IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Northampton Township, Appellant	:	
v.	:	
	:	No. 2057 C.D. 2010
John W. Parsons and Susan E. Parsons	:	Submitted: May 9, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: July 12, 2011

Northampton Township appeals from the order of the Court of Common Pleas of Bucks County (trial court) which authorized John R. and Susan E. Parsons (Parsons) to maintain a pole barn/basketball facility on land designated as "restricted open space."

In 2000, the Township purchased two lots (Property) from Omnivest, L.P., in lieu of condemnation. Lot #1 consisted of 49.38 vacant acres, a portion of which were leased to a local farmer to plant crops. Lot #2 was 2.21 acres and contained an existing farmhouse and stone/wood horse barn.

Funding of the Township's purchase was partially obtained through Bucks County Municipal Open Space Program which provides municipal land acquisition grants. As a condition of the Open Space grant, the Township entered into a Declaration of Covenants, Conditions and Restrictions.

The WHEREAS clause stated the general purpose of the Open Space grant was to enable municipalities to acquire land "to protect natural areas, preserve agriculture, or provide park and recreation facilities." Article III, Declaration of Covenants, Conditions and Restrictions, May 24, 2000, at 1; Reproduced Record (R.R) at 10a.

Article IV of the Declaration entitled "Land Use Restrictions" set forth the restrictions specific to the Property at issue which were based on the Township's Application and representations at the time it applied for the grant:

> 1. *The Municipality [Township] hereby covenants, on behalf of itself and its successors and assigns, that all lands acquired by the Municipality [township] with Municipal Land Acquisition Grant funds shall be used for wildlife refuge, sanctuary, open space, agricultural, recreational, historical, cultural, or natural resource conservation purposes. Any diversion or disposal of the land for uses other than the purposes noted above* must be consistent with applicable state law, including 32 P.S. 5005,[1] and *may not occur without the approval of the Bucks County Commissioners*. *This covenant shall run with the land and bind the property in perpetuity*.

Article IV of the Declaration of Covenants, Conditions and Restrictions, May 24, 2005, at 2; R.R. at 11a (Emphasis added).

The Declaration of Covenants, Conditions and Restrictions was recorded with the Bucks County Recorder of Deeds.

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[1] Section 5 of the Open Space Lands Act, Act of January 19, 1968, P.L. 992, as amended (providing for the acquisition of property for the protection of natural or scenic resources, the protection of scenic areas for public visual enjoyment from public rights of way, and the preservation of sites of historic, geologic or botanic interest).

In 2005, the Township decided to sell the Property to a private individual and conducted a public bidding process. The sale of the Property was subject to all of the restrictions of record, including the Declaration of Covenants, Conditions and Restrictions.

After reviewing all the bids, the Township offered the Property to the Parsons. Although the Parsons agreed to purchase the Property subject to the restrictions, the Township agreed, on behalf of the Parsons, to seek modification of the Declaration of Covenants, Conditions and Restrictions from the Bucks County Office of Open Space and Bucks County Planning Commission. However, the County *refused* to lift the open space restrictions and the Parsons purchased the Property subject to the existing Declaration of Covenants, Conditions and Restrictions which continued to specifically restrict the use of Lot #1.

The Final Agreement of Sale between the Township and the Parsons dated December 14, 2005, specifically provided that the Parsons were purchasing the Property subject to the Declaration of Covenants, Conditions and Restrictions:

> 7. It is understood and agreed by the parties hereto that Buyer [Parsons] *is purchasing the Premises under and subject to the Bucks County Municipal Open Space Program Declaration of Covenants, Conditions and Restrictions dated May 24, 2000, …* and recorded in *Deed Book 2090, Page 1275, in the Office of the* Recorder of Deeds of Bucks County, Pennsylvania, and that no commitments or assurances have been made by the Seller [Township] to Buyer [Parsons] as to any amendments or other modifications to such Declaration.

Final Agreement of Sale, December 14, 2005, ¶7 at 2; R.R. at 48a. (Emphasis added).

Paragraph 8 of the Agreement of Sale also contained specific deed restrictions on the *use* of the Property to which the Parsons agreed:

> 8. The Buyer [Parsons] agrees to accept Premises subject to the following deed restrictions:
>
> a. The Premises may not hereinafter be subdivided or used for any other purpose other than as one (1) single-family detached dwelling with the exception that the owner of the Premises may develop and use the Premises *as a tree farm or horse farm* to the exclusion of such development or use by any other party other than the owner of the Premises.
>
> b. The use herein as a single-family residential dwelling, *tree farm or horse farm* *shall be subject to the limitations of zoning classification R-2 under Section 140-15 of the current Zoning Code of Northampton Township*….
>
> c. The use of the Premises as a *tree farm or horse farm* shall be subject to the following limitations:
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> ****
>
> (ii) *No buildings*, fencing, tents improvement or fixture shall be placed upon the Premises, whether permanent or temporary, *except* such as are building structures, stalls, barns and the like used *for the keeping of horses*.

Final Agreement of Sale, December 14, 2005, ¶8 at 2; R.R. at 48a. (Emphasis added).

On October 1, 2008, the Township received a report that a two-story, 14,000 square foot, 100' by 65' steel pole barn was constructed in the restricted "open space" area of Lot #1. Upon further investigation, the Township learned that the Parsons did not obtain the appropriate permits, approvals or building inspections from the Township. The Township also discovered that the pole barn was to be used as an indoor community basketball facility.

The Township issued notices of violation to the Parsons and ordered them to cease and desist construction immediately.

On November 25, 2008, the Township filed a two-count Complaint in Equity against the Parsons which alleged that the Parsons: (1) violated the Declaration of Covenants, Conditions and Restrictions; and (2) failed to comply with necessary inspections and permits and approvals. The Township sought the removal or demolition of the offending structure so as to return the Property to its original vacant open space and damages.

The Parsons subsequently offered to carve a portion of the unrestricted land on Lot #2, to be donated as "open space" in exchange for the portion of land on Lot #1 which contained the pole barn/basketball facility. The Township rejected the "swap" because the construction of the pole barn/basketball facility was a blatant violation of the Declaration of Covenants, Conditions and Restrictions and the Agreement of Sale, and jeopardized and undermined the intent and integrity of the Bucks County Municipal Open Space Program.

On May 9, 2010, a hearing was held before the trial court. The Township's Manager, Robert Pellegrino (Pellegrino), testified that the pole barn/basketball facility encroached on conserved land and that it was built without permits. The Township pursued demolition to avoid setting a precedent for other conserved land in the community. Hearing Transcript, May 9, 2010 (H.T.), at 13-15; R.R. at 143a. Because no permits or inspections were obtained, the Township was also concerned that the pole barn/basketball facility was not constructed according to Township building codes. H.T. at 15; R.R. at 143a.

Michael Solomon (Solomon), the Township's Director of Planning and Zoning, testified that after litigation was commenced, the Parsons submitted construction plans to the Township that the Township found to be "deficient" by the Township's building inspector, particularly the foundation because it was already constructed and could not be inspected. H.T. at 30; R.R. at 147a.

Christine Kern (Kern), the Bucks County Open Space Coordinator, was responsible for administering three grant programs for open space preservation and land conservation throughout the County. Her testimony was, for the most part, undisputed. Kern testified that in 2000, the Township received an $872,000 grant to purchase the property with the understanding that the Declaration of Covenants, Conditions and Restrictions would be recorded. H.T. at 42; R.R. at 150a. Kern testified that prior to the Township's sale of the Property to the Parsons, the Township requested, on behalf of the Parsons, that the restrictions be eliminated or modified. That request was denied by the Open Space Review Board because of its "concern for the integrity of the program" which was a "voter-approved bond for the permanent protection of open space.[2]" H.T. at 45; R.R. at 151a.

Kern explained that the Bucks County Municipal Open Space program "is built on the concept that *once the land is preserved, it remains open with no improvements*." She indicated that the County would, therefore, "be opposed to having the structure … in the protected area of the property." H.T. at 44; R.R. at 150a. (Emphasis added). She explained that the County did not pursue

[2] Voters agreed, in response to a referendum, which asked them to approve the issuance of bonds dedicated to open space and farmland preservation.

enforcement of the restrictions against the Parsons because, under the grant guidelines, the Township, as the municipality which obtained the Open Space grant, "takes the lead role in enforcement and monitoring of the properties that are conserved." H.T. at 45; R.R. at 151a.

Kern stated that Article III of the Declaration of Covenants, Conditions and Restrictions, incorporated by reference, the Bucks County Municipal Open Space Program application guidelines. The guidelines provide that if an applicant plans to "improve" the property by erecting a structure "the board asks they be presented at the time of application, any plans for development." H.T. at 52, 66; R.R. at 152a, 156a. Here, the Township's application for a grant limited the Property's use to "*passive recreation" and "agricultural use*." H.T. at 51; R.R. at 152a. She emphasized that funding was provided to the Township to acquire the Property for "passive recreation" such as trails, passive fields, ball fields and agriculture, not to erect structures such as a basketball facility. H.T. at 49-53, 66; R.R. at 152a-153a, 156a.

John Parsons testified that he owned a construction business. He *conceded* that before he purchased the Property, he attempted to have the restrictions removed and his request was not approved by the County. Mr. Parsons said the farmhouse needed a number of electrical and plumbing improvements and repairs. Under agreement with the Township, he performed the repair work. He did not secure permits from the Township for this repair work.

Mr. Parsons explained that he did not obtain permits because he purchased the steel building from Anvil Construction which had a close-out sale on some Butler buildings, that is, pre-engineered buildings. He had to "make the

order ASAP because of the situation. Mr. Parsons "brought the building in" and erected it. He assumed he could erect the building and then pay the permits and fines later. H.T. at 94-96; R.R. at 163a.

Mr. Parsons stated that "the true purpose" of the pole barn was for "kids to be able to play basketball inside." H.T. at 96; R.R. at 163a. He coached basketball for 20 years and wanted to provide the community with an indoor basketball facility. He believed under his open space covenant, the basketball facility was a "recreational facility" and that he was entitled to build a recreational facility in the open space. H.T. at 97; R.R. at 164a.

Mr. Parsons was willing to carve out an equivalent amount from Lot #2 and dedicate that to "open space" with a covenant which prohibited any structures. He did not intend to charge a fee to use the facility. He estimated that he spent approximately $1 million constructing it. H.T. at 104-105; R.R. at 165a-166a.

On September 1, 2010, the trial court concluded that the pole barn/basketball facility did not violate the Declaration of Covenants, Conditions and Restrictions because the pole barn qualified as a "recreational facility." The trial court relied on Mr. Parson's testimony that the basketball facility would be open to the community, the costs of insuring the basketball court were borne by the Parsons, no fees would be charged to use or maintain the structure, and the facility would have no commercial value.

The trial court also concluded that the structure did not violate the Agreement of Sale because the Parsons were authorized to build a barn for the

keeping of horses. The trial court held that the fact that the "community children, rather than horses, will be using the inside of the pole barn is a distinction without a difference." Trial Court Opinion, December 10, 2010, at 9.

Finally, the trial court permitted the Parsons to retain the pole barn/basketball facility even though they failed to obtain permits, but required them to apply for all appropriate permits, make no commercial use of the barn, offer an area equal to that of the barn plus a buffer of fifteen foot surrounding the barn, totaling 14,140 square feet, to the Bucks County Municipal Open Space Program and execute a Deed of Conservation Easement and Declaration of Restrictive Covenant for that portion.

On appeal[3], the Township argues that the trial court erred because: (1) it permitted the Parsons to retain the pole barn/basketball facility even though the structure violated the Declarations, Conditions and Restrictions dated May 24, 2000, which restricted Lot #1 for specific purposes; (2) it permitted the Parsons to retain the pole barn/basketball facility even though the structure violated the Agreement of Sale which specifically forbade the construction of any barn, except for the keeping of horses; (3) it permitted the Parsons to retain the pole barn/basketball facility even though the Parsons failed to apply for and obtain the necessary building permits and inspections; and (4) the trial court's September 1, 2010, order sets a dangerous precedent because it sends the message that

[3] This Court's must review the trial court's final decree in equity for an error of law or abuse of discretion. Earl Township v. Reading Broadcasting, Inc., 770 A.2d 794 (Pa. Cmwlth. 2001).

landowners may violate restrictions and covenants so long as they were willing to make concessions after an offending structure is built.

I.

The Township first argues that the trial court erred when it permitted the Parsons to maintain the pole barn/basketball facility. The Township contends that the pole barn violated the "Use Restrictions" contained in the Declaration of Covenants, Conditions and Restrictions which restricted the use of Lot #1 for "wildlife refuge, sanctuary, open space, agricultural, recreational, historical, cultural, or natural resource conservation purposes." This Court agrees.

First, the trial court erroneously relied on language in the WHEREAS clause of the Declaration which identified the ***general purposes*** for which a municipality ***may*** obtain an Open Space grant from the Bucks County Municipal Open Space Program. The WHEREAS clause provided that grant funds may be obtained for, among other things, "recreational facilities." Concluding that the basketball facility was a "recreational facility" the trial court found that the pole barn did not violate the Declaration. The trial court's reliance on the WHEREAS clause to identify the land use restrictions placed on this particular Property was a misinterpretation of the Declaration.

The ***specific*** land use restrictions that were applicable to this Property were set forth in Article IV "Land Use Restrictions" and provided that Lot #1 was to be maintained for "wildlife refuge, sanctuary, open space, agricultural, recreational, historical, cultural, or natural resource conservation purposes."

Further, according to the undisputed testimony of the Bucks County Open Space Coordinator, Kern, if an applicant plans to "improve" a property by erecting a structure it must make a request of the Open Space Review Board at the time of application and provide any plans for development. Here, the Township did not request an Open Space grant to construct a recreational facility and there was no mention by the Township that a large indoor basketball facility was planned or ever presented to the Open Space Review Board. The Township *could have* requested a grant for the construction of a recreational facility, but it *did not*.

Kern also testified that the Township's application for a grant limited the Property's use to "*passive recreation" and "agricultural use*." H.T. at 51; R.R. at 152a. She emphasized that funding was provided to the Township to acquire the Property for "passive recreation" such as trails, passive fields, ball fields and agriculture, not to erect structures such as a basketball facility. H.T. at 49-53, 66; R.R. at 152a-153a, 156a.

The record is clear. At the time the Open Space grant was obtained, the Township sought to "preserve" a 50-acre farm which consisted of vacant land, a portion of which was farmed by a local farmer. The purpose of the Open Space grant was to provide funding for the Township to maintain the farm as it was, as 50 acres of open space, for passive recreation including walking and nature trials and farmland, and to preclude any further future development. The Open Space grant funds were clearly not provided for the Township or its successors to build a 14,000 square foot indoor recreational basketball court on restricted land. The Parsons' erection of the pole barn on land designated for open space for use as an indoor community basketball facility was in plain disregard of the express words of the Declaration if Covenants, Conditions and Restrictions. Jones v. The Park

Lane for Convalescents, Inc., 384 Pa. 268, 120 A.2d 535 (1956) (plain disregard of express words of a restriction will be deemed a violation). The record does not support the trial court's conclusion that erection and use of the pole barn as a community indoor basketball facility on restricted open space was consistent with the Declaration.

Further, Mr. Parsons conceded that before he purchased the Property, he attempted to have the restrictions removed and his request was not approved by the County. Consequently, he was well aware that the Declaration precluded him from building the pole barn on Lot #1. His "belief" that the Declaration of Covenants, Considerations and Restrictions permitted him to build a "recreational facility" on Lot #1 was directly contradicted by his admission that he sought, prior to purchasing the Property, to have the restriction removed. If he truly believed he could build a "recreational facility" on Lot #1, then it makes no sense that he would attempt to remove the restriction.

The Township is entitled to the equitable relief is seeks. To uphold the trial court order would indeed encourage landowners in the future to violate deed restrictions and make concessions later. The Court agrees with the Township that endorsement of the Parsons' conduct would be harmful to the integrity of Open Space programs and Commonwealth land preservation goals.

II.

Next, the Township contends the trial court erred when it concluded that construction of the pole barn on Lot #1 for use as an indoor basketball facility was contemplated under the Agreement of Sale.

As mentioned, the Agreement of Sale permitted the Parsons to continue to use the Property "*as a single family dwelling, a tree farm or a horse farm subject to the limitations of zoning classification R-2 under Section 140-15 of the Zoning Code of Northampton Township*." Horse farms or tree farms were a "permitted use" in an R-2 Zoning District under Section 140-15 of the Zoning Code of Northampton Township which authorized the construction of buildings, structures and/or barns "for the keeping of horses.[4]"

Neither party disputes that the continued use of the Property as a farm, or tree farm or horse farm was consistent with the Declaration or that construction of a barn for the keeping of horses would not constitute unauthorized development on restricted Property. A barn for the keeping of horses is a permitted use in an R-2 District and was clearly consistent with the previous use of the Property which included a stone/wood horse barn. The Agreement of Sale specifically referenced

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[4] Section 140-15 of the Ordinance which governs R-2 Zoning Districts provides:

> (1) Uses by right.
> (a) One single-family detached dwelling.
> (b) a home-based business, where such business is located in a dwelling and provided such use shall not supersede any deed restriction, covenant or agreement restricting the use of land, or any master deed, bylaw or other document applicable to a common-interest-ownership community.
> (c) *Agriculture, or farm or farm unit* as defined in this chapter; provided, however, that such use shall be located on a lot, parcel or tract of ground not less than five acres in size, and further provided that buildings, structures, stalls, *barns*, stables and the like *used for the keeping of horses*, livestock and poultry shall be located not less than 150 feet from any property line. (Emphasis added).

A "farm or farm unit" is defined in Section 140-8 of the Ordinance as " a tract or parcel of ground not less than five acres in size which is used for agriculture, tilling of the soil, *raising of* livestock, *horses* or poultry, for landscape nursery stock, *tree farms* and similar traditional farming operations." (Emphasis added).

Section 140-15 of the Zoning Code, which sets forth the permitted uses *of the Property*. It is clear from the Agreement of Sale, which expressly limited *the use of the Property* to a horse or tree farm, the purpose was to maintain the natural integrity of the Property. When the Township purchased the Property, it was a farm with a farmhouse and a wood/stone horse barn. A portion of Lot #1 was farmed by a local farmer.

The question is whether since the Agreement of Sale authorized a barn for the keeping of horses, the Parsons were entitled to build a barn for an indoor community basketball facility.

The trial court held that the basketball facility was permitted under the Agreement of Sale because there was no discernable distinction between a barn for the keeping of horses and a basketball facility for community children.

This Court finds that the trial court incorrectly focused on the *use of the pole-barn* and concluded that regardless of whether it was used by horses or children, it was nevertheless a barn, which was permitted under the Agreement of Sale. This Court concludes that there is a discernable difference between the two and the Agreement of Sale clearly did not permit a barn for use as a basketball facility.

Use of the pole barn as a basketball facility *changed the use of the Property from a farm to one which hosts a community indoor recreation facility*. An indoor recreation facility is more akin to commercial activity. Simply because the Parsons agreed not to charge a fee for the use of the facility does not change the nature of the activity. A basketball facility would be open to the general public

with increased automobile and pedestrian traffic and the need for parking. The Agreement of Sale clearly limited any improvement to the specific uses set forth in Section 140-15 of the Zoning Ordinance. Rather than being used as a single family dwelling or farm, the Property was to be used by a multitude of children, together with their parents, which undeniably violated the Agreement of Sale.

Because the trial court incorrectly held that the Parsons' construction and use of the pole barn for use as an indoor basketball facility did not violate the Agreement of Sale, this is also grounds for reversal.

In light of this Court's conclusion that the trial court erred when it permitted the Parsons to retain the pole barn because the pole barn violated the Declaration of Covenants, Conditions and Restrictions, and the Agreement of Sale, it is unnecessary to address whether the trial erred when it permitted the Parsons to retain the pole barn even though the Parsons failed to obtain the necessary permits and approvals from the Township.

III.

This Court, having determined that the Township is entitled to equitable relief, reverses the trial court with instructions to order the Parsons to dismantle and remove the pole barn which encroaches on the restricted open space of Lot #1 and violated the Agreement of Sale.

In Peters v. Davis, 426 Pa. 231, 231 A.2d 748 (1967), injunctive relief was granted because the record portrayed a flamboyant defiance and disregard of both the zoning ordinance and the restrictions. Likewise, in this controversy, Mr. Parsons conceded that he was fully aware of the recorded restrictions as he sought

to have the restriction modified or removed before he bought the Property.[5] He also signed the Agreement of Sale and was aware of the restrictions contained therein.

If a property owner, deliberately and intentionally violates a valid express restriction running with the land or intentionally 'takes a chance', the appropriate remedy is a mandatory injunction to eradicate the violation. Moyerman v. Glanzberg, 391 Pa. 387, 138 A.2d 681 (1958); Ventresca v. Ventresca, 126 A.2d 515 (Pa. Super. 1956). The Parsons purchased and erected a pre-engineered pole barn for use as a basketball facility which encroached on restricted land, and did so at their own risk that the Township would seek to enforce the restriction and Agreement of Sale.

The trial court also based its decision to allow the barn to remain on restricted land that the "community will suffer the loss of this valuable resource." Trial Court Opinion, December 10, 2010, at 11. However, where one deliberately violates a restriction, injunctive relief requiring a modification of the building to comply with the restriction should not be denied on the theory that the loss caused by it will be disproportionate to the good accomplished. Peters.

Regardless of whether the basketball facility would benefit the community, the restrictions were aimed at the preservation of the community's open space, and to preclude any further improvements on the restricted land. The trial court, in essence, held that the basketball facility was more important to the

[5] The Parsons also had constructive notice. Where a restrictive covenant is recorded in the Recorder of Deeds all parties affected are deemed to have notice of its contents. Loeb v. Watkins, 428 Pa. 480, 240 A.2d 513 (1968).

community than the community's interest in the preservation of open space. The bottom line is that a pole barn for use as a basketball facility was deliberately and intentionally erected on restricted land in direct violation of the Declaration of Covenants, Conditions and Restrictions and the Agreement of Sale. Equity compels the structure be removed and Lot #1 returned to its condition before the pole barn was constructed.[6]

The trial court is reversed with instructions to enter an order consistent with this opinion.

BERNARD L. McGINLEY, Judge

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

[6] Finally, despite the trial court's conclusion that the Parsons would suffer financially there was no evidence in the record relating to the financial harm that would result from dismantling and removing a pre-engineered building. For example, there was no evidence that the building could not be dismantled and resold. The only testimony which related to the injury which might result was that the Parsons' purchased and erected the pole barn at a *cost* of $1 million.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Northampton Township, Appellant	:	
v.	:	
	:	No. 2057 C.D. 2010
John W. Parsons and Susan E. Parsons	:	

O R D E R

AND NOW, this 12th day of July, 2011, the Order of the Court of Common Pleas of Bucks County in the above-captioned case is hereby REVERSED. The Court of Common Pleas of Bucks County is instructed to order the Parsons to dismantle and remove the pole barn which was erected on restricted open space and in violation of the Agreement of Sale.

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BERNARD L. McGINLEY, Judge