

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David Chauner and Carolyn :
Worthington, and William and Mary :
Ewing, :
Appellants :

v. :

Board of Supervisors of Newlin :
Township : No. 129 C.D. 2009

Robert M. Curtis, :
Appellant :

v. :

The Zoning Hearing Board of Newlin :
Township :

David Chauner, Carolyn Worthington, :
William Ewing, Mary Ewing, :
Michael Lewis, and Jill Lewis :

v. :

The Board of Supervisors of Newlin : No. 213 C.D. 2009
Township : Argued: September 17, 2009

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: October 9, 2009

Before us are cross appeals from a decision of the Court of Common Pleas of Chester County (trial court) which consolidated three separate appeals taken over the years involving various requests that Robert Curtis (Landowner)

made to construct a Quonset hut on his property to house excavating equipment and antique cars. Landowner's appeal deals with two decisions of the Zoning Hearing Board of Newlin Township (Zoning Board), that the trial court affirmed, that denied his application to allow the Quonset hut as an accessory use and denied his request for a special exception that would allow the structure as a non-conforming use. David Chauner and Carolyn Worthington, and William and Mary Ewing (Neighboring Property Owners) have appealed the trial court's order affirming the decision of the Board of Supervisors of Newlin Township (Board of Supervisors) to grant a conditional use to allow construction of the Quonset hut as a heavy equipment sales or repair facility. Because we discern no error in any of the three decisions by the trial court, we affirm.

Landowner owns a 10.1 acre parcel of land located in Newlin Township, Pennsylvania, which was originally zoned residential but since 1999 when a new zoning ordinance was enacted it has, like all property in the Township, been zoned "Flexible Rural Development," the only zoning district. There are uses as of right, by special exception and by conditional use. If a use is not specifically provided for, it is permitted if it is substantially similar to other permitted uses, special exceptions or conditional uses. Also unique under the Township's Zoning Ordinance is that two main uses are allowed on the same zoning lot.

Landowner constructed his residence on the property, and since 1982, Landowner has also used the property to store and repair excavating equipment (bulldozers, dump trucks, backhoes) used in his commercial excavating business as well as to store antique cars. Landowner's property is an "interior lot," and he and his neighbors utilize a 10-foot wide private driveway contained within a 50-foot easement as their sole means of access to the nearest public road. On several

occasions, Landowner sought permission from the Zoning Board to erect a 50' by 125' Quonset hut on his property near the private driveway in order to store his excavating equipment and vehicles indoors.

In 2002, Landowner sought a special exception to expand a non-conforming use because his storage of the equipment and vehicles on the property pre-dated the Township's current Zoning Ordinance which was enacted in 1999. However, when Landowner began storing his heavy equipment on the property in 1982, the Township's 1980 Zoning Ordinance only allowed residential uses. The Zoning Board denied his special exception because he had not made out that the storage of heavy equipment was a lawful non-conforming use. Landowner appealed to the trial court.

In 2005, Landowner applied for a permit to build the storage hut as an "accessory structure" to the main residential use. A permit was originally issued on the condition that Landowner limit his use of the storage hut to non-commercial purposes, and Landowner began construction. However, Neighboring Property Owners appealed the issuance of the permit and it was revoked. The Zoning Board upheld the revocation of the permit to build the storage hut because its proposed location did not comply with the 50-foot setback requirement from the private driveway. Landowner again appealed to the trial court.

In 2006, Landowner sought a conditional use from the Board of Supervisors to erect the Quonset hut according to Zoning Ordinance §704

Automotive/Vehicular Sales and Service, Gas Station, **and Similar Facilities**¹ and §709 Heavy Equipment Sales, Service, and/or Repair Facility.² Finding that

¹ Section 704 of the 1999 Newlin Township Zoning Ordinance provides in pertinent part:

A. Lot Area. The minimum lot area is two acres.

B. Location Controls. No facility shall be located within 500 ft of a school, place of worship, public recreation area, or residential area.

C. Access. All means of access shall be designed to provide safe and convenient travel without the potential for causing vehicles to back up into a public street.

D. Setbacks. Pumps, pump islands, vacuum stations, air towers, vending machines, canopies, and other structures shall not be located in any required yards or set backs. No outdoor display of products not associated with the use shall be permitted.

E. Landscaping. A landscaped screening area shall be provided along all property lines, excluding the front line, property lines adjacent to existing commercial uses, and access points. Planting shall not interfere with the normal line of sight needed for safe entering and existing maneuvers by vehicles.

F. Land Development Plan Requirements. The following requirements shall be shown on a land development plan:

1. All vehicles (except for tow trucks) shall be stored within a building when the facility is not open for business, but may be stored in rear yards, or in front or side yards when screened from view. Licensed vehicles, unregistered or dismantled automobiles, trucks, tractors, trailers, or parts may be placed outside for periods not to exceed 14 days. No Township rights-of-way may be utilized for any purpose. Vehicles shall not be parked outside the main structure during the hours of 9 PM to 6 AM in excess of one vehicle for every 300 sf of business lot area exclusive of buildings or structures, unless screened. There shall be no

(Footnote continued on next page...)

Landowner's proposed use was sufficiently similar to those permitted by these sections, the Board of Supervisors granted Landowner's conditional use, subject to conditions.³ Neighboring Property Owners appealed to the trial court, and the trial court consolidated this with Landowner's two previous appeals.

(continued...)

limitation on the number of vehicles parked within a structure.

I. Hours of Operation. The facility shall not operate between the hours of 12:00 Midnight and 6:00 AM.

² Section 709 of the 1999 Newlin Township Zoning Ordinance provides in pertinent part:

A. Minimum Lot Size. Minimum lot size shall be four acres.

B. Location of Activities. All service and/or repair facilities shall be conducted within enclosed structures or in rear yard areas.

C. Screening. All exterior storage and/or display areas shall be screened from adjoining residential properties. All exterior storage or display areas shall be set back not less than 75 ft from adjoining street lines and shall be covered with a dustless surface.

D. Fencing. The storage of junked vehicles, boats, machinery, trucks, trailers, motor homes, vehicles bodies, and similar equipment shall be located only within a fenced-in area (fences facing front yards shall be solid and not less than six feet in height).

F. Outside Storage of Vehicles. No unregistered vehicle shall be stored outside for more than 180 days.

G. Control of Nuisances. The applicant shall submit a plan for controlling noise, traffic, and lighting, as well as a plan for the disposal of solvents, waste oils, degreasers, and other hazardous materials.

³ The April 17, 2006 order of the Board of Supervisors granted Landowner's conditional use application, subject to the following conditions:

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1. The front façade (end of building facing the private street) shall be designed in accordance with a sketch prepared by Bill Ewing and attached to this ORDER as Exhibit “A”.
2. The proposed Quonset hut shall be set back from the edge of the right-of-way 50 feet minimum.
3. The proposed hut shall not exceed 52 feet in width by 100 feet in length.
4. All equipment and vehicles of whatsoever nature shall be stored at all times inside the building.
5. The use of the building shall be used solely for applicant’s personal use; there shall be no work done on the subject premises by any commercial or industrial tenant or by applicant excepting work on vehicles and equipment owned by applicant.
6. There shall be no emission or smoke, gasoline, diesel or other vapors evident outside of the building except during transportation of vehicles to and from the site.
7. There shall be no outdoor storage of equipment, vehicles, machinery or trash at anytime.
8. There shall be no display of vehicles on the subject premises excepting those vehicles used by applicant for personal use and daily transportation.
9. There shall be no signs advising of applicant’s use.
10. Applicant shall submit for review and possible approval by the Board of Supervisors a landscape plan to mitigate the effects of the commercial looking Quonset style building and to attempt to blend same into the residential neighborhood.
11. No dumpster shall be located outside of the building.
12. There shall be no drive on the east side of the building connecting to the private street. All access to the proposed building shall be via the existing house and garage driveway located west of the existing curve of the private street.
13. Applicant shall comply with all other laws of the Commonwealth of Pennsylvania and ordinances of Newlin Township.

Without taking additional evidence, the trial court upheld all three previous decisions. Regarding Landowner's appeals, the trial court held the Zoning Board properly denied Landowner's request for a special exception based on a lawful non-conforming use because when he began storing his excavating equipment on the property, it was zoned residential and industrial and commercial activities were not permitted. The trial court also held the Zoning Board properly revoked Landowner's building permit because the Quonset hut did not meet the 50-foot setback requirement from the private driveway.

Regarding Neighboring Property Owners' appeal from the Board of Supervisors' grant of the conditional use, the trial court agreed with them that Landowner's proposed use did not fit squarely within §§704 or 709, but stated that the Board of Supervisors was entitled to considerable discretion in interpreting its own ordinance. Because the Board of Supervisors determined Landowner's proposed use was sufficiently similar to and much less intrusive than operation of a heavy equipment service or repair facility, the trial court found no error in granting Landowner's conditional use application even though he would only be using the storage hut for his own personal use.

Both parties have filed cross appeals,⁴ essentially raising the same issues they asserted before the trial court. Neighboring Property Owners have appealed the Board of Supervisors' grant of the conditional use application arguing that Landowner's proposed use does not satisfy the ordinance's technical

⁴ Our scope of review in a zoning case where the court below took no additional evidence is limited to whether the zoning board committed an error of law or abuse of discretion. *Soble Construction Co. v. Zoning Hearing Board of Borough of East Stroudsburg*, 329 A.2d 912, 916 (Pa. Cmwlth. 1974).

requirements. They also argue that his use is illusory because §§704 and 709 only allow heavy equipment and automobiles to be stored as a separate commercial use and it is undisputed that under the trial court order Landowner is only allowed to repair and store his own vehicles and equipment in the Quonset hut. Landowner has appealed the denial of the special exception to expand a non-conforming use, claiming that the current Zoning Ordinance allows property owners to continue to use their properties for any and all uses then in existence, even those which failed to conform to the previous ordinance. He also contends that he was entitled to a special exception because the proposed use is similar to substantially similar uses allowed under the Zoning Ordinance. He also appeals the revocation of the permit to build the Quonset hut as an accessory use claiming the private driveway is not subject to the 50-foot setback requirement.

Because the Honorable Thomas G. Gavin of the Court of Common Pleas of Chester County at No. 03-00747, No. 05-06508, and No. 06-04277 thoroughly addressed each of these issues in his opinion, we affirm the trial court's order based on the sound reasoning contained in that opinion.

DAN PELLEGRINI, Judge

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ORDER

AND NOW, this 9th day of October, 2009, the order of the Court of
Common Pleas of Chester County dated December 19, 2008, at No. 03-00747, No.
05-06508, and No. 06-04277, is affirmed.

DAN PELLEGRINI, JUDGE

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BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE KELLEY

FILED: October 9, 2009

I respectfully dissent. I believe that both the Zoning Hearing Board and the Board of Supervisors of Newlin Township lacked jurisdiction to adjudicate the three separate applications filed solely by Robert M. Curtis seeking permission to erect a storage hut on the subject property that he owned with his estranged wife, Leslie H. Curtis. Without requiring proof that Leslie H. Curtis, as a co-tenant by entireties of the subject property, consented to the three applications filed by Curtis or that Curtis solely owned the subject property, the Zoning Hearing Board and the Board of Supervisors should have dismissed the applications in the first instance due to the lack of participation or joinder of Leslie H. Curtis as a necessary party.

The record in this matter shows that the applicant Curtis was not the sole owner of the subject property in 2002, when he sought a special exception to expand a non-conforming use, nor in 2005, when the Zoning Hearing Board of Newlin Township upheld the revocation of a permit to build the storage hut. During these time periods, Curtis owned the property with his wife, Leslie H. Curtis. See Transcript of October 15, 2005 Hearing Before Zoning Hearing Board, Exhibit T-1 (Curtis Deed Dated January 29, 1982); Transcript of February 15, 2005 Hearing Before Zoning Hearing Board of Newlin Township, Exhibit 14 (Curtis Deed Dated January 29, 1982). However, Leslie H. Curtis, applicant's spouse, was not named as an applicant nor did she ever participate in the foregoing proceedings.

During the October 15, 2005 hearing before the Zoning Hearing Board on the application for a special exception, the Township's attorney pointed out that the subject property was owned by Robert and Leslie Curtis and that she had not joined in the application. Reproduced Record (R.R.) at 37a. Curtis was

then asked by the Township's attorney if his wife, Leslie H. Curtis, knew he was making the application for a special exception and Curtis replied that she was aware of the application. Id. When asked further how the Zoning Hearing Board knew that Leslie H. Curtis was aware of the application, Curtis responded, "Well, call her up and ask her, if you want." Id.

The record further reveals that during the February 15, 2006 hearing before the Board of Supervisors of Newlin Township regarding the conditional use application filed by Curtis, he testified, in response to questioning by his attorney, that he was now the only owner of the subject property. R.R. at 145a. However, other than his statement, Curtis did not offer any documentation, such as a deed, to support his claim that he was the sole landowner.

Section 107 of the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10107, defines "landowner", in pertinent part, as "the legal or beneficial owner or owners of land . . . or other person having a proprietary interest in land."¹ In Beekhuis v. Zoning Hearing Board of Middletown, 429 A.2d 1231 (Pa. Cmwlth. 1981), the applicants' standing was called into question because their respective spouses, as co-tenants by entireties of the land involved, had not been named as co-applicants. Upon review of the foregoing definition, this Court determined that each applicant, as an individual tenant by the entireties, would appear to have at least some proprietary interest, even if he did not possess the totality of beneficial ownership. Beekhuis, 429 A.2d at 1237. This Court stated further that "[t]o insure that a justiciable zoning controversy does exist,

¹ I note that Article 2, Section 201 of the Newlin Township Zoning Ordinance also defines "landowner" as "the legal or beneficial owner or owners of land . . . or other person having a proprietary interest in land."

however, such individual tenant should be required to establish that the appeal is with the consent of the spouse.” Id.

Herein, it is clear that Curtis did not prove by substantial evidence that his spouse, Leslie H. Curtis, had consented to, or was aware of, the applications for a special exception or permit. With regard to the third application for a conditional use, Curtis simply stated that he was now the only owner of the subject property. However, he did not support this statement by producing a new deed to the subject property proving that he was the sole landowner. I note that in the first two proceedings, the deed to the subject property proving Robert M. Curtis and Leslie H. Curtis were tenants by the entireties was submitted into evidence thus producing an even more compelling reason why Curtis as of necessity should have come forward with a new deed showing that he now solely owned the property. Additionally, Curtis’ credibility is facially questionable as he testified during the hearing before the Zoning Hearing Board on the first application, that his estranged wife Leslie H. Curtis lives in Florida and he lives on the subject property with his girlfriend. R.R. at 39a.

Based on the fact that Curtis’ spouse, Leslie H. Curtis, was not even named as a party and did not consent to any of the applications and that Curtis failed to prove that he was the sole landowner with respect to the application for a conditional use, I believe that all three actions should have been dismissed in the first instance. Accordingly, I would vacate the trial court’s order and remand with instructions to further remand to the appropriate body to dismiss all three actions.

JAMES R. KELLEY, Senior Judge