IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania	:	
	:	
	:	
	:	
v.	:	No. 1554 C.D. 2009
	:	Submitted: May 14, 2010
Deborah O'Shell,	:	
	:	
Appellant	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: September 9, 2010

Deborah O'Shell (Appellant), appeals from an order of the Court of Common Pleas of Blair County (trial court), which found her guilty of violating Sections 110-3B and 110-21 of the Township of Antis Subdivision and Land Development Ordinance, (Ordinance), and Section 2L of the Antis Township Nuisance Ordinance (Nuisance Ordinance). Appellant was ordered to pay a fine of $300.00 for each of the three violations, plus all statutorily imposed costs of prosecution. We affirm.

Appellant is the president of a non-profit corporation known as Blair County Wildlife Rehabilitation Center. Appellant's property serves as a sanctuary for wildlife and she also rehabilitates wildlife there. Appellant was advised by her surgical staff and veterinarians to build a pond on her property to treat water fowl. Appellant alleges she contacted Antis

Township (Township) to get the proper permits, and ultimately contacted the Department of Environmental Protection (DEP), which issued a waiver in November of 2007, for Appellant to construct a pond.

In September of 2008, Christ W. Arseniu (Arseniu), the Ordinance Enforcement Officer for the Township, came to the property to inquire about the construction of the pond. Appellant showed Arseniu the waiver. Arseniu "observed a gentleman in a bulldozer doing some grading on the property, and … that there was a huge excavation. It looked like a pond had been put in over the Labor Day weekend…. The excavation was in addition to the pond…." Notes of Testimony (N.T.) at 2-4.

On November 18, 2008, three separate citations were filed by Arseniu against Appellant at the office of Magisterial District Judge Fred B. Miller (DJ Miller). Arseniu alleged that Appellant violated Sections 110-3B and 110-21 of Ordinance 4-2006 and Section 2L of Ordinance 3-2005.

On January 23, 2009, a hearing was held before DJ Miller, who found Appellant guilty of all citations and imposed fines and costs. Appellant timely appealed to the trial court.

On June 19, 2009, the trial court held a hearing, at which testimony was taken. The trial court made the following findings of fact:

> 1. The real property in question is located within Antis Township and owned by the Defendant [Appellant] herein.
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> 2. The subject property is utilized by the Defendant [Appellant] as a wildlife refuge and sanctuary, and licensed by the Pennsylvania Game Commission and Department of Agriculture.

3. The Defendant [Appellant] installed a pond on the subject property with the specific intention to treat the water fowl, and created a "beach" so as to allow the baby water fowl to walk into the pond.

4. On September 2, 2008, in response to a call regarding construction activity on the Defendant's [Appellant] property, Mr. Arseniu went to the site, where he personally observed a man on a bulldozer performing grading work.

5. Mr. Arseniu described what he observed as a "huge excavation" and indicated that it appeared to be construction of a pond.

6. Mr. Arseniu had a discussion with the Defendant [Appellant] at the site, at which time the Defendant [Appellant] advised she had a permit from the Pennsylvania Department of Environmental Protection for the construction of a pond.

7. Mr. Arseniu reported his findings to Mr. Ziegler, and as a result written correspondence dated September 2, 2008 was sent by Mr. Arseniu to the Defendant [Appellant] (Commonwealth Exhibit 3).

8. In the September 2, 2008 correspondence the Defendant [Appellant] was advised that the "earthmoving activity appears to exceed 5,000 square feet and would, therefore, by definition, be a Land Development" and requested the Defendant [Appellant] to file [a] Land Development Application with the Township to be approved by the Supervisors.

9. The September 2, 2008 correspondence also advised the Defendant [Appellant] of Ordinance 3-2005, Section 2.L., which deals with the interference of the "…flow of a stream, creek or other waterway, by means of dam construction or otherwise,…".

10. Mr. Arseniu took photos of the area in question. On the first date, there was no water in the pond. On the second occasion, there was water with seeding and mulching.

11. Mr. Arseniu had observed the stream prior to September 2, 2008, and he "believes" the water flows in a different direction from before.

12. Mr. Dutrow, the consulting engineer for the Township, made an on-site inspection of the premises on September 18, 2008. There was also a representative of DEP present.

13. Mr. Dutrow testified positively that based upon his professional experience and own observations, well more than 5,000 square feet of ground was disturbed. Mr. Dutrow estimated that approximately 10,000 square feet was disturbed, approximately ½ of which was the pond itself.

14. Mr. Dutrow further testified that exact measurements would have been obtained if not for the threats they received from the Defendant [Appellant] relative to "trespassing", etc.

15. Mr. Dutrow confirmed that Commonwealth Exhibit 4 (photo of area in question) is consistent with what he saw relative to ground disturbance for the pond and surrounding area.

16. The ground disturbance included specifically the pond itself, vegetation being removed, and the ground being seeded and mulched, per Mr. Dutrow.

17. Mr. Dutrow refuted the possibility that the ground disturbance consisted of only raking and seeding, noting it was not consistent with his observations nor with the by-pass channel.

18. Mr. Ziegler was also present on-site on September 18, 2009, and testified that he "saw a very large pond" and freshly disturbed ground.

19. Mr. Ziegler confirmed the letter dated October 6, 2008 by Attorney Fanelli to the Defendant [Appellant] (Commonwealth Exhibit 5), as well as the correspondence dated October 28, 2008 that he authored (Commonwealth Exhibit 6).

20. Both letters again advised the Defendant [Appellant], inter alia, that she was in violation of the subject Township Ordinances; that her waiver request had been denied by the Township Board of Supervisors; that she must submit a land development application; and that she may be subject to further enforcement remedies, including but not limited to fines and penalties if she failed to comply.

21. The Defendant [Appellant] never submitted an application for land development.

22. The Defendant [Appellant] admits that the pond in question consisted of 4,600 square feet itself at the time in question.

23. The Defendant [Appellant] admits constructing the by-pass channel, which she testified she did at the request of DEP. Although she claims the stream is the exact same as before, she also admits that it was "ziggy zaggy" before, and now is "straight".

24. The Defendant [Appellant] also testified that prior to the construction, the stream did not run completely into the pond, but "just a little bit". She acknowledged that because of the by-pass channel, it is "blocked off".

25. The ground disturbance involved with the construction of the pond, including the surrounding area, was greater than 5,000 square

> feet, thus requiring the Defendant [Appellant] to comply with the Township Subdivision & Land Development Ordinance.
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> 26. The Defendant [Appellant] did interfere with the flow of the stream/creek by construction of the by-pass channel, thus she was in violation of the Township Nuisance Ordinance.

Trial court opinion, Findings of Fact Nos. 1-26, at 2-4. The trial court determined that the witnesses for Township were more credible than Appellant. The trial court concluded that Appellant was in violation of both Section 110.3.B and 110-21 of the Ordinance and Section 2.L. of the Nuisance Ordinance. The trial court ordered Appellant to pay a $300.00 fine, plus costs of prosecution, for each of the violations. Appellant now appeals to this court.[1]

Appellant contends that the trial court erred and/or abused its discretion in finding that the Commonwealth proved beyond a reasonable doubt that Appellant was guilty of violating Sections 110-3B and 110-21 of the Ordinance, and Section 2L of the Nuisance Ordinance, as Appellant did not engage in land development or interfere with the flow of a stream, creek or other waterway.[2]

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[1] Our review is limited to whether the trial court abused its discretion or erred as a matter of law. An abuse of discretion may be found only if the findings are not supported by substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Constantino v. Zoning Hearing Board of Forest Hills, 618 A.2d 1193 (Pa. Cmwlth. 1992).

[2] Appellant further states that the "Purpose" of the Antis Township Subdivision and Land Development Ordinance is for supervision and direction of large projects such as housing projects, major commercial developments, subdivisions, etc., rather than for the construction of a small pond aimed at wildlife rehabilitation. Ordinance 4-2006 states that its purpose is as follows:

Footnote continued on next page…

Section 110-3.B. entitled Jurisdiction and authority; compliance required; enforcement, provides that:

> B. Land development control. Land development must comply with the regulations contained in this chapter. Such compliance shall include, but not be limited to, the filing of preliminary and final plans, the dedication and improvement of rights-of-way, streets and roads and the payment of fees and charges as established by the Board of Supervisors. Land development plans shall indicate the location of each structure and clearly define each unit and shall indicate public easements, common areas and improvements, all easements appurtenant to each unit and improvements to public rights-of-way.

Artice IV entitled Plan Requirements, Section 110-21, entitled Approval Required, of the Ordinance provides that:

> After the effective date of this chapter, no person, firm or corporation proposing to make or having made a subdivision or land development, within the area of jurisdiction of the chapter, shall proceed with any development, such as grading of roads or alleys or any other action, before obtaining approval of the proposed subdivision or

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> A. The purpose of this chapter is to provide for the orderly, logical and harmonious development of the township and to protect, promote and create conditions favorable to the health, safety, morals and general welfare of the township's citizenry by:
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> (2) Providing for the orderly development of open lands and acreage in concert with environmental and natural capacities and limitations.

Section 110-2.A.(2) of Ordinance 4-2006. Thus, the purpose of Ordinance 4-2006 does fall within the issues addressed here.

> land development by the Antis Township Board of Supervisors. The provisions and requirements of this chapter shall apply to and control all land subdivision and development which has not been recorded in the office of the Recorder of Deeds in and for Blair County, Commonwealth of Pennsylvania, prior to the effective date of this chapter.

Land Development is defined as:

> A. Any of the following activities which involves the improvement of one (1) lot or two (2) or more contiguous lots, tracts or parcels of land for any purpose involving:
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> ***
>
> 4. Surface changes, earth moving activities, building additions, paving existing unpaved areas, or other development covering a cumulative area of 5,000 square feet or greater.

Section 110-5 of Ordinance 4-2006.

Pursuant to the Antis Township Subdivision and Land Development Ordinance, a person must file a land development application if they engage in "land development" which is defined as activities involving, "[s]urface changes, earth moving activities… or other development covering a cumulative area of 5,000 square feet or greater." Section 110-5 of the Ordinance.

Appellant contends that the Commonwealth failed to prove that the land development on her property exceeded 5,000 square feet. Appellant denies that she did any landscaping around the pond. She states that when the pond was put in, the tires on the equipment used damaged some areas and she "just mulched it, put in my seeding and stuff, didn't even have the

money to get as much seed as I wanted to." R.R. at 56-57. There was no digging done, other than for the pond. R.R. at 63.

A review of the record reveals otherwise. Arseniu testified that he observed a gentleman on a bulldozer grading the property after the pond was already completed. Arseniu stated that he estimated that the earthmoving activity exceeded 5,000 square feet. R.R. at 40-41. Further, the Township witness, Christopher Dutrow (Dutrow), a consulting engineer, testified that he paced off the area and that there "was approximately [a] 10,000 square foot disturbance" of the area. N.T. at 14. Dutrow stated:

> The 10,000 square foot of earth disturbance included not only the pond, which may have been roughly half of that disturbance, I had also included other grading activities, embankments, other grading around the pond to move dirt so that the pond could be constructed.
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> ***
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> I'm confident that there's been over 5,000 square foot of disturbance.

N.T. at 14, 16. Dutrow testified that more than seeding and planting was done that "ground had been moved…I believe there had been much more ground disturbance than simply raking and seeding." N.T. at 18. Dutrow stated that the pond constituted roughly half of the disturbance and that the other half was due to the grading activity around the pond.

The trial court did not err in determining that the Commonwealth met its burden of proving that Appellant had disturbed over 5,000 square feet when putting the pond on her property, thus requiring a land development application to comply with the Ordinance.

Next, Appellant contends that the trial court erred and abused its discretion in finding Appellant guilty of violating Section 2.L of the Nuisance Ordinance, as she did not interfere with the flow of a stream. Section 2.L of the Nuisance Ordinance provides that:

> Section 2. Nuisances Declared Illegal: Nuisances, including, but not limited to the following, are hereby declared to be illegal:
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> ***
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> L. Interfering with the flow of a stream, creek or other waterway, by means of dam construction or otherwise, or removing the embankment of a stream so as to alter the natural flow of the stream.

Arseniu testified that the "stream had been altered from its original location" and when asked if the stream was in the same path that it was prior to September 2, stated, "I don't believe it [i]s, no." R.R. at 43. Further, Appellant testified that the "creek, other than being made straight by the pipes in there, that creek is in the same exact place it's been for 45 years." R.R. at 45. "Well, this is a bypass that was put in, again, to appease everybody. It is a straight shot, this pipe, and it's done like it's under some big highway. This is perfectly done, perfectly whatever." R.R. at 58-59. "The stream is in the exact same place that it has always been and he knows that." R.R. at 60. On cross, Appellant stated that "other than it being ziggy-zaggy, the pipe is put in straight…. The only thing is that the pipe needed straightened." R.R. at 65.

Appellant's own testimony reveals that the stream has been diverted by a pipe. The trial court did not err in determining such was a

violation of Section 2.L of the Nuisance Ordinance. Accordingly, we affirm the decision of the trial court.

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JIM FLAHERTY, Senior Judge

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O R D E R

AND NOW, this 9th day of September, 2010 the order of the Court of Common Pleas of Blair County in the above-captioned matter is affirmed.

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JIM FLAHERTY, Senior Judge