

[J-144-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CHANCEFORD AVIATION	:	No. 79 MAP 2005
PROPERTIES, LLP AND CHANCEFORD	:	
AVIATION, INC.,	:	Appeal from the Order of the
	:	Commonwealth Court entered January 7,
Appellants	:	2005, at No. 943 CD 2004, reversing the
	:	Order of the Court of Common Pleas of
	:	York County, Civil Division, entered April
v.	:	1, 2004, at No. 2003-SU-003232-YO8.
	:	
	:	
CHANCEFORD TOWNSHIP BOARD OF	:	865 A.2d 975 (Pa. Cmwlth. 2005)
SUPERVISORS,	:	
	:	
Appellee	:	ARGUED: December 7, 2005

DISSENTING OPINION

MR. JUSTICE SAYLOR

DECIDED: May 31, 2007

For the reasons stated by the majority, I agree with its holding that the Commonwealth Court erred in its indication that the Airport Zoning Act (“AZA”) is directory rather than mandatory. Nevertheless, I support the Commonwealth Court’s conclusion that Section 411 of the Chanceford Township Zoning Ordinance, in its general application, is sufficient to comply with the terms of the AZA. See Baublitz v. Chanceford Twp. Bd. of Supervisors, 865 A.2d 975, 978-79 (Pa. Cmwlth. 2005). Since I believe, however, that there is an issue concerning Section 411’s applicability in the circumstances involved in the present case, I would remand to the Commonwealth Court for further consideration. My reasoning follows.

As the majority notes, the AZA requires an affected municipality to enact zoning regulations preventing the creation of airport hazards if its existing zoning ordinance does not already do so by providing for permitted land uses and restricting the height of objects and structures lying within airport hazard areas. Further, the statute requires that such municipalities adopt, in full or by reference, the provisions of model zoning ordinances or other similar guidelines set forth by the FAA related to airport hazards. See Majority Opinion, slip op. at 3-4.

For its part, Section 411 provides that an airport may be established by special exception within the Township, subject to certain conditions related to airport obstructions. See Majority Opinion, slip op. at 10 n.5. Among other things, the conditions set forth in Section 411 prohibit the existence of tall structures and natural objects lying outside the airport but within approach zones and mandate compliance with applicable FAA regulations. See id.

The majority reasons that, because Section 411's provisions merely establish the conditions that must be met by an applicant seeking to operate an airport as a special exception within the Township and do not place direct zoning restrictions on properties lying adjacent to permitted airports, their scope is too limited to satisfy the mandates of the AZA. Section 411, however, relates directly to the types of hazard that are the concern of the AZA -- in keeping with the AZA, it provides for the land uses permitted in airport hazards areas, restricts the height of structures and objects in those areas, and incorporates FAA regulations.¹ As applied, Section 411 merely shifts the financial

¹ As the majority observes, the Aviation Code defines airport hazards as structures or objects which might obstruct or pose a hazard to the airspace required for the landing (continued . . .)

responsibility of insuring safe airport operations from the Township and neighboring landowners to the party seeking to establish an airport by special exception.² Significantly, once the conditions of Section 411 have been met by a landowner, the Pennsylvania Municipalities Planning Code, 53 P.S. §§10101-11202 (“MPC”), provides the Township with adequate mechanisms through which to enforce continued compliance.³ For these reasons, Section 411 appears to me to be an adequate alternative to the enactment by the local governing body of zoning provisions limiting the use of neighboring properties.

Although I therefore differ with the majority’s conclusions concerning the general effect of Section 411 and the outcome of this appeal to the degree that Section 411 applies, I would agree that the AZA does require the Township to enact additional zoning regulations aimed at preventing hazards that might affect the airport if Section 411 does not apply to regulate the use of Appellants’ lands. In this regard, Appellants

and taking off of aircraft, and describes airport hazard areas as those locations where such hazards might be established. See Majority Opinion, slip op. at 8 n.3.

² This might be accomplished by the landowner, for example, by restrictive covenant or conveyance of rights in air space above neighboring properties, see 68 P.S. §801.

³ The violation of a condition attached to the grant of a special exception is the equivalent of a zoning violation and exposes the landowner to the imposition of both fines and equitable remedies under the MPC. See, e.g., In Re Kreider, 808 A.2d 340, 343 n.6 (Pa. Cmwlth. 2002). Specifically, Section 617 of the MPC, 53 P.S. §10617, grants municipalities the right to bring an equity action to enjoin zoning violations, while Section 617.2 of the MPC, 53 P.S. §10617.2, provides that such a violation subjects the landowner to a civil fine of \$500.00 per violation, plus court costs, including reasonable attorney’s fees, with each day a violation continues constituting a separate violation.

suggest that the airport is exempted from the zoning regulation as a prior nonconforming use.

Notably, the Township concedes in its brief that the airport was established prior to the enactment of the Ordinance in 1979, but suggests that it was not a public airport at that time, and thus, by implication, that the nonconforming use is limited to the airport's operations as a private facility. See Appellee's Brief at 1. Appellants, by contrast, claim that the airport has been operated publicly since 1975. See Appellants' Brief at 7. The record, however, does not clearly resolve the issue, and, in fact, as the majority notes, the parties' briefs fail to address the matter with any particularity. See Majority Opinion, slip op. at 11 n.6.⁴

In terms of the disposition of the appeal, in my estimation it is significant that Appellants initiated the underlying proceedings through a mandamus action. It is well established that mandamus is an extraordinary remedy and that a writ of mandamus may only be issued where there is a clear legal right in the petitioner, a corresponding duty in the respondent, and a lack of any other appropriate remedy. See McGriff v.

⁴ An additional argument can be made that the airport remains a nonconforming use, whether it was operated as a private or a public facility upon enactment of the Township Zoning Ordinance. Under the "natural expansion" doctrine, the owner of a nonconforming business is permitted as a matter of right to expand the use, and "an overly technical assessment of [the] use cannot be utilized to stunt its natural development and growth." Chartiers Tp. v. William H. Martin, Inc., 518 Pa. 181, 188, 542 A.2d 985, 988 (1988); see also Limley v. Zoning Hearing Bd. Of Port Vue Borough, 533 Pa. 340, 343, 625 A.2d 54, 55 (1993) (holding that the proposed conversion of a private club to a public restaurant would not constitute a change in use, but merely an expansion of the initial nonconforming use under the natural expansion doctrine, given that, pursuant to applicable zoning regulations, the initial nonconforming use consisted of the sale of food and beverages to customers as a primary activity of the private club, which activity would continue after the conversion).

Pennsylvania Bd. of Probation and Parole, 809 A.2d 455, 458 (Pa. Cmwlth. 2002), aff'd, 575 Pa. 537, 838 A.2d 564 (2003). Furthermore, within the context of mandamus proceedings, “the burden of proof . . . falls upon the party seeking the extraordinary remedy to establish his legal right to such relief.” Werner v. Zazyczny, 545 Pa. 570, 578, 681 A.2d 1331, 1335 (1996). Under my rationale as described above, the characterization of Appellants’ property as a prior non-conforming use is essential to the applicability of the AZA and, correspondingly, the availability of mandamus relief. Within this framework, I would remand for a determination concerning whether relief was available to either party in the procedural posture of this case (i.e., on consideration of the parties’ cross-motions for summary judgment).

Given that I would remand for further consideration, I respectfully dissent with regard to the majority disposition.