

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

West Pottsgrove Township	:	
	:	
v.	:	No. 926 C.D. 2009
	:	
Ryan Shawn Moyer, Georgette Moyer	:	Submitted: March 12, 2010
and Blaine Moyer,	:	
	:	
Appellants	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE COHN JUBELIRER**

**FILED: July 14, 2010**

Ryan Shawn Moyer (Ryan Moyer), Georgette Moyer (together, Landowners) and Blaine Moyer<sup>1</sup> (Intervenor), (collectively, the Moyers) appeal from the April 1, 2009 order (April Order) of the Court of Common Pleas of Montgomery County (trial court), which, upon reconsideration, granted West Pottsgrove Township’s (Township) Motion for Permanent Injunction (Motion) and enjoined the Moyers from “engaging in more than one lawful use of the property

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<sup>1</sup> Blaine Moyer, who is married to Georgette Moyer, resides on the property at issue but does not have an ownership interest in that property. He is proceeding pro se in this appeal, and has filed a separate brief. Although he raises similar issues as Landowners, he also raises additional issues. Where Blaine Moyer raises similar arguments as Landowners, we will address Landowners’ more developed arguments.

situate[d] at County Parcel Nos. 64-00-02284-00-1 and 64-00-02287-00-7, known as Blocks 13 & 14 on Hawthorne Road, and 64-00-02290-00-4 and 64-00-00802-00-7, known as Blocks 30 & 31 on Hawthorne Road [(the Property)].” (April Order ¶ 3, R.R. at 182a.) The April Order further directed the Moyers to: (1) remove the mobile home situated on the Property, but permitted the Moyers to establish a residence on the Property, “which conforms in all respects with the lawful ordinances of [the Township]”; (2) remove all the junk, debris, vehicles, gas pumps, and other materials from the Property and restore the Property to its state prior to their purchase and occupation thereof; and (3) comply “in all respects with the Zoning Ordinance of West Pottsgrove Township [(Zoning Ordinance)].” (April Order ¶¶ 4-6, R.R. 182a-83a.)

On appeal, Landowners argue that the trial court erred in granting the Motion because: (1) the Township did not establish a clear right to relief as a matter of law; (2) the trial court erroneously relied upon a decision upholding the Zoning Hearing Board of West Pottsgrove Township’s (Board) denial of the Moyers’ zoning appeal by a different trial court judge to find that the Township established a clear right to relief; and (3) the Township did not establish that a greater injury would result from refusing, rather than granting, the Motion. Intervenor also argues that the trial court erred and/or abused its discretion when it granted the Motion.

## **I. Background**

On July 31, 2007, Landowners purchased the Property from Goldia Patten. The Property is zoned R-2 residential. The Moyers operate a private salvage yard

in which they scrap or salvage motor vehicles and other materials on the Property. Edward Whetstone, the Township Manager and Zoning Officer, issued a Notice of Violation and Cease and Desist Order (Notice) to Landowners on August 10, 2007. The Notice asserted that the Moyers' activity on the Property violated various Township Zoning and Code Ordinances, directed the Moyers to cease and desist those activities, and gave them ten days in which to appeal.

Landowners appealed the violations of, *inter alia*, Sections 701 and 701.1 of Article VII of the Zoning Ordinance with the Board and sought an interpretation of certain sections of the Zoning Ordinance from the Board (Zoning Appeal). Intervenor intervened in the Zoning Appeal. The Board held hearings on the Zoning Appeal on October 10, 2007, November 8, 2007, and December 6, 2007. On February 13, 2008, the Board issued a written decision rejecting the Moyers' argument that the use of the Property as a private salvage yard was the continuation of a legal, nonconforming use and denying the Zoning Appeal. The Moyers filed an appeal with the trial court, which was heard by The Honorable Kent H. Albright.

The Township issued numerous citations in September 2007 citing the Moyers for other, non-zoning violations of the International Property Maintenance Code (Property Maintenance Code), the Township's Code of Ordinances, and the Township's Subdivision and Land Development Ordinance, which contains the Township's Stormwater Management Ordinance (Township's Codes and Ordinances). (Trial Ct. Order, January 20, 2009 (January Order) at 3, Findings of Fact (FOF) ¶ 10, R.R. at 148a.) A Magisterial District Judge ruled against the

Moyers on the alleged violations, and the Moyers appealed that determination to the trial court. (FOF ¶¶ 11-12, R.R. at 148a.)

While these appeals were pending, the Township filed a Civil Action (Complaint) against the Moyers, pursuant to Pa. R.C.P. No. 1531,<sup>2</sup> seeking Preliminary and Permanent Injunctive relief in the nature of enjoining the Moyers from continuing to violate the Zoning Ordinance and the Township's Codes and Ordinances. (Township's Civil Action-Injunctive Relief Pa. R.C.P. No. 1531, January 30, 2008, R.R. at 4a-23a; Motion for Preliminary/Permanent Injunction, January 30, 2008, R.R. at 24a-25a.) The Moyers filed an Answer denying the material allegations of the Complaint and raising as New Matter various defenses to the alleged violations of the Zoning Ordinance and the Township's Codes and Ordinances.<sup>3</sup> (Landowners' Answer to Township's Complaint, March 6, 2008, R.R. at 26a-35a.) Landowners also filed an Answer to the Motion denying the material allegations and asserting that an injunction would be improper under these circumstances. (Answer of Landowners to Motion, March 6, 2008, R.R. at 36a-41a.)

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<sup>2</sup> Rule No. 1531 sets forth the requirements for a trial court to issue "Special Relief. Injunctions." Pa. R.C.P. No. 1531.

<sup>3</sup> Intervenor also filed an answer denying the material allegations of the Complaint and asserting a "counterclaim." (Intervenor's Response to Civil Action-Injunctive Relief Pa. R.C.P. 1531, with Counterclaim, March 6, 2008 (Intervenor's Response).)

On March 6, 2008, the trial court<sup>4</sup> entered a Temporary Order enjoining the Moyers from residing on the Property but did not enjoin the Moyers' operation of the private salvage yard. (Trial Ct. Order, March 6, 2008, R.R. at 65a.) Thereafter, the trial court, The Honorable Thomas P. Rogers presiding, held three hearings on the Motion on May 14, 2008, May 23, 2008, and June 12, 2008. Judge Rogers also inspected the Property on May 27, 2008. The Township offered documentary evidence, and the testimony of a representative of a neighboring property owner, of various officials who had inspected the Property and of Ryan Moyer, who was called as if on cross-examination. The officials testified not only regarding the Moyers' per se violations of the Township's Codes and Ordinances, but also to violations of the Zoning Ordinance and per se violations of Township Ordinance 2007-2 (the Holding Tank Ordinance). The Moyers offered documentary evidence and the testimony of Ricky Patten, who testified regarding the past use of the Property.

Following the hearings, the trial court issued the January Order denying the Motion. The trial court concluded that the Township's evidence failed to establish its entitlement to permanent injunctive relief, concluding that the Township failed to establish a clear right to relief, an urgent necessity to avoid an injury that cannot be compensated for by damages, and that a greater injury would result by refusing, rather than granting, the Motion. (January Order, Conclusions of Law (COL) ¶¶ 3-5, R.R. at 154a.)

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<sup>4</sup> The Honorable S. Gerald Corso presiding.

On January 27, 2009, the Township filed a Motion for Reconsideration and to Admit Evidence related to Judge Albright's decision in the Zoning Appeal, filed on January 14, 2009, and arguments on this motion were held on March 9, 2009. The trial court granted the Motion for Reconsideration and allowed the Township to submit Judge Albright's decision, which denied the Moyers' Zoning Appeal and rejected, *inter alia*, the Moyers' argument that the private salvage yard use was the continuation of a legal nonconforming use. After considering Judge Albright's decision, Judge Rogers issued the April Order, which stated:

[a]s a decision at Law has been rendered in the [Zoning Appeal] affirming the [Board] and finding that the lawful nonconforming use of the [Property] owned by the [Moyers] had been abandoned many years prior to their purchase of the [Property] on July 21, 2007, the undersigned is constrained to reverse its prior decision denying [the Township's] request for a permanent injunction.

(April Order at 1-2, R.R. at 181a-82a.) The trial court held that the Township had established: "a clear right to relief based upon the determination of the [Zoning Appeal]"; "an urgent necessity to avoid injury which cannot be compensated for by damages"; and "a greater injury will result from refusing rather than granting the relief requested." (April Order at 2, ¶¶ 1-2, R.R. at 182a.) Accordingly, the trial court granted the Motion and ordered the Moyers to: cease engaging in more than one lawful use of the Property; remove the mobile home on the Property, but allowed them to establish a residence thereon, which conforms to the Township's lawful ordinances; remove all junk, debris, vehicles, gas pumps, and other material from the Property and restore the Property to its prior state; and comply in all respects with the Zoning Ordinance. (April Order at 2-3, ¶¶ 3-6, R.R. 182a-83a.)

The Moyers filed an appeal with this Court and, after directing the Moyers to issue Concise Statements of Matters Complained of on Appeal, the trial court issued an opinion in support of the April Order. In that opinion, the trial court rejected Landowners' assertion that the Township had not established a clear right to relief, reasoning:

[The Township] has attempted to enforce its legitimate ordinances, building code requirements, stormwater management requirements, zoning requirements and land development ordinances with regard to [the Moyers] since August 2007. The Township has issued notices of violation, cease and desist orders, citations and finally filed this equity action in order to curtail the blatant disregard of the Township's Ordinances exhibited by [the Moyers]. The Municipalities Planning Code, 53 P.S. §10617.2 expressly empowers municipalities to seek equitable relief to restrain violations of their zoning ordinances. Board of Supervisors of West Brandywine Township v. Matlack, 394 A.2d 639 (Pa. Cmwlth. 1978). [The Township] has availed itself to [sic] this form of relief as a last resort when all prior attempts to curtail [the Moyers'] unlawful activities failed. In view of these circumstances, the Township has a clear right to relief based upon ongoing illegal violations of its Zoning Ordinance.

(Trial Ct. Op. at 9-10, December 18, 2009, R.R. at 942a-43a.) Summarizing the credible testimonial evidence offered by the Township, the trial court held that "there exists a real potential for pollution to develop in the Township. This is the type of injury that cannot be compensated for by damages." (Trial Ct. Op. at 15, R.R. at 948a.)

The trial court also rejected Landowners' argument that Judge Albright's decision affirming the Board's order did not change the legal posture of the case. The trial court held that, in affirming the Board's decision, Judge Albright made it clear that the Board's decision in the Zoning Appeal was supported by substantial

evidence and that the Moyers were, in fact, acting in violation of the Zoning Ordinance. (Trial Ct. Op. at 16, R.R. at 949a.) Finally, the trial court rejected Landowners' contention that the trial court erred and/or abused its discretion and contradicted its January Order by concluding that the Township established that a greater injury will result from refusing, rather than granting, the injunctive relief. Citing Ryan Moyer's testimony on cross-examination, in which he "admit[ted] to the violations of the Township Ordinances," the trial court stated, *inter alia*, that the Moyers:

refuse to acknowledge, although they have admitted to on the record, the many violations amassed from the unlawful use of their property. The cessation of these unlawful activities will not harm [the Moyers] as much as permitting the continuation of the activities with the high potential for pollution in [the Township] and to adjoining landowners.

(Trial Ct. Op. at 16-17, R.R. at 949a-50a.)

With regard to Intervenor's nine alleged errors of law set forth in his Concise Statement of Matters Complained of on Appeal, the trial court concluded that Intervenor's concise statement, "while well intentioned is too vague to allow the court to identify the issues raised on appeal." (Trial Ct. Op. at 28, R.R. 961a.) Thus, the trial court did not address Intervenor's issues, concluding, essentially, that they were waived, citing, among others, Commonwealth v. Heggins, 809 A.2d 908, 911 (Pa. Super. 2002) (holding that, even if a trial court correctly guesses the issues raised on appeal, where the concise statement is too vague, the issues are still waived), and Commonwealth v. Dowling, 778 A.2d 683, 686-87 (Pa. Super. 2001) (stating that "a Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all"). The trial court further noted that, to the extent that Intervenor's



issues were duplicative of Landowners' issues, those issues already had been addressed, and rejected, by the trial court.

## **II. Landowners' Arguments**

### **A. The Township Failed to Establish a Clear Right to Relief**

On appeal, Landowners first argue that the trial court erred in granting the Motion because the Township failed to establish a clear right to relief as a matter of law.<sup>5</sup> According to Landowners, the Township has not established a clear right to relief because the Township failed to abide by its own ordinances, particularly the Property Maintenance Code and Zoning Ordinance, in its attempts to regulate the Moyers' activities on the Property. Landowners further assert that the Township did not have a clear right to relief because the Moyers' use of the Property as a private salvage yard was the continuation of a legal, nonconforming use.

Section 617 of the Pennsylvania Municipalities Planning Code (MPC)<sup>6</sup> provides, in relevant part, the following:

In case any . . . land is, or is proposed to be . . . used in violation of any ordinance enacted under this act or prior enabling laws, the governing body or, with the approval of the governing body, an officer of the municipality, or any aggrieved owner or tenant of real property who shows that his property or person will be substantially affected by the alleged violation, in addition to other remedies, may institute any appropriate action or proceeding to prevent, restrain,

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<sup>5</sup> “[W]hen reviewing the grant or denial of a final or permanent injunction, an appellate court's review is limited to determining whether the trial court committed an error of law.” Buffalo Township v. Jones, 571 Pa. 637, 644, 813 A.2d 659, 663-64 (2002). Our review of a question of law is de novo. Id. at 644 n.4, 813 A.2d at 664 n.4.

<sup>6</sup> Act of July 31, 1968, P.L. 805, as amended, 53 P.S. § 10617.

correct or abate such . . . land, or to prevent, in or about such premises, any act, conduct, business or use constituting a violation.

53 P.S. § 10617. Thus, pursuant to Section 617, a municipality may file an action in equity to prevent, restrain, correct or abate acts, conduct, business or uses that violate that municipality's zoning ordinance. Gateway Motels, Inc. v. Municipality of Monroeville, 525 A.2d 478, 481-82 (Pa. Cmwlth. 1987); Babin v. City of Lancaster, 493 A.2d 141, 144 (Pa. Cmwlth. 1985). The availability of equitable relief under Section 617 of the MPC is not limited by the fact that a municipality "has the power to impose penalties for zoning ordinance violations." Babin, 493 A.2d at 144. This Court has held that where there is an admitted violation of an ordinance, there is a *per se* violation of the ordinance that entitles a municipality to injunctive relief under Section 617. See Township of Little Britain v. Lancaster County Turf Products, Inc., 604 A.2d 1225, 1228-29 (Pa. Cmwlth. 1991) (holding that a trial court erred in applying the general standard for establishing an entitlement for a preliminary injunction where the admission of the landowner established a *per se* violation of the zoning ordinance and entitled the municipality to injunctive relief under Section 617). Where there is evidence that a landowner's violation of a zoning ordinance is deliberate, substantial, and done in bad faith, it is proper for the trial court to order the removal or abatement of the offending structures or uses. See Siegmund v. Duschak, 714 A.2d 489, 492 (Pa. Cmwlth. 1998) (affirming a trial court's determination that held that the landowners' violation of the zoning ordinance was substantial, deliberate and in bad faith where they received a permit to repair the roof and add a deck to a non-conforming building, but built a second floor, and which directed the landowners to raze and remove the offending second floor).

In addition to Section 617 of the MPC, Section 904 of the Township’s Stormwater Management Ordinance, found in the Township’s Subdivision and Land Development Ordinance, authorizes the Township’s solicitor to institute injunctive or other appropriate actions or proceedings in law or equity to ensure the enforcement of the Stormwater Management Ordinance. (Stormwater Management Ordinance § 904.) Sections 106.3 and 106.5 of the Property Maintenance Code authorize the Township to seek relief in either law or equity to restrain, abate, or correct violations of the Property Maintenance Code. (Property Maintenance Code §§ 106.3, 106.5, R.R. at 883a.) Section 10-7 of the Township’s Code of Ordinances permits the Township to file an action in law or equity to obtain an injunction or a restraining order to prevent the maintaining of junk or debris on a property. (Code of Ordinances § 10-7.)

“[I]n order to establish a claim for a permanent injunction, the party must establish his or her clear right to relief.” Buffalo Township v. Jones, 571 Pa. 637, 644, 813 A.2d 659, 663 (2002). “[U]nlike a claim for a preliminary injunction, the party [seeking a permanent injunction] *need not establish either irreparable harm or immediate relief* and a court ‘*may issue a final injunction if such relief is necessary to prevent a legal wrong for which there is no adequate redress at law.*’” Id. (quoting Soja v. Factoryville Sportsmen's Club, 522 A.2d 1129, 1131 (Pa. Super. 1987) (emphasis added).) The moving party must also prove that the “injunction is necessary to avoid an injury that cannot be compensated by damages.” Penn Square General v. County of Lancaster, 936 A.2d 158, 167 (Pa. Cmwlth. 2007) (quoting Harding v. Stickman, 823 A.2d 1110, 1111 (Pa. Cmwlth.

2003)). Finally, the moving party must show that “greater injury will result from refusing rather than granting the relief requested.” Id.

We point out, initially, that the majority of Landowners’ arguments essentially are the same as those raised in their Zoning Appeal, which were rejected by Judge Albright in his decision and order affirming the Board’s denial of the Moyers’ Zoning Appeal. This Court affirmed that order in Moyer v. Zoning Hearing Board of West Pottsgrove Township, No. 259 C.D. 2009, (Pa. Cmwlth. filed July 8, 2010) (Moyer I). In Moyer I, this Court upheld the Board’s determination that the Moyers’ activities on and use of the Property for a residential and business use were violating the Zoning Ordinance, rejecting the arguments that Landowners’ raise here. The Board, Judge Albright, and this Court have held that the Moyers have violated the Zoning Ordinance and, thus, we conclude that the Township is entitled to seek equitable relief to end these violations of its Zoning Ordinance under Section 617 of the MPC. This is particularly true where the Township has attempted, to no avail, to enforce the Zoning Ordinance’s requirements against the Moyers since August and September 2007 by issuing the Notice and citations, respectively. The trial court characterized the Moyers’ actions as demonstrating a “blatant disregard of the Township’s Ordinances” (Trial Ct. Op. at 9, R.R. at 942a), and we agree that the Moyers’ continued violation of the Zoning Ordinance constitutes a legal wrong that must be redressed. Accordingly, we conclude that the Township has established a clear right to relief with regard to the violations of the Zoning Ordinance.

Moreover, Ryan Moyer essentially admitted to engaging in conduct and activities that violated numerous provisions of the Zoning Ordinance and the Township's Codes and Ordinances. (Hr'g Tr. at 11, 29-30, 34-39, 45-46, May 23, 2008, R.R. at 495a, 513a-14a, 518a-23a, 529a-30a.) Ryan Moyer admitted, *inter alia*, that up until the issuance of the preliminary injunction, the Moyers were living on the Property and conducting a salvaging and recycling "enterprise" on the Property. (Hr'g Tr. at 11, 29-30, R.R. at 495a, 513a-14a.) He stated that the Moyers do not have a license from the Commonwealth of Pennsylvania to operate a salvage yard or recycling facility. (Hr'g Tr. at 29, R.R. at 513a.) Ryan Moyer further acknowledged that his family never applied for an occupancy permit for the mobile home in which they lived, the mobile home was not hooked up to a public sewer or septic tank, they were storing their household waste in a plastic tote or using a Port-a-Potty, and they did not have a permit from either the Township or the Montgomery County Health Department to use the tote or Port-a-Potty as a holding tank. (Hr'g Tr. at 34-39, 47, R.R. at 518a-23a, 531a.) He admitted that the mobile home was not on a foundation, but rested on cinder blocks. (Hr'g Tr. at 41, R.R. at 525a.) Ryan Moyer further stated that, with the exception of filing an application for a permit to hook up their electricity, which was denied, the Moyers never applied for any other permit. (Hr'g Tr. at 39-40, R.R. at 523a-24a.) In addition, Ryan Moyer testified that the Moyers never obtained an electrical hook-up inspection for the electrical service at the mobile home and that there is no set or fixed electrical service for the mobile home. (Hr'g Tr. at 42-43, 132, R.R. at 526a-27a, 616a.) He acknowledged that the Moyers cleared vegetation from an area of over an acre without filing an erosion and sedimentation control plan with the Montgomery County Soil Conservation District (Conservation District) and cut

down trees over six inches in diameter without Township permission. (Hr'g Tr. at 45-46, R.R. at 529a-30a.) Ryan Moyer also testified that he and his family believe that, so long as their actions are not harming anyone, the Township has no legal authority to regulate their activity on the Property. (Hr'g Tr. at 46-48, 135, 144-45, R.R. at 530a-32a, 619a, 628a-29a.)

The Township also presented the credible testimony of a representative of a neighboring property owner and of numerous officials who inspected the Property. Their testimony, in addition to Ryan Moyer's testimony, establishes that the Moyers' activity on the Property violated the Zoning Ordinance and the Township's Code and Ordinances. Further, the Township introduced evidence that the Moyers' activities on the Property had the potential to pollute, not only neighboring landowners' properties, but also the waters of the Commonwealth.

Douglas Dilliplane, P.E., a senior managing engineer with Bursich Associates, the firm that acts as the Township's engineer, credibly testified that, based on his inspection of the Property, a review of the photos of the Property before and after the Moyers took possession, and a report by the Conservation District, the Moyers were required to submit an Erosion and Sedimentation Control Plan under the Stormwater Management Ordinance and failed to do so. (Hr'g Tr. at 33-34, May 14, 2009, R.R. at 283a-84a.) Mr. Dilliplane further testified that the Moyers failed to file plans with the Township prior to cutting down trees in excess of six inches on the Property, as required by the Township's Subdivision and Land Development Ordinance. (Hr'g Tr. at 43-45, R.R. at 293a-95a.) Mr. Dilliplane explained that water from the Property flows in a westerly direction and that the

natural drainage flow would allow potentially polluted or contaminated water to flow from the Property, across the adjoining property owned by Waste Management, and flow into Manatawny Creek, a Commonwealth waterway. (Hr'g Tr. at 38-43, R.R. at 288a-93a.) Finally, Mr. Dilliplane opined that, based upon the activities the Moyers engaged in on the Property, particularly if any spills or problems developed in the drainage and storage of fluids from dismantled vehicles, there was a potential for pollution of the downstream properties and the waters of the Commonwealth. (Hr'g Tr. at 45-48, R.R. at 295a-98a.)

Heath Lahr, a representative of the Conservation District, testified that, after inspecting the Property, the Moyers were required to, but did not, file an Erosion and Sedimentation Control Plan due to the Moyers' land clearing and earth disturbance activities. (Hr'g Tr. at 80, May 14, 2009, R.R. at 330a.) Lee Gould, an inspector for the Department of Environmental Protection (DEP), testified concerning: his two inspections of the Property; the Moyers use of the Property for junking cars and storing automotive fluids in 55-gallon drums; the lack of a containment area for draining automotive fluids from the vehicles; the use of a plastic tote for the storage of household waste; and the lack of safeguards in place with respect to the drainage of automotive fluids on the Property. (Hr'g Tr. at 97-104, R.R. at 347a-54a.) Further, Mr. Gould agreed that he would be concerned if half a drum of oil were to spill on the Property, that this would be considered a "pollution event," and would require clean up. (Hr'g Tr. at 111, R.R. at 361a.)

John Wardzinski, the District Manager in charge of the Waste Management property located adjacent to the Property, testified regarding his observations of the

activity on the Property. Mr. Wardzinski indicated that, after observing the Moyers' activities on the Property, he and Waste Management had concerns regarding the potential contamination and pollution of Waste Management's monitoring wells and/or its stormwater basin if oil, grease, anti-freeze, or other automobile waste materials ever spilled onto the Property. (Hr'g Tr. at 136-38, R.R. at 386a-88a.) Mr. Wardzinski explained that, because of the natural contours of the land, a spill on the Property could cause ground pollution and that Waste Management would be responsible for reporting that pollution to DEP, as well as conducting an investigation to determine the source of the pollution at great cost to Waste Management. (Hr'g Tr. at 137-39, R.R. at 387a-89a.)

Mr. Whetstone testified regarding his inspection of the Property, the Notice issued relating to the Moyers' activities on the Property, and about the Moyers' numerous violations of the Zoning Ordinance and the Township's Codes and Ordinances that he observed on the Property. (Hr'g Tr. at 213-16, 219-28, May 14, 2009, R.R. at 463a-66a, 469a-78a.) David Matyasovsky, a certified Code Enforcement Officer for the Township, also testified that he conducted multiple inspections of the Property, during which he observed the Moyers' activities on the Property, including various violations of Township's Codes and Ordinances. (Hr'g Tr. at 90-91, 100-14, June 12, 2008, R.R. at 748a-49a, 758a-72a.)

This Court, as the trial court did on reconsideration, finds this credible testimony "compelling in presenting a clear picture of the potential for pollution that [the Moyers'] unlawful activities could present" and which could cause "damage to the properties of adjoining landowners, and to the Township." (Trial



Ct. Op. at 10, 14, R.R. at 943a, 947a.) Moreover, this credible testimony reveals numerous and ongoing violations occurring on the Property, to which the Township has sought, unsuccessfully thus far, to end. Accordingly, we conclude that the trial court did not err in holding that the Township has established a clear right to relief and that the injuries that could result from the Moyers' activities on the Property and the potential pollution ensuing therefrom could not be compensated for by an award of damages.<sup>7</sup>

### **B. The Trial Court Erred in Relying on the Zoning Appeal Decision**

Landowners next assert that the trial court erred in finding that the Township established a clear right to relief based solely upon Judge Albright's determination upholding the Board's denial of Landowners' Zoning Appeal.<sup>8</sup> According to

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<sup>7</sup> With regard to Landowners' argument that the Township's violation of the Property Maintenance Ordinance's appeal provisions by not establishing a Board of Appeals precludes the granting of the requested relief, we conclude that, even if those violations were not considered, there is substantial evidence in the record to support the trial court's conclusion that there were numerous, ongoing violations of the Township's Zoning Ordinance, Stormwater Management Ordinance, Subdivision and Land Use Ordinance, Code of Ordinances, and the Holding Tank Ordinance that support the Township's clear right to relief.

<sup>8</sup> Landowners further argue that the trial court's decision should be reversed because "the property is non-conforming, and because all professionals (including the Township's witnesses) have testified nothing dangerous on the [P]roperty is going on. In short this is merely a zoning case and no injunction should be issued. Let due process take its course." (Landowners' Br. at 25.) This argument, however, ignores the fact that: (1) the Moyers received the Notice, cease and desist order, and citations; (2) the Moyers failed to comply in any fashion by curtailing their use of the Property until a court order directed them that they could not reside on the Property; (3) the Moyers have had their arguments regarding their alleged continuation of a nonconforming use of the Property rejected by both the Board and Judge Albright; and (4) there is credible testimony that there was a potential for pollution of neighboring property owners' land and of the waters of the Commonwealth. (Trial Ct. Op. at 10, 14, R.R. at 943a, 947a.) This is not merely a zoning case, but involves numerous, admitted violations of multiple Township Ordinances that the Township seeks to enforce by filing this action in equity.

Landowners, the legal posture of this case did not change when Judge Albright issued his decision and, therefore, the trial court erred in reversing its January Order and granting the Township's Motion. Further, relying on Heichel v. Springfield Township Zoning Hearing Board, 830 A.2d 1081 (Pa. Cmwlth. 2003), Landowners maintain that it is likely that they will prevail on their Zoning Appeal. We disagree.

Initially, we note that this Court rejected Landowners' reliance on Heichel in Moyer I. In doing so, we concluded that Heichel was distinguishable from the situation here and that the Township established that any nonconforming use of the Property as a private salvage yard was abandoned before Landowners purchased the Property. Moyer I, slip op. at 27-30. Moreover, we rejected Landowners' other arguments challenging the Board's and Judge Albright's decisions denying Landowners' Zoning Appeal and finding that the Moyers' activities on the Property violated the Zoning Ordinance.

In City of Philadelphia v. Budney, 396 Pa. 87, 151 A.2d 780 (1959), our Supreme Court affirmed a trial court's order enjoining the landowner from violating the city's zoning ordinance by continuing to operate a junkyard, which the zoning board of adjustment had refused to permit. Id. at 87-88, 151 A.2d at 781. The landowner appealed to the trial court, which ultimately dismissed the appeal, and the landowner took no further action. Id. at 88, 151 A.2d at 781. Thereafter, the city initiated an action in equity when the landowner continued to use the property in violation of the zoning ordinance. Id. During the equity action, the landowner averred the existence of a nonconforming use, but the trial court

ruled that the landowner could not raise the nonconforming use defense in the equitable action, found a violation of the zoning ordinance and the existence of a nuisance, and enjoined the use of the junkyard. Id. On appeal, the Supreme Court rejected the landowner's allegations of error, declining to allow the landowner to raise the defense of nonconforming use where he had already lost on that issue before the zoning board of adjustment and the trial court on appeal. Id. at 88-89, 151 A.2d at 781. The Court stated:

[i]f we permit a person, sought to be restrained from violating the ordinance, to introduce testimony of a nonconforming use, we would have equity courts replacing boards of adjustment. Instead of people seeking to enforce their rights through the proper administrative procedures, we would have them continue to violate ordinances waiting for the city to bring an equity action at which time their right[s pertaining to the nonconforming use] would have to be litigated. This is contrary to the legislative directive in establishing both a procedure as well as a forum for zoning matters.

Id.

Similarly, in Funk v. Township of Bensalem, 342 A.2d 785 (Pa. Cmwlth. 1975), this Court relied on Budney to conclude that, where the landowners exercised their appeal rights under the local ordinance and the MPC and were found to have violated the zoning ordinance, the landowners could not raise certain defenses in the subsequent action in equity as those defenses involved questions that could only be determined by a zoning appeal. Id. at 786-87 n.1. Thus, this Court concluded that:

[t]he instant zoning ordinance and the MPC provided [the landowners] with an adequate means by which they could establish their [defenses] . . . by allowing an appeal to the zoning board from a denial of a zoning permit. [The landowners] invoked this

administrative mechanism initially, then abandoned it preferring to somehow substitute equity for law relief. They cannot now relitigate the same claims lost before the zoning board.

Id. at 787.

Here, Landowners invoked the administrative mechanism prescribed by the Zoning Ordinance and the MPC, which resulted in Judge Albright making the legal determination in the Zoning Appeal that the Board did not err in finding that there was not a nonconforming use in existence when Landowners purchased the Property. In doing so, he rejected the same defenses Landowners raised to the trial court in the Township's equity action. The trial court, sitting in equity, was asked to reconsider its determination that the Township had not established a clear right to relief based on the Moyers' violations of, *inter alia*, the Zoning Ordinance, in light of Judge Albright's conclusion that the Moyers had, in fact, violated the Zoning Ordinance. As pointed out by the trial court, Judge Albright's decision in the Zoning Appeal changed the legal posture of this matter, "by finding, contrary to [the Moyers'] assertions, that the [Board's] decision was supported by substantial evidence." (Trial Ct. Op. at 16, R.R. at 949a.) Had the trial court not considered Judge Albright's decision in the Zoning Appeal, the trial court would have allowed Landowners to continue to assert defenses that had been considered, and rejected, in the administrative law scheme set forth by the legislature to make such determinations, a result contrary to Budney and Funk. Accordingly, we conclude that the trial court did not err in relying on Judge Albright's determination denying the Zoning Appeal to conclude that the Township established a clear right to relief based on the Moyers' numerous violations of the Zoning Ordinance.

**C. The Township Did Not Prove that a Greater Injury Will Result from Refusing Rather than Granting the Motion**

Landowners last argue that the Township did not prove that a greater injury will result from refusing, rather than granting, the Motion. Landowners contend that allowing the trial court's April Order to stand would ruin the Moyers' lives by taking away their home and livelihood. In contrast, they assert that, given the witnesses' testimony that the Moyers currently are not causing harm by their actions, the injury to them by granting the Motion is greater than any injury that the Township will suffer if the Motion is denied. Landowners maintain that this is merely a "[z]oning [c]ase that should be fully adjudicated before the issuance of an injunction [should] be lawfully entered." (Landowners' Br. at 27.)

We are cognizant of the burden that an injunction will place on Landowners. However, Landowners have admitted violations of the Township's Codes and Ordinances, not merely the Zoning Ordinance. For a period of more than 2 ½ years, from August 10, 2007, the day the Township issued the Notice, through at least April 1, 2009, the day the trial court granted the Motion, the Moyers have engaged in unlawful activity on the Property, including the operation of a private scrap yard, despite the Township's numerous attempts seeking compliance of its Ordinances. Given our holding in Moyer I, that the Board properly held that the use of the Property as a scrap yard violates the Zoning Ordinance, the injury to the Township arising from the continued operation of an illegal scrap yard in a residential district is a greater injury than the injury to the Moyers, whose business activity on the Property has been declared a violation of the Zoning Ordinance.

In addition, there is also Ryan Moyer's testimony regarding the Moyers' failure to: obtain *any* of the permits required by the Township's Codes and Ordinances; comply with any of the Township's attempts to regulate the Moyers' business or residential activity on the Property; or file an Erosion and Sedimentation Control Plan before clearing the Property. (Hr'g Tr. at 37-40, 45-48, 128-29, 134-36, 143-46, May 23, 2008, R.R. at 521a-24a, 529a-32a, 612a-13a, 618a-20a, 627a-30a.) Regarding the mobile home in which he and his parents reside, Ryan Moyer acknowledged, *inter alia*, that: the Moyers did not obtain an occupancy permit; there was no connection to a public sewer or private septic system and that they were storing household sewage in a plastic tote or using a Port-a-Potty; there was no water hook up in the mobile home; the mobile home rests on cinder blocks and not on a permanent foundation; and there is no fixed electrical connection to the mobile home and the electrical hook-up the Moyers used was never inspected. (Hr'g Tr. at 34-43, 47-48, 94, 131-32, 137-39, R.R. at 518a-27a, 531a-32a, 578a, 615a-16a, 621a-23a.)

Moreover, the trial court was concerned, as is this Court, about the potential for pollution to the Township, adjoining property owners, and the waters of the Commonwealth that the Moyers' unabated activity presents. (Trial Ct. Op. at 17, 19, R.R. at 950a-52a.) As testified to by Mr. Dilliplane, if contamination of the Property occurred, the run-off and flow of water from the Property would flow naturally to the adjoining properties, including Waste Management's monitoring wells and stormwater basins and, ultimately, into Manatawny Creek. (Hr'g Tr. at 36-43, 48, May, 14, 2008, R.R. at 286a-93a, 298a.) He further testified regarding the potential for sediment pollution in Manatawny Creek based on the lack of

erosion controls on the Property. (Hr’g Tr. at 36-37, 45, R.R. at 286a-87a, 295a.) Mr. Gould agreed that he would be concerned if half a drum of oil were to spill on the Property, that this would be considered a “pollution event,” and would require clean up. (Hr’g Tr. at 111, R.R. at 361a.) Therefore, we hold that the trial court did not err in finding that a greater injury would occur by refusing to grant the Motion than by granting the Motion.

### **III. Intervenor’s Arguments**

Before we address Intervenor’s arguments, we note that we have tried, with difficulty and limited success, to discern those arguments from the brief that was filed with this Court.<sup>9</sup> We further point out that, like the trial court, this Court is constrained by the rules of procedure that govern how and when issues must be raised. One such rule is that, where a trial court requires the filing of a Concise Statement of Matters Complained of on Appeal, the issues on appeal must be raised with sufficient specificity as to allow the court to identify the issue and engage in an adequate review of the issue. Pa. R.A.P. 1925(b)(4)(ii);

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<sup>9</sup> We note that Intervenor’s brief does not comply with the Rules of Appellate Procedure in that, with few exceptions, he does not cite to legal authority to support his arguments and he combines multiple unrelated issues and arguments under the same heading, thus making it difficult for the Court to discern what issues are before this Court on appeal. See Pa. R.A.P. 2119 (requiring, *inter alia*, that the “argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part . . . the particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent” and “[c]itations of authorities must set forth the principle for which they are cited”). The Township argues that Intervenor’s appeal should be quashed because Intervenor’s Concise Statement of Matters Complained of on Appeal was vague and failed to adequately identify the issues on appeal in a concise manner. (Township’s Br. in Response to Intervenor’s Br. at 10-11.) While we decline to quash Intervenor’s appeal, we will address only the issues that we have been able to discern from Intervenor’s brief and which were raised, generally, in his Concise Statement of Matters Complained of on Appeal.

Commonwealth v. Lemon, 804 A.2d 34, 37 (Pa. Super. 2002). Additionally, issues may not be raised for the first time on appeal. Pa. R.A.P. 302(a). Keeping these rules and principles in mind, we will attempt to address those issues Intervenor asserts that are properly before our Court.

Intervenor first challenges the trial court’s decision granting reconsideration and accepting Judge Albright’s decision in the Zoning Appeal as evidence pursuant to Pa. R.C.P. No. 227.1. Essentially, Intervenor argues that the trial court erred and/or abused its discretion by: (1) accepting Judge Albright’s decision as evidence, reconsidering and, ultimately, reversing its January Order, including the findings of fact set forth in that order pursuant to Rule No. 227.1; and (2) accepting and considering Judge Albright’s decision as evidence without requiring the decision to be transcribed into the record. We disagree.

Pa. R.C.P. No. 227.1(a) provides, in relevant part: “[a]fter trial and upon the written Motion for Post-Trial Relief filed by any party, *the court may . . .* (4) affirm, modify or *change the decision*; or (5) enter any other appropriate order.” (Emphasis added.) “The general rule is that a court may in its discretion grant a rehearing, but such decisions are peculiarly within the sound discretion of the trial court.” Kruth v. Liberty Mutual Insurance Co., 499 A.2d 354, 356 (Pa. Super. 1985). The grant or denial “of an opportunity for rehearing or reconsideration for the purpose of receiving additional evidence will not ordinarily be disturbed by an appellate court.” See id. “Reversal is appropriate only if the lower court has committed an abuse of discretion.” Id. In order to present after-discovered evidence to a trial court, that evidence: (1) must be new; (2) could not have been



obtained at trial in the exercise of due diligence; (3) is relevant and non-cumulative; (4) is not for the purposes of impeachment; and (5) must be likely to compel a different result. Leung v. Pennsylvania Public Utility Commission, 582 A.2d 719, 721 (Pa. Cmwlth. 1990).

Considering the above factors, we conclude that the trial court did not abuse its discretion in granting the Township's Motion for Reconsideration and to Admit Evidence related to Judge Albright's decision in the Zoning Appeal as evidence in this matter. First, we note that Pa. R.C.P. No. 227.1 clearly authorizes a trial court to, in its discretion, reconsider and change its original decision upon the filing of a Motion for Post-Trial Relief. Here, the trial court reviewed the decision at law in the Moyers' Zoning Appeal, which rejected the Moyers' defenses to their violations of the Zoning Ordinance and affirmed the Board's determination that the Moyers violated the Zoning Ordinance, and reevaluated its prior decision denying the Township's request for a permanent injunction. In reevaluating its prior decision, the trial court concluded that the ongoing violations of the Zoning Ordinance and violations of the Township's Codes and Ordinances, in addition to the expert testimony regarding the potential pollution to Manatawny Creek and to adjoining landowners that could result from the Moyers' continued use of the Property as a private scrap yard, supported the Township's entitlement to a permanent injunction. We discern no error or abuse of discretion in the trial court's reconsideration of the record before it to come to a conclusion contrary to its initial determination.

With respect to the admission and consideration of Judge Albright's decision in the Zoning Appeal, the trial court noted in its opinion:

The decision on the [Zoning] Appeal is directly related to the instant matter and was decided on January 14, 2009 while the instant matter was . . . decided on January 24, 2009. Since the [Zoning] Appeal was familiar to all Parties, the undersigned exercised its discretion to permit the matter to be admitted as evidence in the reconsideration of the permanent injunction.

(Trial Ct. Op. at 24, R.R. at 957a.) Thus, Judge Albright's decision in the Zoning Appeal: was new; could not have been obtained at trial exercising due diligence; was relevant in that it addressed and rejected many of the arguments the Moyers raised during the injunction proceedings pertaining to their violations of the Zoning Ordinance, and was non-cumulative; was not introduced for the purpose of impeachment; and was likely to, and in fact did, compel a different result.

Finally, with regard to Intervenor's assertion that, in order to be properly introduced as evidence, Judge Albright's decision should have been transcribed into the record, we are unaware of any such requirement. Judge Albright's decision was attached as an exhibit to the Township's Motion for Reconsideration and to Admit Evidence, (Motion for Reconsideration and to Admit Evidence Relating to Defendants' Land Use Appeal Pursuant to Pa. R.C.P. No. 227.1 Exh. A, R.R. at 161a), and Intervenor acknowledged in his answer that "Judge Albright's Order is a document which speaks for itself . . ." (Answer of Blaine Moyer and Georgette Moyer to Plaintiff's Motion for Reconsideration and to Admit Evidence Relating To Defendant's Land Use Appeal Pursuant to Pa. R.C.P. No. 227.1 ¶ 6, R.R. at 175a). Thus, we reject Intervenor's allegations that the trial court erred or abused its discretion in this regard.

We conclude that Intervenor's remaining arguments are related to his constitutional concerns regarding alleged due process violations, injustices, and government officials acting outside the scope of their authority. In addressing these arguments, we acknowledge Intervenor's belief in his constitutional right to be free from the restrictions that the Township seeks to place on his and his family's activities on the Property. Moreover, we note Intervenor's position about the need to be vigilant and his concern about the encroachment of government regulations on his constitutional rights. That being said, we disagree that the trial court erred in granting the Motion here.

First, with regard to Intervenor's assertion that Mr. Whetstone lacked the authority to issue the Notice, the proper place for Intervenor to have raised this issue was before the Board during the Zoning Appeal. However, as we held in Moyer I, Intervenor and Landowners waived their challenge to Mr. Whetstone's authority to issue the Notice by failing to raise it during the proceedings before the Board. Moyer I, slip op. at 12. In doing so, this Court held that Intervenor and Landowners had the opportunity to raise this issue during three hearings before the Board, but failed to do so even though they knew as early as when they filed their appeal to the Board that Mr. Whetstone was acting as both the Township Manager and Zoning Officer. Id. at 12 and n.10. We cannot address issues in this equity action that Intervenor could have and should have raised in the Zoning Appeal. See Budney, 396 Pa. at 88-89, 151 A.2d at 781; Funk, 342 A.2d at 786-87 n.1.

Next, Intervenor takes issue with the fact that, despite there being other Port-a-Potties in the Township, the Township is preventing the Moyers from using a

Port-a-Potty on the Property. However, as Mr. Whetstone testified, the Port-a-Potties in the park and in other locations, such as construction sites, are *temporary* and are not being used as permanent plumbing fixtures. (Hr'g Tr. at 52-53, June 12, 2008, R.R. at 710a-11a.) Moreover, it is undisputed that the Moyers did not apply for a holding tank permit for either the plastic tote or the Port-a-Potty being used on the Property.

With respect to Intervenor's various arguments that his and Landowners' due process rights were denied, we note that the Moyers raised this argument in their Zoning Appeal and we rejected the same in Moyer I. This Court held in Moyer I that there were no due process violations where the Moyers received multiple hearings over three months to raise issues, present defenses, and where they had the opportunity to file an application challenging the validity of the Zoning Ordinance as suggested by the Board's solicitor, but failed to do so. Id., slip op. at 13-19. Moreover, with respect to the equity matter involved here, the trial court held three hearings during which the Moyers actively participated by presenting evidence and testimony, cross-examining witnesses, and presenting argument to the trial court. Finally, with regard to the other citations, the Moyers appealed the citations to the district justice and appealed that determination to the trial court. Thus, the Moyers have not been denied due process.

Finally, Intervenor argues that he and his family have a constitutional right to be free from the restrictions the Township seeks to impose on their use of the Property. Although we acknowledge Intervenor's desire to be vigilant and his concern about the encroachment of government regulation, the power of the

government, including municipalities like the Township, to regulate the use of land is “founded upon the constitutional principles of the police powers of government to promote the public health, morals, safety and general welfare.” Forks Township Board of Supervisors v. George Calantoni & Sons, Inc., 297 A.2d 164, 166 (Pa. Cmwlth. 1972). In In re Realen Valley Forge Greenes Associates, 576 Pa. 115, 838 A.2d 718 (2003), our Supreme Court stated the following:

Property owners have a constitutionally protected right to enjoy their property. . . . That right, however, may be reasonably limited by zoning ordinances that are enacted by municipalities pursuant to their police power, *i.e.*, governmental action taken to protect or preserve the public health, safety, morality, and welfare. Cleaver [v. Board of Adjustment], [414 Pa. 367, 372], 200 A.2d [408] at 411-12 [(1964)] (“it is well settled that [the] constitutionally ordained right of property is and must be subject and subordinated to the Supreme Power of Government – generally known as the Police Power – to regulate or prohibit an owner’s use of his property”).

Id. at 131, 838 A.2d at 727-28 (quoting C & M Developers, Inc. v. Bedminster Township Zoning Hearing Board, 573 Pa. 2, 14, 820 A.2d 143, 150 (2002)). Moreover, “[a] property owner is obliged to utilize his property in a manner that will not harm others in the use of their property, and zoning ordinances may validly protect the interests of neighboring property owners from harm.” Hopewell Township Board of Supervisors v. Golla, 499 Pa. 246, 255, 452 A.2d 1337, 1341-42 (1982). Here, in addition to the continued violations of the various Township Ordinances, there was credible expert testimony presented regarding the potential environmental hazards attendant to the Moyers’ activities on the Property. As these environmental hazards have the potential to affect the Moyers’ neighbors and the community as a whole, we conclude that the trial court did not err in granting the Township’s Motion.

For the foregoing reasons, the trial court's April 1, 2009 order is affirmed.

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**RENÉE COHN JUBELIRER, Judge**

