IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Mulch-It, Inc. and Thomas Pancoast, | : | |
| Appellants | : | |
| v. | : | No. 34 C.D. 2009 |
| Zoning Hearing Board of Springfield Township | : | Argued: December 7, 2009 |
| Mulch-It, Inc. and Thomas Pancoast | : | |
| v. | : | No. 107 C.D. 2009 |
| Zoning Hearing Board of Springfield Township | : | |
| Appeal of: Springfield Township | : | |

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE FLAHERTY FILED: February 19, 2010

Mulch-It, Inc. (Mulch-It) and Thomas Pancoast (Pancoast), an officer of Mulch-It (collectively, Appellant) appeal from an order of the Court of Common Pleas of Delaware County (trial court) which remanded

the case to the Zoning Hearing Board of Springfield Township (Board) for a new hearing. The Township of Springfield (Township) has filed a cross-appeal. We reverse.

Mulch-It is the lessee of a tract of land (Property) located in an "A" residence zoning district, which is designed for low to medium density residential development. The Property is the site of a former quarry and a wooded buffer shields the Property from neighboring residences.

In 2000, the Township authorized the use of the Property for storage and distribution of bulk materials on a temporary basis for a period of two years. In 2005, the Board granted Appellant's request for a special exception stating:

> 1. A special exception is granted to permit the continuation and extension of the existing nonconforming use to store mulch, stone, top soil, masonry products, other non-offensive bulk materials and to store and distribute sheds, swing sets, gazebos and similar wood products on the premises.
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> 2. A special exception and/or variance to allow for the expansion of the existing mulch storage area, beyond the existing black topped surface, is DENIED.

(R.R. at 38a.) Thereafter, the Board issued a supplemental decree (decree) and order modifying the previous order as follows:

> 1. A special exception is granted to permit the continuation and extension of the nonconforming use to store, distribute and sell mulch, stone, top soil, masonry products, other non-offensive bulk materials, sheds, swing sets, gazebos and similar wood products.

> In all other respects the original Opinion is hereby ratified and confirmed.

(R.R. at 39a.)

Thereafter, on October 18, 2006, the Township code enforcement officer issued a notice of abatement to Appellant. The notice informed Appellant that it was in violation of the Ordinance and the decree. Among the violations was a claim that "[p]iles of tree cuttings, wood chips or mulch and earth are being stored outside the paved area." (R.R. at 40a.) The Township and Appellant agreed to suspend the notice while the parties attempted to amicably resolve the matter.

On January 5, 2007, a new notice of abatement was issued incorporating the averments of the original notice of abatement. (R.R. at 42a.) Appellant appealed to the Board from the notice of abatement.

At the Board hearing, it was agreed on the record that the Township had the burden under the Pennsylvania Municipalities Planning Code (MPC) to produce evidence to sustain the notice of abatement.[1] (R.R. at 172a-173a.) The Township presented exhibits and testimony from its code enforcement officer in support of its contention that Appellant was properly cited with the violations specified in the notice of abatement. Appellant presented testimony in its defense.

The Board issued a decision upholding the violations asserted in the notice of abatement. Specifically, the Board noted that the decrees initially issued granted a special exception to permit the continuation and extension of the nonconforming use to store, distribute and sell "mulch,

[1] Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §§ 10101-11202.

stone, top soil, masonry products, other non-offensive materials, sheds, swing sets, gazebos and similar wood products." The Board determined that Appellant was currently storing landscaping materials. "The storage and sale of the landscape materials, fill dirt and wood chips are not listed in either Decree as permitted materials and are, in the Board's opinion, not permitted as 'non-offensive materials' … and are in direct violation of the ….decree …." (Board opinion at 15.) Although Appellant claimed that the materials were "non-offensive" the Board noted Pancoast's answer to a question wherein he stated that asbestos materials or termites might be mixed in with the materials in question. Pancoast also testified that he occasionally finds objects in the materials, including plastic bottles, rakes, etc. The Board concluded that the landscaping materials are not among those listed in the decrees as permitted and are "hereby declared offensive materials and not permitted on the premises …." (Board opinion at 18, 19.)

Appellant appealed to the trial court. Without taking additional evidence, the trial court remanded to the Board stating as follows:

> 1) The Appellee Board committed an error of law shifting the burden of proof to the Appellant to show that landscaping materials, fill dirt and wood chips are permitted non-offensive materials. See decision of Appellee Board dated 11/2/07; 53 Pa. C.S.A.16016(D); Hartner v. Zoning Hearing Board of Upper St. Clair Township, __ Pa. Cmwlth. __, 840 A.2d 1068 (2004).
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> 2) The Appellee Board made findings not supported by substantial evidence when it held that landscaping material, mulch and fill of [sic] "offensive materials". See Decision of Appellee Board dated 11/2/07; Hartner v. Zoning Hearing Board of Upper St. Clair Township, supra.

> 3) The proper remedy in this case is a remand for a new hearing before the Springfield Township Zoning Hearing Board so that the Springfield Township can present evidence in support of its contention that landscaping materials, mulch and fill are offensive materials. Hartner v. Zoning Hearing Board of Upper St. Clair Township, supra.

(Trial court order at 1, 2.)

On appeal, Appellant claims that the trial court erred in remanding to the Board for the presentation of additional evidence and that the trial court should have sustained Appellant's appeal because the Township failed to demonstrate violations supported by substantial evidence.[2] The Township claims that the trial court erred in determining that the Board improperly shifted the burden to Appellant and also argues that the Board's findings are supported by substantial evidence.[3]

We conclude that the trial court erred in remanding to the Board for a new hearing and that substantial evidence supports the Board's determination that the materials now being dumped on the Property including fill dirt, brush and yard waste are offensive materials which are not permitted on the premises.

Here, the trial court's reliance on Hartner in ordering a remand to the Board for a new hearing is misplaced. With respect to enforcement notices, in accordance with Section 616.1(d) of the MPC, 53 P.S. § 10616.1,

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[2] On February 4, 2009, this court issued an order stating that the trial court's remand order is appealable pursuant to Pa. R.A.P. 311(f)(2).

[3] Where, as here, the trial court does not take additional evidence, this court's review is limited to determining whether the board committed an error of law or abuse of discretion. Valley View Civic Association v. Zoning Hearing Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983).

the municipality shall have the responsibility of presenting its evidence first.[4] In Hartner, this court stated that "[a] municipality cannot meet its burden in an enforcement proceeding merely by setting forth the relevant procedural history and establishing the content of the relevant zoning provision without presenting any evidence that those provisions were violated by the named individuals or entities." Id. 840 A.2d at 1070.

In this case, before the Board, it was agreed that the Township had the obligation to first present evidence as to "why the applicant/petitioner is … alleged to be in violation of the Ordinance" and that the Appellant would then be permitted to rebut the Township's evidence. (R.R. at 173a.) The Township did in fact present the testimony of the code enforcement officer, who testified as to the different types of materials that he observed on the Property. Pictures of the Property were also admitted into evidence. Appellant then offered his testimony.

Unlike Hartner, where the zoning officer merely recited the procedural posture of the case and set forth the township's position, the Township in this case actually presented evidence and testimony regarding materials on the Property. The property owner in Hartner "had to disprove the case against them before the Township had established the case at all." Id. at 1070. Because in this case the Township properly presented evidence as to Ordinance violations and Appellant was then afforded an opportunity to present contrary evidence, we conclude that the trial court erred in ordering a remand based on Hartner.

[4] Section 616.1 was added by the Act of December 21, 1988, P.L. 1329.

Next, we address the issue of whether substantial evidence supports the Board's findings that Appellant is storing offensive materials on the Property. The Board specifically found that "[t]he storage and sale of the landscaping materials, fill dirt and wood chips are not listed in either Decree as permitted materials and are, in the Board's opinion, not permitted as 'nonoffensive materials' …." (Board opinion at 15.)

According to the Appellant, the Board's findings that the landscape materials, fill dirt and wood chips were "offensive materials" prohibited under the 2005 decree, is not supported by substantial evidence. A board's findings must be supported by substantial evidence, which has been defined as such reasonable evidence as a reasonable mind might accept as adequate to support a conclusion. Valley View Civic Association.

Here, Appellant claims that the evidence presented on the issue of whether the materials were offensive was speculative, that the materials might contain elements such as bottles or bugs. According to Appellant, there was no evidence to suggest that those elements were prevalent or noxious so as to be considered "offensive" and the law is clear that evidence which is based on pure speculation does not rise to the level of substantial evidence necessary to support findings in land use and zoning matters. See Bailey v. Upper Southampton Township, 690 A.2d 1324 (Pa. Cmwlth. 1997).

A review of the testimony regarding the materials on the Property reveals that it was not speculative. The code enforcement officer identified pictures of the Property which depicted large mounds of dirt with

rocks and grass and large mounds of material which included branches and leaves. Appellant himself testified that some of the brush and yard waste had been found to contain junk, rakes, tools and shovels.

Appellant acknowledged that he began accepting the landscaping material and fill dirt on the Property in 2006, after the initial decrees were issued and that such items were not listed in the decree. Landscapers pay Appellant to dump or drop off tree branches, leaves and the like from residential properties. Appellant, in turn, sells these materials to another company that processes them. As to the fill dirt, Appellant explained that it is found deeper in the ground and contains rocks and there is the possibility of insects in every product he sells. Appellant acknowledged that at the same time he began collecting the landscaping materials and fill dirt, he began receiving complaints from neighbors regarding odors. Prior to this, he received only a couple of complaints.

In its decision, the Board noted that it was persuaded by the potential for unsavory contamination of the additional unprocessed bulk products that were being dumped on the Property, including plastic bottles, hand tools, termites, insect larvae, asbestos and ground contamination. Additionally, by Appellant's own admission, as soon as he began accepting materials on the Property, which were not listed in the decree, he began receiving complaints from neighbors regarding odors. Here, the Board's decision to uphold the notice of abatement was premised on numerous concerns and it is the function of the board to weigh the evidence before it. Spargo v. Zoning Hearing Board of the Municipality of Bethel Park, 563

A.2d 213 (Pa. Cmwlth. 1989). As such, we agree with the Township that the Board's findings were supported by substantial evidence.

In accordance with the above, the decision of the trial court is reversed.

JIM FLAHERTY, Senior Judge

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**O R D E R**

Now, February 19, 2010, the order of the Court of Common Pleas of Delaware County, in the above-captioned matter, is reversed.

JIM FLAHERTY, Senior Judge