate ownership" in Section 267 is consistent with the construction of that phrase in cases including Lebeduik v. Bethlehem Township Zoning Hearing Board, 596 A.2d 302 (Pa. Cmwlth. 1991), Parkside, and West Goshen Township v. Crater, 538 A.2d 952 (Pa. Cmwlth. 1988).

This Court addressed the precise point at issue here in Dudlik v. Upper Moreland Township Zoning Hearing Board, 840 A.2d 1048 (Pa. Cmwlth. 2004). The Court reviewed cases involving adjoining lots held in common ownership at the time of enactment of ordinance provisions rendering one or more undersized. It noted that many ordinances contained language similar to that in Parkside, namely that a building might be erected on a nonconforming lot held in single and separate ownership at the time of enactment of a zoning change, with "single and separate ownership" defined as "the ownership of property by any person, which ownership is separate and distinct from that of adjoining property." Dudlik, 840 A.2d at 1052. In such cases, the notion of an automatic merger of the lots was rejected, and owners were provided the opportunity to show by objective evidence some

physical manifestation on the land of an intent to hold the properties in single and separate ownership. See West Goshen Township.

In Dudlik, however, the definition of "single and separate ownership" was different; the ordinance definition was a lot "the owners of which are not identical with any lot adjoining...." Dudlik, 840 A.2d at 1053. The Court held that that definition legislatively imposed the result that the Court declined to impose under language such as that in Parkside, which required only ownership which was "separate and distinct." In Dudlik, where the ordinance provision expressly required merger for zoning purposes based upon common ownership at the time of enactment of the zoning change, the Court affirmed the zoning hearing board's determination that parcels were merged. The definition in Section 267 of the Joint Ordinance is equivalent to the definition in Dudlik that the Court held to have the effect of requiring merger for zoning purposes based on identity of the adjoining owners, regardless of objective proof of intent to keep the properties distinct. The Zoning Board in applying Section 1208(C)(1)(a) of the Joint Ordinance and not granting a special exception under Sections 1208(C)(2) and 267 did not misapply merger doctrine but rather correctly applied the ordinance. Dudlik.

Further, the Court does not agree with the Melskys' assertion that this result is confiscatory. In Tinicum the Court did not hold that any lot rendered undersized by a zoning change had to be approved for construction regardless of any other concerns. The language they rely upon from Tinicum stating that a pre-existing lot that has been rendered undersized by a zoning change must be permitted to be developed by special exception or variance to avoid confiscation is derived from Jacquelin v. Horsham Township, 312 A.2d 124 (Pa. Cmwlth. 1973). In Jacquelin, however, what was at issue was a single lot, held entirely separately from adjoining lots at the time zoning was enacted, which was rendered undersized for its district. Although truly single and separate lots must be afforded protection against being rendered unsuitable for any use, a lot adjoining another with common ownership at the time of zoning enactment or amendment is different. When required to be merged for zoning purposes to come into conformity, such a lot is used as part of the combined lot; it is not rendered useless.

The Melskys argue that the Zoning Board erred in refusing to grant a variance, raising the same arguments that applying Section 1208(C)(1)(a) of the Joint Ordinance constituted improperly applying the rejected concept of automatic merger. They contend that the finding that a grant would alter the essential character of the neighborhood lacked support because the evidence showed that some other dwellings in the area were on lots less than three acres and they repeat a general claim of confiscation. Finally, the Melskys assert that the Zoning Board erred in finding a physical integration of the two properties, even though it found that at all times the two parcels had maintained a distinct character, i.e., that no appurtenance of the residence was located on the vacant lot, which was farmed.

As Holt correctly indicates, in a similar situation in West Goshen Township, the Court concluded that the lot claimed to be separate was not "separate and distinct" at the time of the enactment of the

zoning ordinance, and it rejected a variance argument because the undersized portion was deemed not to be a separate lot; rather, the total lot was being used for the purpose for which it was zoned.[7] Here also the subject property is not a separate lot. The Melskys failed to establish a right to a variance, and any inconsistency in the Zoning Board's findings as to separate use is irrelevant. The order of the trial court affirming the order of the Zoning Board is affirmed.

Judge McGinley did not participate in the decision in this case.

AND NOW, this 7th day of February, 2005, the order of the Court of Common Pleas of Bucks County affirming the decisions of the Newton Township Zoning Hearing Board is affirmed.

DORIS A. SMITH-RIBNER, Judge

1. Holt questions whether the trial court erred in concluding that Section 1(a) of the Act of July 9, 1976, P.L, 919, as amended, 53 P.S. §4104(a), providing for deemed approvals, applies to a use permit under provisions of Section 1403 of the Newtown Area Joint Municipal Zoning Ordinance (Joint Ordinance) and whether, even if it does, the Zoning Board erred in concluding that the use permit would authorize construction on a portion of a larger parcel where the portion at issue was not a lot held in single and separate ownership under the ordinance provisions. On the cross-appeal the Melskys question whether the Zoning Board erred and abused its discretion in denying a special exception by erroneously applying the doctrine of automatic merger of contiguous lots; in erroneously placing the burden on the applicant of proving whether the two lots had been integrated into a single lot; in refusing to grant a variance to the provision of Section 1208(C)(1) of the Joint Ordinance requiring owners of contiguous nonconforming lots to combine them, which results in confiscation; in refusing to grant a variance to minimum lot size requirements; and in refusing to grant relief to the landowner although the Zoning Board found that the lots in question at all times maintained a distinct character with no physical integration.

2. The Zoning Board was incorrect in stating that the 1959 Newtown Township Zoning Ordinance changed the minimum lot size for this property from 40,000 square feet to 130,000 square feet. Rather, a December 27, 1973 amendment changed the minimum lot size (without public water and sewer) to 130,000 square feet (nearly 3 acres) in the R-1 Low Density district; both Melsky lots, and the two together, became nonconforming at that time. R.R. 152a, 162a.

3. 53 P.S. §4104 provides in pertinent part: (a) A municipality which regulates the construction, erection, maintenance, operation or repair of buildings, structures or devices by means of an ordinance requiring the filing of an application, the payment of a fee and the issuance of a permit shall render a decision either approving or disapproving the application for a permit within 90 days after the application is filed unless the ordinance requires a decision within a lesser period of time, provided that any disapproval of the application shall be issued within said 90-day period containing a brief explanation setting forth the reasons for said disapproval and the manner in which the application can be corrected and/or modified to obtain the required approval. If no decision is rendered on the application within 90 days, the application shall be deemed to be approved and the permit shall be deemed to have been granted immediately, unless the applicant has agreed in writing to an extension of time. No agreement to extension of time for action may be made a part of an application form nor may any such agreement be required of any applicant under threat of denial of the application.

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.... (c) As used in this section, "buildings, structures or devices" means anything constructed or erected with a fixed location on or in the ground including dwellings, offices, places of assembly, mobile homes, signs, walls, fences, or other improvements to real estate.

4. In a zoning appeal, when the trial court takes no additional evidence, this Court's review is limited to determining whether the zoning hearing board committed an error of law or an abuse of discretion. Dudlik v. Upper Moreland Township Zoning Hearing Board, 840 A.2d 1048 (Pa. Cmwlth. 2004).

5. Holt also argues that if Section 4104(a) applies to applications for use permits, the Zoning Board erred in determining that there was a deemed approval because Section 1208(C)(1) of the Joint Ordinance requires that the entire property be considered as one lot. This argument shall be addressed in the Court's consideration of the Melskys' appeal from the special exception and variance denials.

6. The Zoning Board cited In re Appeal of Puleo, 729 A.2d 654 (Pa. Cmwlth. 1999), for the proposition that when adjoining parcels were held in common ownership at the time of enactment of an ordinance, the burden was placed on the applicant to show by objective evidence that they were intended to be held in single and separate ownership at that time.

7. In analytically distinct cases where property was held by different owners at the time of enactment of zoning, to which provisions such as Section 1208(C)(1)(a) of the Joint Ordinance do not apply, the Court has refused to endorse a rule that would permit anyone but the adjoining owner to purchase and develop, and further the Court has placed the burden of proving a claim of a physical merger of such lots on the party advancing it. Appeal of Gregor, 627 A.2d 308 (Pa. Cmwlth. 1993); Township of Middletown v. Middletown Township Zoning Hearing Board, 548 A.2d 1297 (Pa. Cmwlth. 1988).