

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sally Freed, :
 :
 Appellant :
 :
 v. : No. 1140 C.D. 2007
 : Argued: December 11, 2007
 Harveys Lake Borough Zoning Hearing :
 Board :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
 HONORABLE ROBERT SIMPSON, Judge
 HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
 SENIOR JUDGE FLAHERTY FILED: March 12, 2008

Sally Freed appeals from an order of the Court of Common Pleas of Luzerne County (trial court) which affirmed the decision of the Harveys Lake Borough Zoning Hearing Board (Board) denying Freed’s appeal from a notice of violation of Harveys Lake Borough Code (Borough Code) § 10-1(B)(6), which provides that no part of any dock, boathouse or shoreline boardwalk shall be located closer than ten feet to the extended property line of the applicant. We affirm.

On November 28, 2005, the zoning officer issued a notice of violation to Freed alleging that her dock violated § 10-1(B)(6) of the Borough Code because it was located closer than ten feet to the extended property line. Freed appealed to the Board which conducted a hearing.

At the hearing, Freed testified that the dock at issue is not permanently affixed. The dock legs sit in the sand bed and she described the dock

as akin to a table sitting in the lake. Freed testified that although the dock is moveable, the dock has not been moved since it was installed some two or three years ago. Freed also introduced a quit claim deed showing that she is the owner of ten feet of lakebed property. Freed additionally testified that the dock was the subject of previous litigation.

Also testifying before the Board was the zoning officer. He testified that Freed's dock is less than eight inches from her extended property line. The zoning officer also introduced pictures of the dock.

Based on the testimony presented, the Board determined that Freed's dock was located less than one foot from her extended boundary line and that such violates the Borough Code, inasmuch as docks are not permitted to be closer than ten feet from the extended property line. The Board also determined that Freed's dock constitutes a structure in accordance with Section 202 of the Harveys Lake Borough Zoning Ordinance of 1993 (Ordinance), which defines a structure as "[a]ny man-made object, the use of which requires an ascertainable location on land, whether or not it is affixed to land." On appeal, the trial court affirmed the decision of the Board. This appeal followed.¹

Initially, Freed maintains that the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §§ 10101-11202, is the exclusive enabling legislation for municipalities to adopt and enforce land use regulation via ordinances and that the Borough Code regulation which speaks in terms of extended property line is an illegal attempt to regulate

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

land use. Here, the Ordinance, by its terms and conditions, regulates the Shoreline District in which Freed's property is located. According to Freed, docks are permitted and in accordance with Section 506.4 E. of the Ordinance, side yards are required to be not less than ten feet on each side. Freed argues that her dock is not closer than ten feet to the side yard boundary line of the lakebed, which lakebed is owned by her. Freed maintains that she is in compliance with the Ordinance and Harveys Lake Borough may not regulate, by a provision of the Borough Code, the locations and dimensions of her dock.

As Freed correctly states, the MPC empowers municipalities to adopt zoning ordinances that ensure a logical and well-reasoned approach to land development. Commonwealth v. Karn, 650 A.2d 1176 (Pa. Cmwlth. 1994). However, The Borough Code, Act of February 1, 1966, P.L. (1965) 1656, as amended, 53 P.S. §§ 45101-48501, also permits boroughs, like Harveys Lake, to adopt building codes. Karn. As such, while the Ordinance authorizes docks in the Shoreline District, such a dock must also be constructed in compliance with the Borough Code provisions.

If Freed is required to comply with the Borough Code, she next argues that the term "extended property line" is not defined and furthermore, that inasmuch as she owns ten feet of lakebed property, she is in compliance with the Borough Code provisions. We disagree.

As to the lakebed, Freed claims that at the Board hearing she submitted a deed for lakebed property which was issued to her by the Greater Wilkes-Barre Association for the Blind as grantor. By virtue of the deed, Freed asserts that she owns ten feet on either side of the dock where it sits on the lake and is, thus, in compliance with the ten foot side yard requirement. The quit claim

deed, however, conveyed lakebed and, as admitted to by Freed's counsel, such does not include the shoreline. (R.R. at 41a.)

With respect to whether the dock complies with the ten foot extended property line, counsel for Freed admitted that if you were to take the property line as it extends from the shoreline, it would be in violation of the provisions. (R.R. at 41a.)

The following exchange took place:

ATTY. MCNEALIS:

So, I'm not ---. Again, I just want the record to be clear. Is it your client's position that she owns 10 feet of shoreline adjacent to this dock on either side?

ATTY. PHILIPS:

She owns 10 feet of lakebed.

ATTY. MCNEALIS:

How about the shoreline?

ATTY. PHILIPS:

No.

...

ATTY. MCNEALIS:

Is she prepared to submit some kind of sketch plan that shows where the dock is in relation to her land property line?

ATTY. PHILIPS:

If you were to take the property line as it extends from the shoreline, it would be in violation of the ordinance.

Just as a property owner cannot construct a dock on the property which infringes upon the ten foot side yard requirement, such dock may not thereafter be enlarged past the side property lines once it reaches the shoreline and

lake. Such determination is supported by § 10-1(B)(7) which further provides that “[t]he total surface of a dock shall be left to the discretion of the shoreline owner except that he must comply with Subsection B(6) and (7) of this section.” The extended property line is just that, an extension of the side property line past the property toward the shoreline and lake. Here, by constructing a dock on the shoreline and into the lake which encroaches on the extended ten foot side yard, Freed has violated § 10-1(B)(6) of the Borough Code.

Next, Freed argues that the testimony of the zoning officer was insufficient to show that the dock was within ten feet of the extended property line. Freed takes issue with the testimony of the zoning officer, who is not a licensed surveyor. In determining that Freed’s dock was within ten feet of the extended property line, the zoning officer measured from a pin located on property next to the dock. The zoning officer, however, admitted that he did not put the pin on the property but assumed, through years of experience, that the pin established a boundary.

The Board responds that the zoning officer observed the surveyor’s pin which indicates the boundary between Freed and her neighbor’s property. The zoning officer testified that there was a distance of eight inches between Freed’s dock and the adjacent gray wooden deck owned by Freed’s neighbor. The zoning officer’s first hand visual observation, in combination with Freed’s counsel’s admission, is sufficient to show that the dock is within ten feet of the extended property line. Specifically, counsel for Freed conceded that Freed does not own ten feet of shore line adjacent to the dock, rather, she owns ten feet of lakebed.

Freed also argues that the actions of the zoning officer were barred by the doctrines of collateral estoppel and/or res judicata. According to Freed, the

zoning officer initially filed a citation with the magistrate on December 20, 2004, which was thereafter withdrawn. In May of 2005, the zoning officer filed a civil complaint. That complaint was thereafter settled. Because of these prior citations, Freed claims that the present action is barred by the doctrines of res judicata and/or collateral estoppel.

However, the doctrines of collateral estoppel and res judicata are not applicable if the merits of the case have not been determined by a court of competent jurisdiction. Department of Environmental Protection v. Fiore, 682 A.2d 860, (Pa. Cmwlth. 1996), petition for allowance of appeal denied, 550 Pa. 686, 704 A.2d 640 (1997). Here, the merits of the prior actions were never determined by a court. As such, the doctrines of collateral estoppel and res judicata are inapplicable.

Finally, Freed maintains that the dock is not a structure as that term is defined in the Ordinance. The Ordinance defines a structure as “[a]ny man-made object, the use of which requires an ascertainable stationary location on land, whether or not it is affixed to the land.” Here, Freed testified that the dock can be removed from the water. The dock operates like a card table in that its legs come down and go into the ground. It is not anchored to the shore and it is not mounted on concrete or any type of adhesive that would affix it to the ground. Based on the testimony she provided, Freed claims that the dock does not fit the definition of a structure.

The Board responds, and we agree, that according to the definition it does not matter whether the dock is permanently affixed. As admitted to by Freed, the dock is anchored to the ground with its legs and is affixed to the shore. Thus, it has a stationary location on the land. Freed also admitted that the dock reaches the

shore and that she uses it to transport herself from the shore to her boat without having to get in the water. Although the dock is not permanently affixed to the land, it does not need to be in order to fit within the definition of a structure.

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

JIM FLAHERTY, Senior Judge

