IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Amerikohl Mining, Inc., Appellant	:	
v.	:	
Township of Elizabeth Zoning Hearing Board	:	No. 2461 C.D. 2010
	:	Argued: November 15, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: December 9, 2011

Amerikohl Mining, Inc. (Amerikohl) appeals from an order of the Court of Common Pleas of Allegheny County (trial court) affirming the decision of the Elizabeth Township Zoning Hearing Board (Board) which denied Amerikohl's request for a temporary use variance and special exception. Finding no error in the trial court's decision, we affirm.

Five Oaks, LLP owns a parcel of property which borders on Mill Hill Road and is located within an R-2 suburban residential district of Elizabeth Township (Township). Amerikohl desired to strip mine the parcel for coal with the attendant restoration of the property. A bond would secure the performance of

the restoration, and the bond would not be released for five years after the last augmented seeding on the property. Because strip mining was not a permitted use in an R-2 zoning district, Amerikohl applied to the Board for a variance from the temporary use provision. Temporary uses are permitted in all zones as a special exception pursuant to Section 1403.45(b) of the Elizabeth Township Zoning Ordinance (Ordinance). "A temporary use or structure" is defined in Section 201 of the Ordinance as "[a]ny use or structure that is intended to be used either on a seasonal basis, during the time of construction and completion of an approved development or for any other period of time that is six months or less." However, Section 1403.45(b) of the Ordinance requires that "[t]he proposed temporary use or structure shall be limited to those uses or structures otherwise authorized in the Zoning District." Alternatively, because mineral removal is permitted secondary to land development as a special exception, the mineral removal proposed here should be permitted as a special exception. In addition to the variance or special exception needed for a temporary use, Amerikohl sought a dimensional variance because mining was a use not permitted in the district.[1]

Before the Board, Amerikohl's counsel stated that the property was a 71-acre parcel that had previously been a beagle club, and with the exception of a gas well, was not currently occupied. He went on to state that the "whole process,

[1] Amerikohl also applied for a dimensional variance to permit it to mine near the property line. The dimensional variance was sought to permit mining within 300 feet of the property line where that line borders a property with an occupied dwelling. Section 1403.31(h) of the Ordinance provides that "no mineral removal shall be conducted within three hundred [300] feet of the property line of an occupied dwelling." (Reproduced Record [R.R.], at 234.) Both the Board and the trial court determined the issue did not need to be addressed because it would only be relevant if strip mining was authorized.

from the time the shovel goes into the ground until the time that the trees are replanted there, is a six-month period." (R.R. at 4.) David Maxwell (Maxwell), Amerikohl's vice president, admitted, though, that the restoration could take the project beyond the proposed six-month period, especially if the mining was finished in the month of December.[2] He stated that of the 71 acres, Amerikohl was "proposing to affect 28 acres" by mining with a "modified block cut method," which involved removing the surface and hauling the dirt to either end of the pit, mining two pits from the middle outward, and replacing the removed dirt when all the coal was removed. (R.R. at 7-8.) Maxwell further testified that as part of its mining operation, Amerikohl would have to mine within 300 feet of a property line which has an occupied dwelling.

As to the restoration efforts, Maxwell stated that when the mining was complete, Amerikohl would "put everything to original contour," then seed, mulch, and plant trees. (R.R. at 9.) Maxwell estimated that the bond to secure restoration, which would be posted with the Department of Environmental Protection (DEP), would be approximately $250,000. DEP would also regulate the restoration and would require a number of trees to grow per acre before the bond would be released.

Amerikohl further provided that the only access to the property was a narrow access road that had approximately a 10% grade with 12-inch water mains running under and beside it, which did not meet Township specifications and would not be adequate for use by Amerikohl. Moreover, a portion of the access

[2] Commissioners Robert Keefer (Keefer) and Robert Thomas (Thomas) testified about the Commissioner intentions when enacting Section 1403.45 of the Ordinance. This testimony
(Footnote continued on next page…)

road ran over property owned by David McCorkle, who at the November 19, 2009 hearing expressed concern over Amerikohl's trucks using the access road to drive on and off the property. Because of this, the company had an agreement with Darrell and Kim Geary to purchase a right-of-way from Mill Hill Road to allow sufficient access to the property and to avoid McCorkle's property.

In a March 4, 2010 decision, the Board denied the temporary use variance because strip mining was not a permitted use in an R-2 zoning district, and the property could be used in accordance with the ordinance. The Board also said that the use was not temporary because it could last more than six months, and strip mining in general was not truly temporary because the removal of the coal would require permanent grading and the land would never be exactly the same. As to Amerikohl's argument that strip mining should be permitted because mineral removal would otherwise be permitted in connection with land development, the Board found that no land development was contemplated, the mining would affect all but a 50-foot buffer of a 71-acre tract of land, and it was not at all similar to "routine grading" permitted in connection with land development. (Zoning Hearing Board Decision dated March 4, 2010, at 4-5.) Amerikohl appealed to the trial court, which affirmed the Board's decision, and this appeal followed.

Relying on *8131 Roosevelt Corporation v. Zoning Board of Adjustment of City of Philadelphia*, 794 A.2d 964 (Pa. Cmwlth. 2002), Amerikohl contends that a temporary use variance should be granted under a more relaxed hardship standard because a temporary variance is less harmful to the overall

(continued…)

was not considered in making our interpretation of that provision.

zoning scheme than a permanent variance. In *8131 Roosevelt Corporation*, the property owner contended that collateral estoppel and res judicata precluded the denial of a zoning variance to an adult cabaret club because the zoning board had previously given it a two-year variance from the zoning restrictions. In denying the permanent variance, we stated that grant of a two year variance "did not purport to establish a permanent determination of unnecessary hardship or lack of adverse impact on the neighborhood," *id.*, at 969, because a property owner seeking a permanent variance had to make out the same standards, and collateral estoppel and res judicata did not apply because each variance request "was limited to a specified period." *Id.* Rather than standing for the proposition that there is a relaxed standard for a temporary variance, *8131 Roosevelt Corporation* stands for the proposition that each application for a variance for the property stands on its own and must meet the normal variance standards.[3] Because there is nothing in the record to establish that the property cannot be used as zoned, the Board properly denied the requested variance from the temporary use provision.

Amerikohl also argues that strip mining should be permitted as a special exception under Section 1403.45 because the restriction that the use or

[3] To establish a right to a variance, the landowner must show that an unnecessary hardship will result if the variance is denied, (1) due to the unique physical circumstances or conditions of the property; (2) because of such physical circumstances or conditions the property cannot be developed in strict conformity with the provisions of the zoning ordinance and a variance is necessary to enable the reasonable use of the property; (3) the hardship is not self-inflicted; (4) granting the variance will not alter the essential character of the neighborhood nor be detrimental to the public welfare; and (5) the variance sought is the minimum variance that will afford relief. Section 910.2 of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, added by Section 89 of the Act of December 21, 1988, P.L. 1329, 53 P.S. §10910.2. Variance relief should be used sparingly and only under exceptional circumstances. *O'Neill v. Zoning Board of Adjustment*, 434 Pa. 331, 254 A.2d 12 (1969).

structure "be limited to those uses or structures otherwise authorized in the zoning district," (R.R. at 246), is ambiguous.[4] It argues that the phrase "otherwise authorized" should be interpreted to mean a temporary use that is less burdensome than that which is otherwise permitted, such as removing minerals from the property despite not developing the land.[5] However, that provision is not ambiguous; it only allows for temporary uses and structures that are permitted in the zoning district and not others. Because mining is not permitted in an R-2 district, the Board properly denied the requested special exception.[6]

Accordingly, for the reasons set forth above, the decision of the trial court is affirmed.

DAN PELLEGRINI, Judge

[4] The MPC provides, in relevant part:

> In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, *where doubt exists as to the intended meaning of the language written* and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.

Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, added by Act of December 21, 1988, P.L. 132, *as amended,* 53 P.S. §10603.1.

[5] Section 1403.31(a) permits "[r]emoval of minerals encountered during the routine grading of a site for the purposes of an approved land development or for the construction of public improvements." (R.R. at 233.)

[6] Amerikohl also seeks a dimensional variance to allow it to mine within 100 feet of the property line bordering property with a residential dwelling, rather than the requisite 300 feet set forth in the Ordinance. However, as the trial court stated, because strip mining is not authorized, this dimensional variance issue is irrelevant. (*See* Trial Court Opinion, dated October 29, 2010, at 5.)

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O R D E R

AND NOW, this 9th day of December, 2011, the order of the Allegheny County Court of Common Pleas, dated October 29, 2010, is hereby affirmed.

DAN PELLEGRINI, Judge