

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Township of Bushkill :  
 :  
 v. : No. 1536 C.D. 2007  
 : Submitted: June 12, 2008  
 Alan Heater and Gloria Heater, :  
 Appellants :

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
 HONORABLE MARY HANNAH LEAVITT, Judge  
 HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
 SENIOR JUDGE FLAHERTY

FILED: July 10, 2008

Alan Heater and Gloria Heater (the Heaters) appeal from an order of the Court of Common Pleas of Northampton County (trial court) which denied their motion for post trial relief from the trial court's March 27, 2007 order entering a verdict in favor of the Township of Bushkill (Township) and directing that the Heaters discontinue storage of a recreational vehicle (RV) on the front yard of their property at 103 Hoffman Road. We affirm.

On May 8, 2006, the Township filed a complaint against the Heaters claiming that they were in violation of Section 405.D of the Bushkill Township Zoning Ordinance (Ordinance) because they stored an RV, which was longer than twenty feet, within the front yard setback of their property. The Township sought an order directing the Heaters to remove the RV. An answer and new matter were filed by the Heaters and, thereafter, the trial court conducted a hearing.

Based on the testimony presented, the trial court found that the Heaters have parked the RV in the front of their property since 1986. At the

hearing, it was revealed that a Township Ordinance enacted in 1980 (1980 Ordinance), prohibited the parking of RV's in front yards. In 1994, the current Ordinance (1994 Ordinance) was enacted which similarly prohibited the parking of RV's in front yards.

In 2002, the Heaters applied for a variance and requested a special exception so that they could park the RV in their front yard. On October 14, 2002, the Zoning Hearing Board of Bushkill Township (Board) issued a decision denying the variance and special exception request. No appeal was taken from that decision.

The Heaters continued to park their RV in the front yard and on December 24, 2002, the Township sent an enforcement notice to the Heaters, via certified and regular mail, informing them that they were not permitted to park the RV in the front yard, due to the 1994 Ordinance which prohibits the parking of RV's in front yards. The certified letter, which was sent to the address of the property at issue, was returned to the Township as unclaimed. No appeal of the enforcement notice was ever made to the Board.

Based on the above, the trial court concluded that the Township complied with the enforcement notice provisions of Section 616.1 of the Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, added by the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10616.1, and that such notice contained adequate information to put the Heaters on notice of their violation of the Ordinance. Further, the trial court disagreed with the Heaters' claim that they were entitled to park the RV in the front yard, as it constituted a nonconforming use. The trial court reasoned that the Heaters were never lawfully permitted to park the RV in the front yard and, as such, it did not constitute a

lawful nonconforming use. The trial court then entered a verdict in favor of the Township and directed the Heaters to discontinue storage of the RV in their front yard. The Heaters, thereafter, filed a motion for post trial relief, which was denied by the trial court. This appeal followed.<sup>1</sup>

Initially, the Heaters claim that the Township, in sending the enforcement notice, failed to comply with the requirements set forth in Section 616.1(b) and (c) which provide:

(b) The enforcement notice shall be sent to the owner of record of the parcel on which the violation has occurred, to any person who has filed a written request to receive enforcement notices regarding that parcel, and to any other person requested in writing by the owner of record.

(c) An enforcement notice shall state at least the following:

(1) The name of the owner of record and any other person against whom the municipality intends to take action.

(2) The location of the property in violation.

(3) The specific violation with a description of the requirements which have not been met, citing in each instance the applicable provisions of the ordinance.

(4) The date before which the steps for compliance must be commenced and the date before which the steps must be completed.

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<sup>1</sup> This court's review is limited to determining whether the trial court committed an abuse of discretion or an error of law. City of Allentown v. MSG Associates, 747 A.2d 1275 (Pa. Cmwlth. 2000).

(5) That the recipient of the notice has the right to appeal to the zoning hearing board within a prescribed period of time in accordance with the procedures set forth in the ordinance.

(6) That failure to comply with the notice within the time specified, unless extended by appeal to the zoning hearing board, constitutes a violation, with possible sanctions clearly described.

The Heaters contend that the Township did not comply with the MPC, inasmuch as the Heaters did not receive the enforcement notice and that such is confirmed by the fact that the certified letter was returned to the Township as unclaimed.

Here, the Township properly complied with Section 616.1(b) in that it sent the enforcement notice to the “owner of record of the parcel on which the violation has occurred....” Specifically, the Township sent the enforcement notice via certified mail and regular mail to “Alan and Gloria Heater” at “103 Hoffman Road[,] Wind Gap, PA 18091” (Supplemental Exhibits at 12.) Although the certified mail was returned to the Township “unclaimed” such does not negate the fact that the Township sent the notice to the owner of record by both regular mail and certified mail. The MPC does not mandate that the owner accept or read the enforcement notice, only that the Township send it, as the Township did in this case.

The Heaters also claim that the Township failed to send a copy of the enforcement notice to their counsel. However, nowhere is it alleged that a written request was made for counsel to receive a copy of the enforcement notice, as is required by Section 616.1(b).

Next, the Heaters claim that the enforcement notice did not state the specific sections of the Ordinance that they allegedly violated, as is required by Section 616.1(c)(3). In the enforcement notice, the Township first informed the

Heaters that they have continued to park their RV in the required front yard setback. (Enforcement notice at p.1.) Thereafter, the enforcement notice cited to the applicable provision of the 1994 Ordinance stating as follows:

Section 405.D. Recreational Vehicle, storage of, subject to the following provisions: In all districts, a recreational vehicle or unit with an overall length of longer than 20 feet shall only be stored on a lot outside of the required front yard or in a garage or in a roofed structure. In no case shall a recreational vehicle or unit with an overall length of longer than 20 feet be located within 10 feet of the side or rear lot line. A recreational vehicle shall not be used for living purposes when stored.

(Enforcement notice at p. 2.) Thus, the Township complied with the requirements of Section 616.1(c)(3). Nonetheless, the Heaters claim that the 1994 Ordinance is inapplicable to them and that the 1980 Ordinance applies because it was the 1980 Ordinance that was in effect when they first began parking the RV in the front yard. We agree with the trial court, however, that at the time the enforcement notice was sent, the 1994 Ordinance, not the 1980 Ordinance, was in effect, such that it was appropriate for the Township to cite to the 1994 Ordinance.

The Heaters also claim that they are permitted to park the RV in the front yard because they have been doing so since 1986. “A nonconforming use is any use, structure, or combination thereof which came into existence prior to an otherwise applicable zoning restriction, but which now violates that restriction.” Finegan v. Board of Supervisors of Earl Township, 826 A.2d 76, 78 (Pa. Cmwlth. 2003). “A non-conforming use status is available only for a lawful use which existed on the land when the zoning ordinance took effect . . . . Appellants, as landowners, have the burden of proving that a lawful non-conforming use existed

at the time the ordinance was established.” Cossell v. Hempfield Township, 526 A.2d 475, 477 (Pa. Cmwlth. 1987).

Here, the Heaters did not meet their burden of proving that, prior to the 1994 Ordinance, they had lawfully parked the RV in the front yard. The 1980 Ordinance similarly prohibited the parking of RV’s in the front yard. The 1980 Ordinance provided:

§405.4 Recreational vehicle or unit, storage of, subject to the following provisions: In all districts, recreational vehicles or units shall be stored on a lot in the rear or side of the principal use, in a garage, or in a roofed structure. In no case shall the recreational vehicle or unit be located within five (5) feet of the side yard line or ten (10) feet from a rear property line.

The Heaters also state that their property is a corner lot and further set forth the definitions of “minimum yard requirements”, “setback line” and “setback, front” in arguing that they are not in violation of the Ordinance. However, for the following reasons, the merits of whether the Heaters are in violation of the Ordinance, is not an issue properly before us.

Specifically, the enforcement notice sent to the Heaters also informed them of their right to appeal to the Board, as is required by Section 616.1(c)(5). The Heaters, claiming they never received the enforcement notice, did not appeal to the Board. In Borough of Latrobe v. Pohland, 702 A.2d 1089 (Pa. Cmwlth. 1997), petition for allowance of appeal denied, 550 Pa. 690, 722 A.2d 1057 (1998), this court stated that failure to appeal the enforcement notice to the zoning hearing board rendered the zoning officer’s determination of a violation unassailable under Section 616.1(c)(6) of the MPC.

Section 616.1 of the MPC sets forth the procedure for charging a landowner with a violation of a zoning ordinance. It requires that the notice of violation set forth the specific violation, with steps to be taken to come into compliance, and the time by which this must be accomplished. The property owner may appeal to the zoning hearing board and failure to do so makes it conclusively a violation.<sup>2</sup> Moon Township v. Cammel, 687 A.2d 1181 (Pa. Cmwlth.), petition for allowance of appeal denied, 548 Pa. 684, 699 A.2d 737 (1997).

Thus, only the Board can adjudicate the Heaters' notice of violation. Having not appealed the notice of violation to the Board such was deemed a final adjudication that the Heaters' use was in violation of the Ordinance. Thus, the merits of whether the Heaters' parking of the RV is a violation of the Ordinance are not properly before us.<sup>3</sup>

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<sup>2</sup> Section 909.1(a)(3) of the MPC, 53 P.S. § 10909.1(a)(3), vests in the Board the exclusive jurisdiction to hear appeals from notices of violations.

<sup>3</sup> We note, however, the following definitions contained in the 1994 Ordinance:

Yard. An area not covered by buildings and that is on the same lot as the subject structure or use. Regulations of specific districts prohibit principal and accessory structures within specified required minimum yards. See also "Setback".

Setback, Front. A "yard" between the front lot line (which usually is the future street right-of-way line) and the closest portion of the subject structure or use and that extends the full width of the lot and from side lot line to side lot line.

The aerial photograph presented to the trial court depicts the RV parked on the side of the Heaters' garage. The garage runs parallel to Hoffman Road, which is the front lot line. By extending the front set back line from the closest portion of the subject structure, the corner of the Heaters' house, the full width of the lot, from side lot line to side lot line, the front setback runs directly along the side of the garage. Thus, by placing the RV on that side of the garage, closest to Hoffman Road, it is within the front setback.

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

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JIM FLAHERTY, Senior Judge



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Alan Heater and Gloria Heater,	:	
Appellants	:	

**ORDER**

Now, July 10, 2008, the Order of the Court of Common Pleas of Northampton County, in the above-captioned matter, is affirmed.

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JIM FLAHERTY, Senior Judge