JOHN H. GALLAGHER AND BARBARA L. GALLAGHER VS. WASHINGTON TOWNSHIP, Franklin County Branch, No. Misc. BB-177

DEMURRER, MANDAMUS, EXHAUSTION OF REMEDIES

Plaintiff landowners applied to Township for inclusion of their farm within the Township Agricultural Security Area. At a public hearing the Township Supervisors informed the plaintiffs that their farm would not be included within the Township Agricultural Security Area unless they agreed to grant a right-of-way through the farm for future road expansion. Subsequent to the Township's denial of the application, plaintiffs sought compensatory damages and a writ of mandamus to order the Township to include the farm within the Agricultural Security Area. The Township objected in the nature of a demurrer. The court granted the demurrer, holding that the plaintiffs failed to exercise the remedy provided by statute and that mandamus may not be used to require way of performing a discretionary act.

1. A demurrer should be granted where from all pleaded facts and inferences therefrom, it is clear that no recovery is possible under any theory of law.

2. The decision of local government of whether a particular property should be included in the Agricultural Security Area as set forth in 3 P.S. § 901 et seq. is a discretionary act for which a writ of mandamus is inappropriate.

3. Township's conditioning of farm's inclusion in the Agricultural Security Area upon the execution of a right-of-way in favor of the Township is a proper exercise of authority under 3 P.S. § 907 if the right-of-way is essential to the Township's comprehensive plan.

4. Mandamus is an extraordinary remedy used to compel official performance of a ministerial act or mandatory duty only where the plaintiff has a clear legal right, the defendant has a corresponding duty, and no other appropriate and adequate remedy exists.

Matthew R. Battersby, Esquire, Counsel for Plaintiffs
Frank J. Lavery, Jr., Equire, Counsel for Defendant

OPINION AND ORDER

Herman, J., September 5, 1995:

OPINION

The plaintiffs, John H. Gallagher and his wife, Barbara L. Gallagher, own a 33-acre farm in Washington Township, Franklin County. The plaintiffs applied for the farm's inclusion within the Township Agricultural Security Area created pursuant to state law and local ordinance. Following consideration of the farm at a public hearing on November 21, 1994, the Township Supervisors denied the application on December 5, 1994 and notified the plaintiffs in writing of their decision on December 14, 1994. The plaintiffs filed a complaint for a writ of mandamus to order the Township to include

the farm within the Agricultural Security Area. The plaintiffs also seek an award of compensatory damages. The Township filed preliminary objections in the nature of a demurrer, counsel submitted memoranda to the Court and argument was held on May 4, 1995. This matter is ready for decision.

At a public hearing on November 21, 1994, the Township Supervisors informed the plaintiffs that their farm would not be included within the Township Agricultural Security Area unless they signed an agreement to allow a right-of-way through their farm for future road expansion in conformity with the Township comprehensive plan. The Supervisors did not formally vote on the plaintiffs' application for inclusion at the hearing. On December 5, 1994, the Supervisors held a meeting and adopted Ordinance No. 130 which established a revised Agricultural Security Area for the Township and did not include the plaintiffs' farm. The Supervisors notified the plaintiffs of the farm's exclusion by letter dated December 14, 1994.[1]

The plaintiffs argue that (1) the December 14, 1994 notice was not timely under 3 P.S. Section 908(b) which requires that property owners be notified in writing of the Supervisors' decision within ten days; and (2) the Supervisors' requirement of a right-of-way was an illegal exercise of their discretion under the Agricultural Area Security Act, 3 P.S. Section 907(a) and a violation of due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 27 of the Pennsylvania State Constitution.

A demurrer should be granted where considering all well-pleaded, material and relevant facts and every inference fairly deducible from those facts, it is clear that no recovery is possible under any theory of law. *Rutherford v. Presbyterian-University Hospital*, 417 Pa. Super. 316, 612 A.2d 500 (1992); *Cianfrani v. Commonwealth State Employees Retirement Board*, 505 Pa. 294, 479 A.2d 468 (1984). All material facts set forth in the complaint are deemed admitted for purposes of that determination. *Clevenstein v. Rizzuto*, 439 Pa. 397,

[1]The Agricultural Security Area Advisory Committee of the Township had met on August 4, 1994 and voted to include plaintiffs' farm in the Agricultural Security Area without conditions. Thereafter the Township Planning and Zoning Commission recommended inclusion provided that the plaintiffs sign a right-of-way in favor of the Township for future road expansion.

266 A.2d 623 (1970). Any doubt as to whether the demurrer should be granted should be resolved in favor of refusing to grant it. *Commonwealth Department of Environmental Resources v. Peggs Run Coal Company*, 55 Pa. Commw. 312, 423 A.2d 765 (1980).

Section 907(a) of the Agricultural Security Area Law, 3 P.S. Section 901 *et seq.* provides that any local public body acting under the law shall weigh various factors in deciding whether a particular property should be included in the Agricultural Security Area. One of these factors is that the "[u]se of land proposed for inclusion in Agricultural Security Area shall be compatible with local government unit comprehensive plans." Section 907(a)(2). In paragraph 7 of their complaint, the plaintiffs aver that at the November 21, 1994 hearing before the Supervisors they were informed their farm would not be included in the area unless they agreed to execute a right-of-way agreement over the farm for future expansion of the Township roads. In the December 14, 1994 written notice sent to the plaintiffs by the Township Manager Michael A. Christopher (Exhibit "C" attached to the Complaint) the plaintiffs were advised that the Supervisors were not willing to include the farm into the Agricultural Security Area because the Township's comprehensive plan indicated that a future roadway is planned to run through the farm. The plaintiffs counter that the Supervisors' refusal to include their farm constitutes a violation of Section 907, as well as the spirit of the Agricultural Security Area law because the demand they execute a right-of-way in exchange for inclusion in the Agricultural Security Area constitutes a condemnation and taking of their land without just compensation and as such is contrary to both the Commonwealth and United States Constitutions. Plaintiffs therefore seek this writ of mandamus to compel the Township to include their farm in the Agricultural Security Area.

The Township correctly points out that mandamus is an extraordinary remedy used to compel official performance of a ministerial act or mandatory duty only where the plaintiff has a clear legal right, the defendant has a corresponding duty, and no other appropriate and adequate remedy exists. *Pennsylvania Dental Association v. Commonwealth Insurance Department*, 512 Pa. 217, 516 A.2d 647 (1986).

> . . .[W]hile a court may direct that discretion be exercised [by a public body or public official] it may not specify *how* that

> discretion is to be exercised nor require the performance of a particular discretionary act. . . The writ cannot be used to control the exercise of discretion or judgment by a public official or administrative or judicial tribunal; to review or compel the undoing of an action taken by such an official or tribunal in good faith and in the exercise of legitimate jurisdiction, even though the decision was wrong; to influence or coerce a particular determination of the issue involved; or to perform the function of an appeal or writ of error. . .In short mandamus is chiefly employed to compel the performance (when refused) of a ministerial duty, or to compel action (when refused) in matters involving judgment and discretion It is not used to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of an action already taken. . . mandamus is a device that is available in our system to compel a tribunal or an administrative agency to act when that tribunal or agency has been "sitting on its hands." It must not be turned into a general writ of error or writ of review. . .

Id. at 227-228.

The plaintiffs argue that the Township may not condition their farm's inclusion in the Agricultural Security Area upon their execution of a right-of-way in favor of the Township. They maintain that since Section 907 does not explicitly list the Township's need for a right-of-way as a proper basis for excluding the farm, the decision to exclude the farm was improper. We do not subscribe to this interpretation of Section 907(a)(2) which specifically provides that if a property's inclusion will interfere with the implementation of the Township's comprehensive plan, the Township may deny the application. According to the averments of the complaint, including the attached exhibits, the Township examined the plaintiffs' farm in relation to the comprehensive plan and determined that the only way to incorporate the farm into the Agricultural Security Area was to obtain from the plaintiffs a right-of-way for future road expansion. The Township complied with the statute in considering the requirements of the comprehensive plan and therefore we cannot compel the Township to include the farm in the Agricultural Security Area.

While we agree with the plaintiffs that the aim of the Agricultural Security Area Act is to conserve and protect agricultural land (3 P.S. Section 901) this does not preclude a local governing body such as the Township from excluding a particular property from the Agricultural Security Area where it will obstruct the effective

implementation of the comprehensive plan for the development or expansion of Township roads.

The plaintiffs have not established a clear right to have their farm included in the Agricultural Security Area. The Township has not neglected to act under Section 907 and therefore to grant a writ of mandamus would be improper particularly where the plaintiffs had another remedy available to them to challenge the Township's decision. Section 910 provides:

Any party in interest aggrieved by a decision or action of the governing body relating to the creation, composition, modification, rejection or termination of an agricultural area may take an appeal to the court of common pleas, in the manner provided by law within 30 days after such decision or action.

The plaintiffs failed to file a statutory appeal pursuant to Section 910 and therefore may not be granted a writ of mandamus instead.[2]

The plaintiffs also argue that the Township did not notify them of the decision to exclude the farm within ten days as required by 3 P.S. Section 908(b). The plaintiffs acknowledge in their complaint that at the November 21, 1994 public hearing the Township advised the plaintiffs the property would be included in the Agricultural Security Area only if they executed a right-of-way but that the Township took no formal vote on the matter. On December 5, 1994 the Township enacted Ordinance No. 130 which revised the Agricultural Security Area and did not include the plaintiffs' farm. The plaintiffs were notified of their exclusion on December 14, 1994. The plaintiffs' position is that they should have received written notice of the Township's decision by December 1, 1994, ten days from the date of the November 21, 1994 public hearing. Since the Township had already decided (if informally) at that public hearing that the farm would not be included absent a right-of-way, plaintiffs contend the

[2]Following oral argument, plaintiffs' counsel forwarded to us an article discussing the United States Supreme Court's decision in *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed. 304 (1994). That case involved analysis of local governmental land use regulations as they relate to the takings clause of the Fifth Amendment to the United States Constitution. As discussed above, we find that the plaintiffs cannot pursue a constitutional challenge to the Township's decision through a writ of mandamus; therefore *Dolan* and related cases are inapposite.

revised Ordinance does not apply to their application which was pending at the time of the Ordinance's adoption. The plaintiffs cite no case law or other authority in support of this contention. In their legal memorandum they also imply that the Ordinance was revised with the specific intent to preclude their farm from the Agricultural Security Area. Based upon the facts available to us in the complaint, we cannot draw that inference or reach that conclusion. Even if the Township failed to notify the plaintiffs in a timely manner, the Act does not require us to nullify the Township's decision on that basis alone.

The plaintiffs have not established their right to obtain a writ of mandamus to compel the Township to include their farm in the Agricultural Security Area. The plaintiffs also failed to file a statutory appeal to this Court for review of the Township's decision. Consequently we are constrained to grant the Township's demurrer and dismiss the plaintiffs' complaint.

ORDER OF COURT

NOW this 5th day of September 1995, the plaintiffs' complaint for a writ of mandamus is hereby DISMISSED.