

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Phillip DeLosh, :
Appellant :
v. :
Adams Township Zoning : No. 1619 C.D. 2007
Hearing Board : Argued: February 11, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: March 13, 2008

Phillip DeLosh (DeLosh) appeals the order of the Court of Common Pleas of Cambria County (common pleas court) that dismissed his appeal of the decision of the Adams Township Zoning Hearing Board (Board) which denied DeLosh's request for a special exception/expansion of a nonconforming use.

On June 1, 2006, DeLosh along with his brother and mother as part of a corporation known as Liberty Park Village, LLC bought a mobile home park located in Adams Township which had been in existence since the 1977 Johnstown Flood. The mobile home park currently has thirteen units and is located in an area classified as "urban" under the Adams Township Zoning Ordinance (Ordinance) which was adopted November 12, 1991. Under Section 502(D) of the Ordinance, a mobile home park is a non-permitted use in an urban area.

DeLosh applied for a special exception to add two units to the mobile home park. The Board held a hearing on January 4, 2007. DeLosh testified that he

wanted to put in two more units and also subdivide a portion of the property. DeLosh had upgraded the property and intended to continue to do so. He explained that he put in a holding tank to catch water to prevent it from undermining the road. Notes of Testimony, January 4, 2007, (N.T.) at 8-11; Reproduced Record (R.R.) at 8-11. If a unit is removed Adams Township only allows replacement within a one year period. N.T. at 13; R.R. at 13. DeLosh thought he might put in an indoor water park on the property. N.T. at 27; R.R. at 27.

Various neighbors testified in opposition and asserted that the property is a fire hazard, the residents cause trouble and are drug dealers, and children who live in the complex ride four wheelers through other peoples' property and gardens. A resident of the park testified that DeLosh had made significant improvements. N.T. at 35; R.R. at 35.

On January 19, 2007, the Board denied DeLosh's request. The Board made the following conclusions:

1. Under the Adams Township Zoning Ordinance mobile homes are not a permitted use in an Urban District.
2. Since the trailer park has been in existence since the time of the 1977 flood, it may constitute a non-conforming use.
3. The purpose of the non-conforming use is residential.
4. Pursuant to the laws of Pennsylvania a non-permitted use cannot be granted by special exception.

5. Pursuant to Pennsylvania law a non-conforming residential use cannot be expanded.

Board Opinion, January 19, 2007, at 1; R.R. at 60.

DeLosh appealed to the common pleas court and argued that he should be allowed to expand the mobile home park by two units under the doctrine of natural expansion which allows a landowner to develop or expand a nonconforming business as a matter of right and supports an increased intensity in a property's utilization. He also argued that the expansion was protected as a pre-existing nonconforming use.

The trial court denied the appeal:

Appellant [DeLosh] contends that the Trial Court's decision dismissing Appellant's [DeLosh] Zoning Appeal was improper as Appellant's [DeLosh] proposed expansion of the mobile home park was protected under the Doctrine of Natural Expansion and as a pre-existing non-conforming use. '[E]xpansion can only be that which is absolutely necessary and cannot be inconsistent with the public interest.' . . . Under the doctrine of natural expansion, a nonconforming use may be extended in scope, as the business increases in magnitude, over ground occupied by the owner for the business at the time of the enactment of the zoning ordinance. . . . However, the right of natural expansion is not unlimited, and a municipality has the right to impose reasonable restrictions on the extension of a nonconforming use. . . . The burden of proving the existence or extent of a nonconforming use rests on the property owner who would claim the benefits of the rights accorded the property with that status. . . . In *Llewellyn [Llewellyn's Mobile Home Court, Inc. v. Springfield Township Zoning Hearing Board, 485 A.2d 883 (Pa. Cmwlth. 1984)]*, the owner of a mobile home park wanted to expand its park from eight units to twenty-eight units. . . .

The original plan and certificate of nonconformance described twenty-eight mobile home lots, however only eight lots were ever used. . . . Commonwealth Court upheld the decision of both the zoning board and the Court of Common Pleas denying the request for expansion because the other twenty lots had never actually been used. . . . In the case at hand, the testimony is unclear as to whether . . . the two lots in question had been used as mobile home units at one time. Even if they had been, at least one year has expired between the time of their use as such, hence the non-conformance use is presumed abandoned. (Citations omitted).

Common Pleas Court Opinion, November 13, 2007, at 2-3; R.R. at 112-113.

Initially, DeLosh contends that the common pleas court erred when it affirmed the Board's denial of his request for a special exception because his request was protected as a nonconforming use.¹

A pre-existing nonconforming use occurs when a lawful existing use is subsequently barred by a change in a zoning ordinance. The right to maintain a pre-existing nonconforming use extends only to uses that were legal when the use came into existence. The enactment of a new ordinance will not protect a pre-existing illegality. The burden of proving a pre-existing nonconforming use is on the property owner. The property owner must establish that the use of the property was a lawful use that predated the enactment of the zoning ordinance which rendered the use nonconforming. Scalise v. Zoning Hearing Board of Borough of

¹ In zoning cases where, as here, the common pleas court did not receive any additional evidence, our review is limited to determining whether the zoning hearing board committed an error of law or an abuse of discretion. Hogan, Lepore & Hogan v. Pequea Township Zoning Hearing Board, 638 A.2d 464 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 538 Pa. 651, 647 A.2d 905 (1994).

West Mifflin, 756 A.2d 163 (Pa. Cmwlth. 2000). “This burden includes the requirement of conclusive proof by way of objective evidence of the precise extent, nature, time of creation and continuation of the alleged nonconforming use.” Jones v. Township of North Huntingdon Zoning Hearing Board, 467 A.2d 1206 (Pa. Cmwlth. 1983).

Here, DeLosh offered no evidence to establish the mobile home park was a legally conforming use prior to the 1977 Ordinance which rendered a mobile home park a non-permitted use in an area zoned as “urban,” or whether the mobile home park complied with the 1977 Ordinance. While the members of the Board commented that the Ordinance was created in 1977 and that the mobile home park was originally created as “flood housing” after the Johnstown Flood of 1977, DeLosh offered no evidence to establish when the park was built, whether it predated the 1977 Ordinance or complied with it, and whether the proposed expansion of two units was located on property that had been used for the mobile home park or on property that had previously been used as a dance hall, pool, and bathhouse. The trial court did not err when it affirmed the Board.²

Accordingly, this Court affirms.

BERNARD L. MCGINLEY, Judge

² DeLosh next contends that the trial court erred when it dismissed his appeal because the request for an exception was protected under the doctrine of natural expansion. However, the doctrine of natural expansion concerns the expansion of a pre-existing nonconforming use. Because DeLosh failed to establish the existence of a prior nonconforming use, the doctrine of natural expansion as a means to achieve the end he desires is unavailable.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Phillip Delosh, | : |
| | : |
| Appellant | : |
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| v. | : |
| | : |
| Adams Township Zoning | : |
| Hearing Board | : |
| | No. 1619 C.D. 2007 |

ORDER

AND NOW, this 13th day of March, 2008, the order of the Court of Common Pleas of Cambria County in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge