

**IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION**

WILLIAM F. DEIBERT and ALMA DEIBERT, husband	:	
and wife, and MICHAEL P. BOROWSKI and PAMELA	:	NO. 2006-C-0084
BOROWSKI, husband and wife,	:	
Plaintiffs	:	
	:	
v.	:	
	:	
PENNSYLVANIA TURNPIKE COMMISSION,	:	
trading as the PENNSYLVANIA TURNPIKE, an	:	ASSIGNED TO:
Instrumentality of the Commonwealth of Pennsylvania;	:	Honorable J Brian Johnson
P.A. GIANNI HOMES, INC., trading as CORRADO	:	
HOMES; CORRADO HOMES, INC., trading as	:	
CORRADO HOMES; MINESITE ROAD, L.P., a limited	:	
partnership; and MINESITE ROAD, LLC, its general	:	
partner, trading as CORRADO HOMES; and LOWER	:	
MACUNGIE TOWNSHIP, a Second Class Township,	:	
Defendants	:	

ORDER

AND NOW, this 22nd day of October, 2010, upon consideration of the Plaintiffs' Motion For Post Trial Relief Pursuant To Pa. R.C.P. 227.1 filed on June 24, 2010 and the responses thereto; the Defendant, Lower Macungie Township's Post-Trial Motion Pursuant To Pa. R.C.P. 227.1 filed on June 25, 2010 and the Pa. R.C.P. 227.1(c) Motion For Post-Trial Relief Of Defendants, Corrado Homes, Inc. And Minesite Road, LP And Minesite Road, LLC filed on July 6, 2010 and the responses thereto and after argument thereon;

IT IS HEREBY ORDERED that the motions are GRANTED in part and DENIED in part;

IT IS FURTHER ORDERED that the June 15, 2010 Opinion and Order filed in this matter are hereby AMENDED as set forth in the Amended Order and Amended Opinion being filed contemporaneously with this Order; and

IT IS FURTHER ORDERED that any issues not addressed, either explicitly or by necessary implication, in the Amended Opinion, will be addressed in the accompanying Memorandum Opinion.

BY THE COURT:

J. Brian Johnson, Judge

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and wife, and MICHAEL P. BOROWSKI and PAMELA	:	NO. 2006-C-0084
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partnership; and MINESITE ROAD, LLC, its general	:	
partner, trading as CORRADO HOMES; and LOWER	:	
MACUNGIE TOWNSHIP, a Second Class Township,	:	
Defendants	:	

Appearances:

Victor F. Cavacini, Esq.
For Plaintiffs

Brian R. Tipton, Esq.
For Defendant, Pennsylvania Turnpike Commission (“Turnpike”)

Paul G. Lees, Esq.
For Defendant, PA Gianni Homes, Inc. (“Gianni”)

Philip Daniel Priore, Esq.
For Defendants, Corrado Homes, Inc. (“Corrado”),
Minesite Road, L.P. and Minesite LLC (“Minesite”)

John D. Kearney, Esq.
For Defendant, Lower Macungie Township (“LMT”)

MEMORANDUM OPINION

J. Brian Johnson, Judge

Before the Court for consideration are the Plaintiffs’ Motion For Post Trial Relief Pursuant To Pa. R.C.P. 227.1 filed on June 24, 2010 and the responses thereto; the Defendant, Lower Macungie Township’s Post-Trial Motion Pursuant To Pa. R.C.P. 227.1 filed on June 25,

2010 and the Pa. R.C.P. 227.1(c) Motion For Post-Trial Relief Of Defendants, Corrado Homes, Inc. And Minesite Road, LP And Minesite Road, LLC filed on July 6, 2010.

The Court is filing an Amended Order and Amended Opinion on the Plaintiff's First Amended Complaint contemporaneously herewith. The Amended Opinion addresses all but four (4) of the issues raised by the parties, either explicitly or by necessary implication. The Court will address the four (4) remaining issues, below.

I. Corrado/Minesite Complied With The SWMA And The SWMA Preempts Act 167 And SALDO And Therefore Corrado/Minesite Cannot Be Found To Have Violated These Enactments

Preemption is “a judicially created principal, based on the proposition that a municipality, as an agent of the state, cannot [sic] contrary to the state.” Burkholder v. Zoning Hearing Board of Richmond Twp., 902 A.2d 1006, 1012 (Pa. Commw. 2006). Preemption can be addressed in a statute by “expressly specifying that municipalities may enact ordinances not inconsistent with the state law that promote the state law’s purpose.” Id. Local legislation cannot permit what a state statute forbids, or prohibit what state enactments allow.” Id. However, in order for the state statute to preempt a municipal ordinance, either the statute must state on its face that local legislation is forbidden or indicate an intention on the part of the legislature that it should not be supplemented by municipal bodies. Id.

The Storm Water Management Act (“SWMA”) requires a municipality to (1) implement a watershed storm water management plan and (2) within its storm water management plan, set forth certain criteria that will assure the rate of runoff generated by a residential construction project does not exceed the pre-development rate *or* that will manage the quantity, velocity and direction of the runoff so as to protect against potential injury. See 32 P.S. § 680.1, et seq.

The moving defendants argue that the Little Lehigh Watershed Storm Water Plan - Act 167 (“Act 167”) and the Lower Macungie Subdivision and Land Development Ordinance (“SALDO”) provisions are not in conformity with the SWMA in that they operate to impose more stringent requirements than are articulated under the SWMA, are that they are therefore void. Namely, Act 167 and the SALDO contain language that requires a developer to assure that the rate of runoff does not exceed the pre-development rate *and* manage the quality, velocity and direction of the runoff. The Moving Defendants suggest that, as a result, the Court need only apply the SWMA.

A legislative enactment can be declared void only when it violates the fundamental law clearly, palpably, plainly and in such a manner as to leave no doubt or hesitation in the mind of the court. *See Adams Outdoor Advertising, LP v. Zoning Hearing Board of Smithfield Tp.*, 909 A.2d 969 (Pa. Commw. 2006). Although an ordinance cannot be sustained to the extent that it is contradictory to or inconsistent with the constitution or an enabling statute, a municipality may make reasonable additional regulations in aid and furtherance of the purpose of the general law as may be appropriate to the necessities of the particular locality. *See Rural Area Concerned Citizens, Inc. v. Fayette County Zoning Hearing Bd.*, 166 Pa. Commw. 520, 646 A.2d 717 (1194).

The policy and purpose of the SWMA is to:

- (1) Encourage planning and management of storm water runoff in each watershed which is consistent with sound water and land use practices.
- (2) Authorize a comprehensive program of storm water management designated to preserve and restore the flood carrying capacity of Commonwealth streams; to preserve to the maximum extent practicable natural storm water runoff regimes and natural course, current and cross-section of water of the Commonwealth; and to protect and conserve ground waters and ground-water recharge areas.

(3) Encourage local administration and management of storm water consistent with the Commonwealth's duty as trustee of natural resources and the people's constitutional right to the preservation of natural, economic, scenic, aesthetic, recreational and historic values of the environment. 32 Pa. C.S. § 680.3.

It is clear to the Court that Act 167 and the SALDO do not “violate[] the fundamental law clearly, palpably, plainly” so as to leave no doubt or hesitation in the mind of the Court. In fact, Act 167 and the SALDO are not in conflict with the purpose of the SWMA at all, but rather contain mandates that directly further the SWMA’s policy. Therefore, this argument is DENIED.

II. Act 167 And/Or SALDO Are Unconstitutional

Corrado argues that Act 167 and the SALDO violate the due process protections of the United States Constitution and Constitution of the Commonwealth of Pennsylvania in that they operate to impose various requirements on a developer that cannot be reconciled with the controlling requirements set forth in the SWMA.

First, it appears to the Court that the moving defendants waived this argument by not making it at trial. However, the Court notes that, as addressed more fully above, Act 167 and the SALDO contain mandates that directly further the SWMA’s policy and that LMT is authorized to make additional regulations beyond those contained in the SWMA in furtherance of the SWMA’s purpose. Therefore, this argument is DENIED.

III. Indemnification And/Or Contribution As To Corrado

Corrado argues that, if it is found liable, it is entitled to indemnification and/or contribution from the Co-Defendants. The Court is not persuaded by this argument. Therefore, this argument is DENIED.

III. Calculation Of Damages

The Plaintiffs believe that there should be an award of damages predicated on the loss of the value suffered by them to their land. Conversely, Corrado and LMT argue that, should the Court award damages, the proper amount of the award would be the cost of remedying the subject problem.

In Wade v. S.J. Groves & Sons Company, 283 Pa. Super. 464, 424 A.2d 902 (1981), the Court held that the measure of damages for injuries to property is the cost of repairs where that injury is reparable; however, where injury is characterized as permanent, the measure of damages becomes a decrease in the fair market value of the property. The Commonwealth Court has interpreted the permanence of an injury in terms of whether the “cost of repair would be unfair or inappropriate under the circumstances” in order to prevent “windfall awards” to plaintiffs where restoration costs exceed diminution in market value. Duquesne Light Co. v. Woodland Hills Sch. Dist., 700 A.2d 1038, 1052 (Pa. Commw. Ct. 1996).

Deibert and Borowski engaged their engineers at the request of LMT to do a feasibility analysis of a remediation effort to pipe the increased volume of surface water to a nearby detention pond located in another development known as “Hidden Valley Development.” The feasibility analysis shows that there is a potential solution to the surface water problem by transporting surface water to the Hidden Valley Development. The piping system to the Hidden

Valley Development must be installed along and under a public street known as East Texas Road, owned by LMT, and there is need for grant of easements over private land. In reviewing the proposed plan, the Lehigh County Planning Commission indicated that the plan was acceptable to it and to the Conservation District, that it was aware of the problem with the current system, and that it would facilitate the remediation in any way that it could. The cost to install the piping system to the Hidden Valley Development is estimated to be approximately \$371,325.00 together with numerous other associated costs as set forth in the Amended Order and Amended Opinion. The diminution in fair market value for both the Deibert and Borowski properties is approximately \$752,000.00.

It appears to the Court that the injury caused by the storm water management facilities is not permanent, as there is a feasible remedy, and the proper measure of damages is \$371,325.00 together with numerous other associated costs as set forth in the Amended Order and Amended Opinion.

Corrado's argument that the Court should not award damages because the Plaintiffs also sought, and preferred, equitable relief, is DENIED. Therefore, the Plaintiff's motion as to damages is DENIED.

BY THE COURT:

October 22, 2010

J. Brian Johnson, Judge