

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

June L. Sell and William A. Sell,

Appellants

V.

Zoning Hearing Board of Lower
Macungie Twp. and Twp. of
Lower Macungie, Lawrence W.
Higgins and Love Homes, Inc.

No. 66 C.D. 2009
Argued: November 10, 2009

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY

FILED: February 19, 2010

June L. Sell and William A. Sell (Sell) appeal from an order of the Court of Common Pleas of Lehigh County (trial court) which affirmed the decision of the Zoning Hearing Board of Lower Macungie Township (Board) which denied Sell's proposal to use one of his subdivided lots, Lot F, for a 35-foot high illuminated billboard. Lower Macungie Township (Township) is the intervenor. We reverse.

Sell is the owner of a subdivision (Subdivision) created by virtue of a plan entitled “Subdivision Plan for Property Belonging to William Sell.” The Subdivision divided the tract into six separate parcels identified as Lots A through F. The Subdivision plan included notes

regarding existing structures on the tract and the intended use of some of the proposed lots. Lot F, which is the only lot at issue, appears on the Subdivision plan as a detention area, and a note placed directly in the area encompassing Lot F provides:

Note: Maintenance of detention area on Lot F shall be provided for by Lot A owner until such time that Lot F becomes a suitable building lot by provision of storm sewer extension of existing facilities.

(R.R. at 197a.) The Township approved the Subdivision on April 15, 1982 and it was thereafter recorded.

Lots A through D in the Subdivision are used in connection with the operation of a business known as AB Natural Stone which sells stone, bricks and landscape materials to the general public. Additionally, Sell has used Lot F for parking, storage of landscape materials, signage, and to house a movable storage trailer, all incident to the operation of AB Natural Stone. Sell has continuously used Lot F as a detention area for the overflow of water from Lots A through E. Lot F also receives the overflow of water from several hundred acres of land which are located upstream from it.

On April 27, 2006, Sell filed an application for a zoning permit. Sell proposed to cease all use of Lot F, except for the detention area, thus making Lot F totally vacant, thereafter erecting a 35-foot high illuminated V-shaped billboard, consisting of two 360 square foot display faces, on Lot F.

The Township Zoning Officer denied Sell's request. Sell appealed to the Board, arguing that he was entitled to erect the sign as of right. Alternatively, Sell maintained that he was entitled to a special exception or variance.

The Board determined that due to the note on the Subdivision plan, Lot F is not a buildable lot and, therefore, could not be used for the proposed sign. (Board's decision at p. 3.) Additionally, the Board denied Sell's request for a special exception or variance. On appeal, the trial court affirmed. The trial court observed that Lot F was designed as a detention area and will remain as one. According to the trial court, a detention area constitutes a use and because the Ordinance provides that a billboard is a primary use, the billboard cannot be erected on Lot F, which already has an existing use, i.e. a detention area. This appeal followed.¹

Sell argues that although a detention area is on Lot F and will remain on Lot F, such does not preclude Sell from erecting an advertising sign on Lot F as of right as he has met all the requirements under the Ordinance. We agree.

Lot F is located in the C-Commercial zoning district in the Township. Section 1001.2 of the Ordinance provides that "advertising signs in accordance with Section 1918" are permitted in the C-Commercial district as a matter of right. Section 1918 of the Ordinance requires, among other things, that "[b]illboards shall only be permitted as primary uses."²

¹ Where, as here, the trial court does not take additional evidence, this court's review is limited to determining whether the zoning hearing board committed an abuse of discretion or an error of law. Cardamone v. Whitpain Township Zoning Hearing Board, 771 A.2d 103 (Pa. Cmwlth. 2001).

² The other requirements of Section 1918 are not at issue.

The Ordinance does not define the term “primary use.” The term “use” is defined in Section 201 of the Ordinance as “a specific purpose for which land, buildings, or structures are designed, arranged, intended, occupied, or maintained, or any activity, occupation, business or operation which may be conducted at a given location.” The term “detention area” is not defined in the Ordinance. A “detention pond” is defined in Section 201 of the Ordinance as “[a] basin designed, intended or used to retard storm water runoff by temporarily storing the runoff in the basin and releasing it at a predetermined rate.” While a detention pond constitutes a “use” by definition, there was no determination made in this case that the detention area was in fact a detention pond, nor is it labeled as such on the Subdivision plan. The detention area is just that, a detention area.

Moreover, even if it were determined that the detention area constituted a use, we observe that the Ordinance only states that the billboard shall be a “primary use.” The Ordinance does not limit the number of uses, primary, principal, accessory or other, on an individual lot. Additionally, primary is not synonymous with only. Zoning ordinances are to be liberally construed to allow the broadest possible use of land and zoning ordinances are to be construed in accordance with the plain and ordinary meaning of their words. Phillips v. Zoning Hearing Board of Montour Township, 776 A.2d 341 (Pa. Cmwlth. 2001). Thus, although Sell intends to continue to use the lot as a detention area, contrary to the Township’s argument, the Ordinance does not prohibit him from also having the primary use of his land as that of a billboard.

Additionally, the note on the Subdivision plan does not limit the use of Lot F to a detention area, nor does the note declare the detention area as the primary use. Rather, the note only addresses the maintenance of the detention area on Lot F. Specifically, the owner of Lot A is responsible for the maintenance of the detention area on Lot F until such time as Lot F becomes a suitable building lot. Sell does not propose to convert Lot F into a building lot. A building is defined in Section 201 of the Ordinance as “[a]ny structure ... intended for the shelter, housing, enclosure of persons, animals or chattels.” A structure is defined as “[a]ny man-made object having an ascertainable stationary location on or in land or water, whether or not affixed to the land.” An advertising sign is a structure which will have no effect on the maintenance provision in the note.

Because Sell is permitted to erect a billboard as of right, we need not address the issue of whether he met the requirements for a special exception or a variance.

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

JIM FLAHERTY, Senior Judge

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ORDER

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

JIM FLAHERTY, Senior Judge