

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael B. Selig, MD FACC, :
Appellant :
v. :
South Whitehall Township :
Zoning Hearing Board and : No. 244 C.D. 2011
South Whitehall Township : Submitted: September 16, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: December 9, 2011

Michael B. Selig, M.D., (Dr. Selig) appeals *pro se* from the order of the Court of Common Pleas of Lehigh County (common pleas court) which dismissed Dr. Selig’s land use appeal.

On May 23, 2006, Dr. Selig filed an application, in his name only, for a special exception with the South Whitehall Township Zoning Hearing Board (ZHB) to establish and maintain a private heliport use on real property located at 2880 Orefield Road, South Whitehall Township (Property), in a Rural Holding Zoning District. The Property had been purchased and was owned jointly by Dr. Selig, and his wife, Gail Selig (Mrs. Selig) in 2000.¹

¹ Dr. Selig owned a separate parcel located at 2816 Orefield Road, in his own name which is not subject to this appeal.

On July 31, 2006, the ZHB granted conditional special exception approval and a side-yard setback variance to Dr. Selig which permitted him to establish and maintain a private heliport on the Property for one private helicopter.

On October 21, 2006, Mrs. Selig instituted divorce proceedings.

At some point after she instituted the divorce proceedings, Mrs. Selig learned for the first time that Dr. Selig had sought and was granted permission to operate a private heliport on property she owned as tenants in the entirety with Dr. Selig. It is undisputed that Dr. Selig failed to notify or inform Mrs. Selig of his application for special exception for the heliport use even though she was a joint owner of the Property.

On December 12, 2006, Mrs. Selig's attorney notified the Township that Mrs. Selig opposed any use of her jointly-owned Property for a private heliport. Claiming she lacked notice of the special exception proceedings before the ZHB, Mrs. Selig filed for permission to appeal *nunc pro tunc*.

At that hearing, Mrs. Selig presented uncontroverted testimony of Keith Zehner, the Township Zoning Officer, that Dr. Selig was provided with notice by letter dated March 20, 2007, of the April 11, 2007, hearing. Counsel indicated to the court that Dr. Selig was provided with the appeal petition but he did not file an answer. Counsel stated that Dr. Selig was "fully aware" of all of the pleadings that have been filed in this matter. He was copied "diligently" by both counsel in this matter, and that she notified him of the hearing. However, Dr. Selig did not make himself a party to the proceedings and did not attend the hearing. Notes of Testimony, April 11, 2007, at 29.

On April 11, 2007, the common pleas court reversed the ZHB's July 31, 2006, decision to grant the special exception due to Dr. Selig's failure to provide Mrs. Selig with notice of the hearing before the ZHB on the application for a special exception, or the ZHB's July 31, 2006, Decision. The common pleas court found that Dr. Selig "falsely misrepresented in his application and at the hearing before the Zoning Hearing Board on June 28, 2006, that he was the sole owner of the [Property]." Common Pleas Court Opinion, April 11, 2007, at 1-2.

On May 11, 2007, Dr. Selig filed an "appeal" from the common pleas court's April 11, 2007, order to this Court. Mrs. Selig filed a Motion to Dismiss Dr. Selig's appeal on the grounds that he lacked legal standing. On June 11, 2007, this Court, *per curiam*, granted Mrs. Selig's Motion to Dismiss on the grounds that Dr. Selig was not a party to the common pleas court proceeding and had no standing to appeal, as he had not intervened. Dr. Selig filed no further appeals from this Court's order.

Three years later, on June 30, 2010, Dr. Selig filed an "Amended Request and Appeal for Reinstatement of the Heliport at 2880 Orefield Road" seeking the following relief: (1) the reinstatement of the ZHB's July 31, 2006, final written Decision and Order which granted Dr. Selig conditional Special Exception approval and a side yard setback variance to establish and maintain a private heliport; (2) a modification of some of the conditions that the ZHB had imposed on Selig's granted conditional approval of the Special Exception; (3) in the alternative, a favorable interpretation that a private heliport use of the Property was a permitted Special Exception use or was "grandfathered" as a prior-existing, nonconforming use in the R-H Rural Holding Zoning District; and (4) a

determination that the Township Zoning Ordinance was invalid and exclusionary regarding the regulation of private helicopter uses within the Township.

A public hearing was held on August 25, 2010. Dr. Selig represented himself. To begin, Dr. Selig acknowledged that the common pleas court reversed the ZHB's July 31, 2006, decision because of his "fraudulent concealment." Hearing Transcript, August 25, 2010, (H.T.) at 10, 35-36; Supplemental Reproduced Record (S.R.R.) at 10b, 35b-36b. He argued, however, that the common pleas court's order should be set aside because "ownership" of the Property "has changed." H.T. at 56; S. R.R. at 56b. He believed the ZHB was now free to grant him the special exception because "it's a new set of parameters." H.T. at 56-57; S.R.R. at 56b-57b. Mrs. Selig "no longer has any interest in" the Property and had no right, as she previously did, to oppose the use of the Property as a private heliport. He claimed that "the issue with the [common pleas] court order ... doesn't apply anymore because the ownership has changed." H.T. at 56; S.R.R. at 56b. In other words, Dr. Selig re-applied for the special exception, this time as the sole owner of the Property, having been awarded full ownership of the Property in the divorce proceeding in June 2010. H.T. at 56-57; S.R.R. at 56b-57b.

Dr. Selig, alternatively, asked the ZHB to grant him a permit to operate the private heliport as a prior-existing, non-conforming use. On this issue, he argued that he was granted a special exception under Section 12.25(c) of the Zoning Ordinance on July 31, 2006. Ordinance No. 861 was adopted by the Township Board of Commissioners on July 11, 2007, which *eliminated* private heliport use as a permitted use in a Rural Holding Zoning District, and in other residential zoning districts. H.T. at 67; S.R.R. at 67b. Dr. Selig argued that he

should be able to “retain the heliport” and that he was “grandfathered” because that use was already approved by the Township on July 31, 2006. H.T. at 18; S.R.R. at 18b. He testified that he never vacated or abandoned the use since it was approved. The “heliport has remained current and active through the F.A.A. and through the Department of Aviation. I never waived my rights to the heliport. It was taken away from me involuntarily.” H.T. at 12-13; S.R.R. at 12b-13b.

The ZHB issued its final, written Decision on October 8, 2010. The ZHB concluded that it had no jurisdiction or legal authority to reinstate or modify its 2006 decision which was reversed by final order and adjudication on April 11, 2007. The ZHB also determined that there was no merit to Dr. Selig’s argument that a private heliport was “grandfathered” or constituted a protected, prior-existing, nonconforming use. Finally, the ZHB concluded that the Township’s Zoning Ordinance was not exclusionary because, while prohibited in residential zoning districts, heliports are permitted special exception uses in the Industrial and Industrial Commercial zoning districts and are permitted by right in the Highway Commercial zoning districts.

On October 29, 2010, Dr. Selig, represented by counsel, filed a Notice of Appeal of the ZHB’s October 8, 2010, Decision. Dr. Selig did not address the October 8, 2010, decision of the ZHB, other than to briefly mention that the heliport use should be “grandfathered.” Primarily, his argument was limited to his contention that the common pleas court was “without jurisdiction” to reverse the

ZHB's July 31, 2006, decision. Specifically, he argued that "the March 2006² (sic) Stipulation by the parties and Intervenor [referring to Township] was ineffective to confer subject matter jurisdiction on [the common pleas] court." Common Pleas Court Memorandum Opinion, January 18, 2011, at 5.

Dr. Selig claimed that Mrs. Selig's appeal involved a marital dispute that was subject to the jurisdiction of the Family Court in the divorce proceedings. He also argued that he was an "indispensible party" and was not given sufficient notice of Mrs. Selig's *nunc pro tunc* zoning appeal.

The common pleas court rejected Dr. Selig's attempt to collaterally attack the final, non-appealed April 11, 2007, order. Mrs. Selig was an owner of the Property. Mrs. Selig's *nunc pro tunc* appeal to the common pleas court was the only proper, legal recourse for her to challenge a ZHB decision issued without her knowledge. Section 1002-A of the Pennsylvania Municipalities Planning Code³ (MPC), 53 P.S. §11002-A. The court found that subject matter jurisdiction existed as a matter of law, and whether the parties "can or cannot stipulate to jurisdiction" was irrelevant. Finally, the common pleas court disagreed that notice of Mrs. Selig's Appeal to Dr. Selig was defective because Dr. Selig was served, not only with the Notice of Appeal but with every pleading that came thereafter.

² The actual date of the Stipulation was not March 20, 2006. It was entered into between the attorneys for Mrs. Selig, the Township and the ZHB on March 20, 2007, whereby they agreed that the court of common pleas had jurisdiction to conduct the April 11, 2007, hearing.

³ Act of July 31, 1968, P.L. 805, as amended, added by the Act of December 21, 1988, P.L. 1329.

On appeal,⁴ Dr. Selig continues to challenge the common pleas court's April 11, 2007, order which sustained Mrs. Selig's appeal and reversed the ZHB's grant of the special exception. He has raised nineteen issues, many of which overlap and are repetitive. This Court has condensed the issues to four.

Notice of the Nunc Pro Tunc Appeal

First, he argues, once again, that he was not given proper notice of Mrs. Selig's *nunc pro tunc* appeal from the July 31, 2006, decision, and that he was an "indispensible party." He makes this argument in an attempt to reinstate the special exception granted by the ZHB on July 31, 2006, but denied by the common pleas court on April 11, 2007.

By order dated June 11, 2007, this Court considered the same issue and quashed Dr. Selig's appeal from the April 11, 2007, order because he was not a party. See Order at Gail R. Selig v. South Whitehall Township Zoning Hearing Board and Township of South Whitehall, Pennsylvania Commonwealth Court, 910 C.D. 2007, filed June 11, 2007.

The doctrine of collateral estoppel prevents a question of law or issue of fact that has been litigated and adjudicated finally in court of competent jurisdiction from being relitigated in a subsequent suit. Callowhill Center Associates, LLC v. Zoning Bd. of Adjustment, 2 A.3d 802 (Pa. Cmwth. 2010). This Court will not entertain this same issue again.

⁴ Where the common pleas court has not taken additional evidence, this Court's function and scope of review is limited to ascertaining whether the common pleas court committed an error of law or manifestly abused its discretion. Larsen v. Zoning Board of Adjustment of the City of Pittsburgh, 543 Pa. 415, 672 A.2d 286 (1996).

Subject Matter Jurisdiction

Next, Dr. Selig argues that the common pleas court lacked subject matter jurisdiction on April 11, 2007, to reverse the ZHB's July 31, 2006, decision to grant him the permit for the special exception heliport use. He claims it was for the Family Court to decide whether Mrs. Selig gave her permission to Dr. Selig to apply for the special exception zoning permit. Dr. Selig's Brief at 37.

As the common pleas court correctly pointed out, subject matter jurisdiction existed as a matter of law. Section 1002-A of the MPC, 53 P.S. §11002-A, provides that all appeals from land use decisions shall be taken to the court of common pleas. Mrs. Selig was a legal owner who claimed that she did not consent to Dr. Selig's original application for special exception and as the result the ZHB entered a decision which impacted her based on Dr. Selig's fraudulent misrepresentation that he was sole owner of the Property. Contrary to Dr. Selig's argument, Mrs. Selig had every right to appeal a decision which she believed negatively impacted her ownership interests. To appeal the decision of the ZHB to grant a special exception to the Family Court would have been procedurally erroneous. Mrs. Selig sought to vacate a decision rendered by the ZHB, and properly followed procedures prescribed in the MPC.⁵

⁵ Dr. Selig also argues that Mrs. Selig's consent was not necessary on his Application for Special Exception. Dr. Selig Brief at 38-41. This is not true. While either a husband or a wife may be an applicant with respect to a property held in the entirety, the applicant should establish that he or she has the consent of his or her spouse. Beekhuis v. Zoning Hearing Board of Middletown Township, 429 A.2d 1231 (Pa. Cmwlth. 1981). As discussed, it was conclusively established in the prior proceedings that Dr. Selig fraudulently concealed Mrs. Selig's ownership interest in the Property from the ZHB, and his contention that she consented was belied by the fact that she filed a *nunc pro tunc* appeal from the ZHB's July 31, 2006, Decision.

Pre Existing Nonconforming Use

Dr. Selig argued before the common pleas court that because he was ultimately awarded exclusive possession of the Property by the Family Court there was no longer any opposition to the heliport use by his ex-wife. He, therefore, returned to the ZHB armed with this “change of circumstance” to re-apply for the special exception or, in the alternative, request that it be re-issued.

The problem Dr. Selig faced was that as of July 11, 2007, the Township’s Zoning Ordinance no longer permitted private heliports in *any* residential district, including the R-H Zoning District where the Property was located.

Consequently, he attempted to convince the common pleas court that he had a pre-existing, non-conforming use which should be “grandfathered.” He argues that he “never gave up his rights” to the special exception permit and the “heliport has always maintained its Federal Aviation Administration and State certifications.” Dr. Selig Brief at 61.

The burden of proving the existence and extent of a nonconforming use is upon the landowner. Jones v. Township of North Huntington Zoning Board, 467 A.2d 1206 (Pa. Cmwlt. 1983). The landowner is required to provide objective evidence that the land was devoted to such use at the time the zoning ordinance was enacted. R.K. Kibblehouse Quarries v. Marlborough Township Zoning Hearing Board, 630 A.2d 937 (Pa. Cmwlt. 1993), allocatur denied, 540 Pa. 609, 655 A.2d 996 (1994).

Here, the testimony and evidence adduced at the August 25, 2010, hearing before the ZHB established that there was never a legally established heliport use at the Property for purposes of a “legally existing non-conforming use.” Dr. Selig admitted he did not have a permit to use the Property as a heliport. He also testified that “I have never landed, I have never used [the Property] as a landing site.” H.T. at 39; S.R.R. at 39b.

The ZHB concluded that a private heliport use was never conducted on the Property and, therefore, could not be deemed as a nonconforming use that predated the Zoning Ordinance amendment which rendered the use a non-permitted one. A “lawful, nonconforming use of a property is a use predating the subsequent prohibitory zoning restriction.” Hafner v. Zoning Hearing Board of Allen Township, 974 A.2d 1204, 1210 (Pa. Cmwlth. 2009). The ZHB’s did not err or make findings of fact not supported by substantial evidence when it declined to permit Dr. Selig to operate a heliport on the Property as a prior existing, nonconforming use.

Exclusionary Zoning

Finally, Dr. Selig argues that Ordinance 861 was “exclusionary” because it eliminated heliports from Rural Holding Zoning Districts.

However, Dr. Selig failed to present any evidence that the Township’s Ordinance was exclusionary in regulating heliport uses. To the contrary, under the Township’s Zoning Ordinance, Heliport (Public and Private) uses are listed as permitted Special Exception uses in the I, Industrial, and I-C, Industrial Commercial Zoning Districts. In addition, “Personal Use Heliport” uses are listed as permitted by right Accessory uses in the HC-1, Highway Commercial Zoning

Districts within the Township. Ordinance 861 only eliminated the heliport use in the Township's residential Zoning District classifications after public hearings in which Dr. Selig participated and presented evidence on noise levels and safety issues.

This Court concludes that neither the ZHB nor common pleas court erred. This Court has upheld the exclusion of heliports from residential areas designed to protect the public interest, noting that the potential safety problems and disturbances to the tranquility of the area were "obvious." Appeal of Green & White Copter, Inc., 360 A.2d 283, 285 (Pa. Cmwlth. 1976).

Waived Issues

Dr. Selig raises five additional issues for the first time in his "Response Brief" in which he essentially accuses Maria C. Mullane, Esquire, Solicitor for the Township, of acting with malice, malicious prosecution and fraud.⁶

⁶ The issues are:

1. Did the Solicitor abuse her discretion, exceeded (sic) her legal authority, act in malice, when she engaged the Township in divorce litigation that was already before the family court and decided upon?
2. Did the Solicitor abuse her discretion, exceeded (sic) her legal authority, act in malice and perpetrated (sic) fraud when she participated in collateral rematch litigation against an order of the family court judge, February 5, 2007, res judicata?
3. Did the Solicitor engage in malicious prosecution to deceive the court by perpetrating acts of fraud on Dr. Selig in order to open the case nunc pro tunc?
4. Did the Solicitor commingle her roles as an adjudicator and litigator with malice and prejudice in this case?

(Footnote continued on next page...)

Not only have these issues been waived⁷, they are without factual support. In fact, the record reveals the opposite, i.e., that both the ZHB members and Township Solicitor gave Dr. Selig, who decided to represent himself, the benefit of the doubt, allowed him ample opportunity to present his case, made suggestions, and generally conducted themselves with patience and cordiality during their protracted dealings with Dr. Selig.

The Order of the common pleas court is affirmed.

BERNARD L. McGINLEY, Judge

(continued...)

5. Were the Solicitors (sic) claims that appellant never established a prior existing use for the property as a heliport, misrepresented to the court?

Dr. Selig Response Brief at 5.

⁷ Pennsylvania Rule of Appellate Procedure 302(a); Commonwealth v. Piper, 458 Pa. 307, 311, 328 A.2d 845, 847 (1974) (issues not raised in the court below are waived and may not be raised for the first time on appeal to this Court).

