Atty Preston, Part 2 (22)

The Bethlehem Gadfly 2 W. Market St., Gadfly's posts, Serious Issues November 19, 2018

(22nd in a series of posts on 2 W. Market St.)

So let's focus on that 3rd bullet. There are 2 parts there to Atty Preston's argument:

1) this petition is not spot zoning

Atty Preston is anticipating that his opponents will argue that the proposal represents spot zoning, defined as "the singling out of one lot or a small area for different treatment from that accorded similar surrounding land indistinguishable from it in character for the economic benefit of the owner of that lot or to his economic detriment."

After disposing of the "economic benefit" part of the definition to Gadfly's satisfaction, Atty Preston poses what he himself calls the "real question": *"does [the proposal] single out a single lot for treatment and is that lot indistinguishable from surrounding properties."* And he cites a case (Appeal of Kates 393 A. 2nd 499) in which a non-conforming use was allowed to exist: "because the ordinance does not rezone any property but merely permits the expansion of existing buildings if they meet certain criteria set forth in the ordinance. . . . Spot zoning is a concept of land classification. The ordinance here does not alter the zoning classification of land on which the use is located and does not therefore spot zone any property."

Atty Preston's conclusion is that "In order to have spot zoning, you actually have to rezone the particular piece of property." And that is not the case here.

Say again using Kates language: the proposed amendment "does not alter the zoning classification of [2 W. Market] and does not therefore spot zone [it]."

Does Gadfly have that right?

If so, Atty Preston has a strong point.

You can find the "Appeal of Kates" here:

https://www.casemine.com/judgement/us/5914c55cadd7b049347d3b86

The pertinent paragraph seems to be:

*The appellants first argue that the Ordinance permitting the expansion of nursing homes was designed 150*150 for the benefit of four specific landowners and that it, therefore, constitutes unlawful spot zoning. We*

find no merit in this argument because the Ordinance does not rezone any property but merely permits the expansion of existing buildings if they meet certain criteria set forth in the Ordinance. Spot zoning is defined as "`"[a] singling out of . . . a small area [of land] for different treatment from that accorded to similar surrounding land. . . ."" Mulac Appeal, 418 Pa. 207, 210, 210 A.2d 275, 277 (1965). Spot zoning is nevertheless a concept of land classification. The Ordinance in question here does nothing to alter the zoning classification of the land on which nursing homes are located and it does not, therefore, spot zone any property.

In response, Atty Tim Stevens for the opposition said: "it does alter the classification; we're speaking a brand-new use, an office use, and putting it into a residential property, and is doing so in one particular property that is serving this particular property owner." Atty Stevens was operating under the 5-minute time limit of the Commission, was trying to pack in several points, thus, unfortunately, there is no extended rebuttal of this specific point by Atty Preston that would help us judge the quality of Preston's argument.

Kates seems to equate "land classification" with zoning. Stevens — though, again, to be fair, he had no time to elaborate — seems to say a new use, without re-zoning, would be a change in classification.

Does Gadfly have that right?

It seems to Gadfly that, absent stronger rebuttal, Atty Preston has made a strong point here. The petition does not rezone the property, as Gadfly understands it. According to Kates, spot zoning can not be applied here. Gadfly is thinking of several things, almost all of which are above his pay grade.

1) Is Kates truly a precedent? Gadfly found this in regard to Hines Nursery v Plumstead Tp (2004): "Van Wingerden's *spot zoning* argument has no merit primarily because *spot zoning* is a concept of land classification. Appeal of Kates, 393 A.2d 499, 501 (Pa.Cmwlth. 1978)." If "land classification" = "zoning," then it seems like Kates was a precedent in 2004. Gadfly doesn't know how to find other cases.

2) Why isn't Kates and this land classification/zoning criteria for spot zoning in such guides for planners as:
https://www.crcog.net/vertical/sites/%7B6AD7E2DC-ECE4-41CD-B8E1-

BAC6A6336348%7D/uploads/Zoning_Validity_Challenges_Handbook.pdf
http://plannersweb.com/2013/11/understanding-spot-zoning-2/
For instance, the first link is to a Pa. guide. You would think it would be "gospel." But it does not mention Kates and has this checklist:

Is it Spot Zoning?
Although a Planning Commission is not qualified to make a legal determination of spot zoning, it should review any zoning amendment with scrutiny to identify whether or not such an issue may exist. The following questions should be considered when reviewing any zoning amendment to help identify whether or not it may constitute spot zoning:

- *Is the requested amendment consistent with the Comprehensive Plan?*
- *Is the requested use or zoning district significantly different from the surrounding area?*
- *Will the use or district benefit a few landowners while creating negative impacts to surrounding landowners?*
- *Will the amendment affect a small area and provide private, rather than public benefit?*

The "use" in the 3rd bullet would seem particularly pertinent here. It looks to Gadfly that these considerations would work against Atty Preston's case.
Gadfly is REALLY puzzled by this omission of Kates. What is he missing?????
3) Atty Preston is assuming that the opposition will use spot zoning as an argument. But what if it doesn't? Are there strong arguments to deny the petition without citing spot zoning? Could denial avoid mentioning spot zoning?
As Gadfly says, all above his pay grade.
Gadfly cannot help but be puzzled and can go no further except to say again that Atty Preston may have a strong point.
————————————

2) the property is distinguishable from others

Atty Preston indicates he won't need this argument since the first point here is strong enough. His argument has to do with the mixed-use of the lot. No other in 2 W. Market's neighborhood has this residential/retail combination, he says. In that respect, it is distinguishable, and thus the proposed change would not be spot zoning according to Atty Preston.

But to Gadfly that argument is a stretch. Gadfly believes that any jury in the land (ha! but it's probably a learned judge we should be thinking about!) would be thinking of appearance, and clearly 2 W. Market is indistinguishable in appearance and style with, say, the 6 next houses to the west in its block.

But focus would be on the phrase "in character" in the definition of spot zoning: "the singling out of one lot or a small area for different treatment from that accorded similar surrounding land indistinguishable from it **in character** . . . ."

What does "in character" mean? My dictionary says, "in accord with a person's [thing's] usual qualities or traits." Is a mixed-use lot indistinguishable "in character" from a single-use lot? In applying the "in character" standard, should we consider the whole lot or just the residence part of the lot? Whew! Above Gadfly's pay grade as well.

But, again, Gadfly would lean to defining "in character" to the style and use of the residence of "2 W. Market," not the technical classification of the lot as a whole and separate from the commercial buildings which front on another street and don't even appear connected to the residence.

But it seems to me that legally Atty Preston has a potentially strong point here as well.

————————

Ok, Gadfly followers, I have brought you far into the weeds. Gadfly loves this stuff. Ha! How about you? Would you care to comment? Help shed some light?