

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lehigh Cement Company, :
Appellant :
 :
v. : No. 2383 C.D. 2008
 : Argued: December 7, 2009
Zoning Hearing Board of Richmond :
Township and Richmond Township :
and Rocky D. Balthasar, Bonnie L. :
Balthasar, Robert C. Welder, :
Kathleen Welder, Thomas Lance, :
Kimberly D. Lance, Carl L. Wahl, :
Daisy A. Wahl, Christopher Rishcoff, :
Ernest R. Mertz, Arline P. Mertz, :
Brian L. Landis, Melinda K. Miller, :
Richard H. Geisinger, Patricia R. :
Geisinger, John H. Keiser, Jr., :
Maricia F. Keiser, Mark Hulsebos, :
Ralph C. Smith, Gladys D. Smith, :
Marcus G. Held, Jr., Barbara A. Held, :
Anne W. Stocker, Rose Settembre, :
Eric J. Workowski, Kathleen :
Workowski, Austin M. Crow, Jr., :
Susan M. Crow, Bruce Traylor, :
Kathy Sue Traylor, Vincenzo :
Dimaggio, Maria C. Dimaggio, Jan :
Marie Allen, Robert Leiby, Samuel :
Chudnovsky, Elodie Chudnovsky, :
George A. Januszak, Elizabeth M. :
Januszak, David Sokol and :
Weatherly Sokol :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: February 25, 2010

Lehigh Cement Co. (Lehigh) appeals an order of the Court of Common Pleas of Berks County (trial court) quashing its land use appeal as interlocutory and remanding the matter to the Zoning Hearing Board of Richmond Township (Board) for a final adjudication. Finding no error by the trial court, we will affirm its order.

Lehigh operates a limestone quarry in Richmond Township, Berks County, located in the Township's Rural Agricultural (RA) and Rural Conservation (RC) Districts.¹ Lehigh's property consists of three parcels of land totaling 202 acres, only a fraction of which is used in the quarrying operation. Lehigh intends to expand its surface mine to the entire 202 acres it owns within the Township, for which it obtained a permit from the Department of Environmental Protection in 1977, before the Township first enacted zoning. Because its mining on the site predates zoning, Lehigh believes that the entire 202 acres constitutes the area of non-conforming use.

On July 21, 2006, Lehigh requested a preliminary opinion from the Township's Zoning Officer to confirm its view that all 202 acres are entitled to be mined as a lawful non-conforming use. In its request, Lehigh explained its intent to expand its quarrying operation and install a portable crusher as an accessory to

¹ A quarry is a permitted use by special exception in the RA District but is not a permitted use in the RC District.

the existing quarry operation. Reproduced Record at 16a-17a (R.R. ___). Lehigh included an application for a zoning permit in the event one was required.

On August 17, 2006, the Zoning Officer issued a determination advising Lehigh that variances and special exceptions would be necessary to expand the quarrying use on its property. The Zoning Officer also advised Lehigh that

[t]he proposed crusher on this parcel is not a permitted use in the RA Zoning District. The installation of a crusher will require zoning relief in the form of a variance.

R.R. 21a. The Zoning Officer further advised Lehigh that it had the right to appeal his determination to the Board within 30 days or apply to the Board for the necessary variances and special exceptions.

On September 18, 2006, Lehigh appealed the Zoning Officer's determination to the Board and applied for several special exceptions and variances. Lehigh appealed, *inter alia*, the Zoning Officer's decision that crushing is not a permitted use in the RA District. Lehigh argued that crushing is an accessory use customarily incidental and subordinate to quarrying. Lehigh also requested a variance from the height restriction in the ordinance so that it could install a portable crusher as an accessory building. Alternatively, Lehigh appealed the Zoning Officer's determination regarding the size and scope of its non-conforming use. Finally, Lehigh raised substantive challenges to the validity of the Township's zoning ordinance.

Hearings were scheduled before the Board, which the parties agreed to bifurcate. Part one of the hearings would consider Lehigh's requests for special exceptions and variances. Part two would consider Lehigh's substantive challenge

to the zoning ordinance and its claim that expansion of its quarry was allowed as a pre-existing, non-conforming use. The first Board hearing was held on December 12, 2006.

On November 30, 2006, before the Board hearings began, Lehigh's representatives met with the Zoning Officer and other Township officials to discuss the crusher it proposed to install. On January 4, 2007, the Zoning Officer sent a letter to Lehigh offering "comments as amendments to our August 17, 2006 letter." R.R. 65a. One of the Zoning Officer's amendatory comments stated:

[In] Part 1(a)(v) of the conclusions in our August 17, 2006 letter we stated that a proposed crusher to be installed at the site will require zoning relief in the form of a variance. In his recent letter, [Lehigh's attorney] provided pictorial evidence that the crusher is in fact a mobile piece of machinery similar in mobility to a track hoe, and is not a fixed building or structure. Therefore it does not need zoning relief.

R.R. 65a.² The Zoning Officer's letter did not contain a "Right to Appeal" notice, as did the original August 17, 2006, determination, nor was it served on the protestants or publicly advertised.

At the next Board hearing, the parties disagreed over whether the Zoning Officer's January 4, 2007, letter was an amendment to his original determination or a new determination that a crusher was permitted as of right on Lehigh's property. Accordingly, a ruling was sought from the Board on whether

² The Zoning Officer also commented on (1) the applicability of slope control provisions in the Zoning Ordinance; (2) criteria for a special exception for an access road to the quarry; and (3) locating a topsoil stockpile within the RA District in order to avoid the need for a variance. R.R. 65a-66a.

the crusher issue was still before it. The Board issued the following order on July 15, 2008:

[U]pon consideration of the Briefs and arguments of counsel for the parties before the [Board] in the matter of the application for zoning relief filed by Lehigh Cement, it is ordered that Appellant, Lehigh Cement, shall be required to pursue a use variance or some other basis of entitlement to use a “crusher” on the property in question.

Appellant’s Brief, Exhibit B.

Lehigh appealed the Board’s order and petitioned for a stay of the Board’s proceedings. The protestant intervenors filed a motion to quash the land use appeal on the theory that the Board’s order was interlocutory.

The trial court held that the Zoning Officer’s January 4, 2007, letter was merely advisory and had no legal force and effect because Lehigh had already appealed the Zoning Officer’s August 17, 2006, determination that the proposed crusher required zoning relief. The trial court quashed Lehigh’s appeal as interlocutory, dismissed its request for a stay, and remanded the matter to the Board to consolidate all issues for a final adjudication.³ Lehigh now appeals to this Court.

On appeal, Lehigh argues that the trial court erred in holding that the Board’s July 15, 2008, order was interlocutory. Lehigh asserts that the Board’s order disposed of all issues as to all parties and was an appealable land use

³ We note that the trial court’s remand language was superfluous; once it quashed Lehigh’s appeal there was nothing left to remand and the proceedings before the Board resumed by operation of law. We will therefore treat the trial court’s order as a final order under PA. R.A.P. 341 and deny Intervenors’ motion to quash the instant appeal.

“decision” for purposes of Section 107(b) of the Pennsylvania Municipalities Planning Code (MPC), 53 P.S. §10107(b).⁴ Further, Lehigh contends that the Board’s order failed to conform with Section 908(9) of the MPC, 53 P.S. §10908(9),⁵ because it contained no findings of fact or conclusions of law. In light of that deficiency, Lehigh believes it is entitled to a deemed approval of either its crusher variance application or its entire application for zoning relief.

Intervenors counter that we should affirm the trial court’s order quashing Lehigh’s appeal because the Board’s order was not a “final adjudication” for purposes of the MPC. Applying the traditional test for “finality” of an order, they assert that the Board’s order was not a final order that “dispose[d] of all claims and all parties.” PA. R.A.P. 341(b)(1). When Lehigh appealed the Board’s order, many issues were still outstanding and Lehigh was still far from resting its case-in-chief. The Zoning Officer’s August 2006 determination raised numerous issues besides the crusher. The Board’s July 2008 ruling requires Lehigh to present its case to the Board on the crusher and all other issues. If it loses, it may then appeal to the trial court. Intervenors argue that this Court should not condone

⁴ Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §10107(b). Section 107(b) defines a “decision” as a

final adjudication of any board or other body granted jurisdiction under any land use ordinance or this act to do so, either by reason of the grant of exclusive jurisdiction or by reason of appeals from determinations. All decisions shall be appealable to the court of common pleas of the county and judicial district wherein the municipality lies.

53 P.S. §10107(b).

⁵ Section 908(9) of the MPC provides, in pertinent part, that when an application for zoning relief is contested or denied, a zoning hearing board’s decision “shall be accompanied by findings of fact and conclusions based thereon together with the reasons therefor.” 53 P.S. §10908(9).

Lehigh's attempt to pursue piecemeal appeals of a multi-faceted land use proceeding. We agree.

The Board's July 15, 2008, order was unusual, but there can be no doubt that it was interlocutory. In its appeal of the Zoning Officer's initial determination dated August 17, 2006, Lehigh (1) challenged the Zoning Officer's decision that crushing is not a permitted use in the RA District, and (2) requested a variance from the height restriction for a portable crusher. Hearings before the Board were barely underway when the Zoning Officer created confusion by issuing the January 4, 2007, letter purporting to amend his original determination. The Board's cursory July 15, 2008, order was really a response to the parties' inquiry as to the status of the crusher issue; the Board reiterated that Lehigh was required to "pursue a use variance or some other basis of entitlement to use a 'crusher' on the property in question." Appellant's Brief, Exhibit B. The Board's order simply confirmed that Lehigh must continue to present its case for using a crusher at its quarry, whether by obtaining a variance or by proving that zoning relief is not required. This was but one of many issues appealed to the Board, and Lehigh must wait until the Board issues a final adjudication on all these issues before it appeals to the trial court.⁶

⁶ Lehigh raises a second issue on appeal: whether the trial court erred in holding that the Zoning Officer's January 4, 2007, letter was merely advisory and not a separate, appealable determination. Lehigh argues that the Zoning Officer's January 4, 2007, letter was a new determination related to the use of a mobile crusher. Notwithstanding that the Zoning Officer called his letter an "amendment," it is separate from the prior August 17, 2006, determination, which dealt with a fixed building or structure.

We need not address this second issue because we have already affirmed the trial court's dismissal of Lehigh's appeal. The effect of the Zoning Officer's determination was limited. He lacked the authority to usurp the adjudicatory authority of the Board. On the other hand, the **(Footnote continued on the next page . . .)**

For all of the foregoing reasons, we hold that the trial court correctly quashed the appeal of the Board's interlocutory order. Accordingly, the trial court's order is affirmed.

MARY HANNAH LEAVITT, Judge

(continued . . .)

Zoning Officer cannot be compelled to take a position in litigation that he now believes to be erroneous. All his "amendment" letter achieved, with respect to the litigation, was to resolve one issue with respect to two parties in the litigation, Lehigh and the Zoning Officer.

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ORDER

AND NOW, this 25th day of February, 2010, the order of the Court of Common Pleas of Berks County in the above-captioned matter, dated November 17, 2008, is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge