

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bucks Cove Rod & Gun Club, Inc. :
Appellant :
v. : No. 2666 C.D. 2010
: Submitted: May 13, 2011
Texas Township Zoning Hearing :
Board and Texas Township Board :
of Supervisors :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: September 14, 2011

Bucks Cove Rod & Gun Club appeals an order of the Court of Common Pleas of Wayne County affirming a decision of the Texas Township Zoning Hearing Board. Bucks Cove challenged a temporary use permit fee imposed by the Township's Zoning Enforcement Officer, but the fee was upheld by the Zoning Board. Concluding the Board erred in determining the permit fee was reasonable, we reverse.

Bucks Cove is a private club that owns approximately 1,100 acres of property in the Township.¹ For a fee, its members are able to use the property for recreational, shooting, hunting, and fishing activities. For more than 30 years the

¹ Bucks Cove was initially incorporated in 1946 as a non-profit corporation, but amended its articles of incorporation in 1994 to become a for-profit corporation.

club has hosted an annual fundraiser known as the “Steak Bake,” which is open to the general public. The Steak Bake traditionally includes food, games of chance and other activities, such as the opportunity to use the club’s trap shoot range.

Approximately one month before the 2009 Steak Bake, Lee S. Krause, the Township’s Zoning Enforcement Officer, informed Bucks Cove that it had to obtain a temporary use permit for the event because the club would be changing the use of its land for a period of four days or less. Krause visited the property and measured the space to be used for the Steak Bake to calculate the amount of the permit fee. Krause calculated that 69,715 square feet of space would be used, which he multiplied by \$.04 pursuant to the Township’s fee schedule for a total fee of \$2,788.60.

Bucks Cove paid the fee under protest and received a temporary use permit on September 15, 2009. After the Steak Bake, Bucks Cove appealed the fee assessment to the Board. Bucks Cove alleged that (1) the fee assessment was arbitrary and capricious and lacked a reasonable basis under the law;² (2) the calculation of the temporary use itemizations were incorrect; and (3) it was “grandfathered” from obtaining a permit since it had never before been required to obtain one. A hearing was held on January 5, 2010.

At the hearing, Krause testified that he calculated the permit fee according to the Township’s fee schedule. He noted that while the fee is only \$.04 per square foot, there is no cap on the total. When asked if he thought the permit fee charged to Bucks Cove was reasonable, Krause stated that he thought it was “somewhat excessive . . . [but] reasonable.” Reproduced Record at 9a (R.R. ____).

² Specifically, Bucks Cove argued that the permit fee had to reasonably relate to the cost of administering the zoning ordinance and, if it did not, it was an illegal revenue generating tax.

Given the amount of the permit fee in this case, Krause waived his use inspection and administrative fees, which are also authorized in the Township's fee schedule. Krause testified that, as Zoning Enforcement Officer, he retains 50 percent of each permit fee he issues as his compensation. For issuing Bucks Cove's permit, he received \$1,394.30 in compensation.

Krause also testified regarding the operative provision of the Township's Zoning Ordinance (Ordinance).³ He stated that Section 602.1 of the Ordinance requires a property owner to obtain a permit prior to changing the use of a building or land. *See* R.R. 92a.⁴ Krause believed that the Steak Bake constituted just such a change of use since Bucks Cove, a private club, was allowing the public to use its grounds and was offering games of chance and other activities. Krause admitted that the term "temporary use" is not expressly defined in the Ordinance. He relied on the definition of "temporary use" in the 2006 International Zoning Code, which the Township adopted in 2008. According to that definition, a "temporary use" is an activity conducted for a fixed period of time such as "the sale of agricultural products, contractors' offices and equipment sheds, fireworks, carnivals, flea markets, and garage sales." R.R. 41a. Because Bucks Cove offers games of chance and raffles at the Steak Bake, Krause likened it to a carnival.

Bucks Cove offered the testimony of two of its members. Bob Romich testified that the activities conducted at the Steak Bake are, generally, no

³ TEXAS TOWNSHIP ZONING ORDINANCE (March 21, 1994), *as amended* (ORDINANCE).

⁴ Section 602.1 of the Ordinance provides, in relevant part:

A building and/or zoning permit shall be required prior to the erection, addition, or alteration of any building or portion thereof . . . ; prior to the use or change in use of a building or land

ORDINANCE §602.1; R.R. 92a (emphasis added).

different than those that club members participate in year round. Jerry Korb, a member of the club's Steak Bake committee, testified that although members pay to use Bucks Cove's property year round, non-member guests are also allowed to use the property. Korb also stated that both members and non-members purchase tickets to attend the Steak Bake. Korb disputed Krause's classification of the Steak Bake as a "carnival" because there are no "carnival activities," such as amusement rides. He disagreed that the gambling wheel and small games of chance make the event a carnival. He also disagreed with Krause's statement that Bucks Cove sells raffle tickets at the event; rather, certain attendees sell raffle tickets.

Korb then testified that Krause's calculation of the area used for the Steak Bake was incorrect. He noted that Krause calculated 12,075 square feet as belonging to the "Pavilion/Wheel/X-Shoot" areas. R.R. 40a. Korb explained that the pavilion, wheel, and X-shoot are three separate areas, and the X-shoot area is not used for the Steak Bake. Korb did not provide the exact size of the X-shoot area.

Based upon the evidence presented, the Board found that the Steak Bake was a "temporary use," different from Bucks Cove's normal use of its property. Accordingly, the Board held that Bucks Cove was required to obtain a temporary use permit under the Township's zoning ordinance.

Regarding Bucks Cove's challenge to the amount of the permit fee, the Board found that Bucks Cove did not demonstrate that the fee was arbitrary or unrelated to the administrative costs incurred by the Township in issuing the temporary use permit. Thus, the Board concluded the fee was reasonable.

The Board next considered Bucks Cove's challenge to the calculation of the fee. Although the Board found that Krause's square footage calculations

may have been exaggerated, it did not find them improper. Bucks Cove did not present evidence on what the proper calculations should have been or the exact size of the X-shoot area. Nevertheless, the Board found that Krause erroneously included 14,850 square feet in the parking lot calculation and reduced the permit fee by \$594.

Finally, the Board considered, and rejected, Bucks Cove's argument that it was "grandfathered" out of the permit requirement. The Board agreed that Bucks Cove's activities were legal and predated the enactment of the Township's zoning ordinance. Nevertheless, it was required to comply with subsequently enacted legislation.

Bucks Cove appealed to the trial court.⁵ The trial court directed the parties to submit briefs and decided the case without taking additional evidence.⁶ Relying on the factual findings of the Board, the trial court determined that Bucks Cove did not offer any evidence showing the temporary use permit fee was unreasonable, or in violation of the Pennsylvania Municipalities Planning Code (MPC).⁷ Bucks Cove now appeals to this Court.⁸

⁵ After filing its appeal with the trial court, Bucks Cove sought to compel discovery of information regarding the Township's distribution of the permit funds and its costs associated with the permitting process. The Township objected, noting that Bucks Cove had ample time to request this information prior to the hearing before the Board. The trial court agreed and denied Bucks Cove's motion to compel discovery.

⁶ On appeal to the trial court, Bucks Cove initially advanced the same three arguments that it advanced before the Board. However, in its brief to the trial court, Bucks Cove did not address its arguments regarding the calculation of the square footage of property used for the Steak Bake and that it was "grandfathered" out of the permit requirement. Accordingly, the trial court deemed those issues to be waived and reviewed only whether the temporary use permit fee was arbitrary and capricious.

⁷ Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§10101-11202.

On appeal, Bucks Cove argues that the Board erred in finding the Township’s temporary use permit fee was valid and reasonable. Specifically, Bucks Cove posits that the permit fee is not commensurate with the administration and enforcement costs incurred by the Township, since the Township does not provide any special services to permittees. Accordingly, Bucks Cove contends the permit fee was arbitrary, capricious and unreasonable, and constitutes an unauthorized tax.

The Board counters that Bucks Cove failed to rebut the presumption that the permit fee is valid. The Board contends that it was Bucks Cove’s burden to present evidence of the Township’s costs to issue temporary use permits, and it did not. Thus, the evidence did not prove the permit fee to be unreasonable.

Section 617.3(e) of the MPC provides that a municipality “may prescribe reasonable fees with respect to the administration of a zoning ordinance.” 53 P.S. §10617.3(e).⁹ A license fee, such as the permit fee at issue here, has been defined by our Supreme Court as

(continued . . .)

⁸ In a zoning appeal, our scope of review when, as here, the trial court has not taken additional evidence is limited to determining whether the Board committed an error of law or abuse of discretion. *Catholic Social Services Housing Corporation v. Zoning Hearing Board of Edwardsville Borough*, 18 A.3d 404, 407 n.2 (Pa. Cmwlth. 2011). An abuse of discretion occurs when the findings of the Board are not supported by substantial evidence. *Id.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* (quoting *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 554-555, 462 A.2d 637, 639-640 (1983)). Furthermore, while this Court is bound by the credibility determinations of the Board, we conduct an independent review of the evidence and determine, as a matter of law, whether the findings of fact are supported by the evidence. *Martin Media v. Hempfield Township Zoning Hearing Board*, 671 A.2d 1211, 1216 (Pa. Cmwlth. 1996).

⁹ Section 617.3(e) of the MPC states:

(e) The governing body may prescribe reasonable fees with respect to the administration of a zoning ordinance and with respect to hearings before the

(Footnote continued on the next page . . .)

a sum assessed for the granting of a privilege. In most instances, where a license is granted the [municipality] invariably incurs expense such as the cost of registration and inspection; it is only proper that the one who seeks and receives a license should bear this expense. To defray the cost of a license a fee is charged to the licensee; *however, this fee must be commensurate with the expense incurred by the [municipality] in connection with the issuance and supervision of the license or privilege.*

Mastrangelo v. Buckley, 433 Pa. 352, 385-86, 250 A.2d 447, 464 (1969) (footnote omitted) (emphasis added). However, as this Court noted in *Talley v. Commonwealth*, 553 A.2d 518, 519 (Pa. Cmwlth. 1989),

[a] license fee is distinguishable from a tax which is a revenue producing measure characterized by the production of a high proportion of income relative to the costs of collection and supervision. Thus, *if a license fee collects more than an amount commensurate with the expense of administering the license, it would become a tax revenue and cease to be a valid license fee.*

Id. (citations omitted) (emphasis added). Thus, a zoning permit fee must be based upon the municipality's costs in providing the services needed to grant the permit; otherwise it will be considered an improper tax. *See also Golla v. Hopewell Township Board of Supervisors*, 452 A.2d 273, 274 (Pa. Cmwlth. 1982); *Borough of Brookhaven v. BP Oil Co.*, 409 A.2d 494 (Pa. Cmwlth. 1979).

(continued . . .)

zoning hearing board. Fees for these hearings may include compensation for the secretary and members of the zoning hearing board, notice and advertising costs and necessary administrative overhead connected with the hearing. The costs, however, shall not include legal expenses of the zoning hearing board, expenses for engineering, architectural or other technical consultants or expert witness costs.

53 P.S. §10617.3(e). Section 617.3 was added by the Act of December 21, 1988, P.L. 1329.

A party challenging the validity of a license or permit fee has the burden of proving it is unreasonable. *Talley*, 553 A.2d at 520. This is because an ordinance enacted by a municipality is presumed to be valid. *In re Apgar*, 661 A.2d 445, 447 (Pa. Cmwlth. 1995). Thus, all doubt regarding the validity of a fee will be resolved in favor of the reasonableness of the fee. *Talley*, 553 A.2d at 520. Accordingly, when reviewing the validity of a fee we give municipalities reasonable latitude in anticipating the expense of enforcing the ordinance. *Id.*

Here, the Board is correct when it asserts Bucks Cove did not offer specific evidence regarding the Township's costs to administer its permitting program. However, there was evidence to support Bucks Cove's assertion that the permit fee was unreasonable. Krause testified that he received half of the \$2,788.60 permit fee; the other half, he said, went to the Township. This contradicts the Board's finding that "[t]he distribution of the remainder of the fee monies was unexplained." Board Adjudication, February 9, 2010, at 4; Finding of Fact No. 13.¹⁰ More importantly, Krause's testimony showed, *and the Board specifically found as fact*, that the Township did *not* provide any services to Bucks Cove, or to any entity requesting a permit for a temporary change in use. Board Decision, February 9, 2010, at 4, Finding of Fact No. 14.

The Board argues that there must be evidence that a permit fee exceeds the municipality's costs in order for that fee to be held unreasonable. This is not a correct recital of the law. Our decision in *Talley*, which reviewed an annual \$100 license fee on any motor-vehicle related business, is instructive.

¹⁰ The only thing that went unexplained was the exact breakdown of where the funds went within the Township's coffers.

In *Talley*, this Court stated that, historically, when the validity of a license fee is challenged, the fee is upheld only when it is commensurate with the cost of administration and enforcement. *Talley*, 553 A.2d at 521. However, we specifically noted that

in those cases evidence was presented as to the “special” services provided or as to the cost incurred by the municipality in providing these “special” services.

Id. (listing prior cases and identifying the special services provided in each). Thus, a party challenging the validity of a license or permit fee can prevail if it shows that the municipality provides no additional services to permittees, even if it does not produce evidence on the overall costs of administering and enforcing the ordinance. *See id.* *See also, e.g., Olan Mills, Inc. v. City of Sharon*, 371 Pa. 609, 92 A.2d 222 (1952)(holding a \$200 license fee, imposed on transient retailers, to be unreasonable because the cost of enforcement was not reasonably related to the fee amount, nor did the licensure requirement impose any unusual costs on the city).

Here, it is undisputed that the Township did not provide any additional services to Bucks Cove, aside from Krause’s inspection to calculate the fee. The Board itself found, as fact, that no special services were provided by the Township with respect to granting the permit.¹¹ Therefore, we must conclude that the Township’s temporary use permit fee, which included separate charges for

¹¹ The Board now tries to reverse course and argues that it provides a service to Bucks Cove by maintaining the Township road that leads to the club. The maintenance of that road, however, is totally unrelated to Bucks Cove’s change in use permit for the Steak Bake. Township roads are maintained year round regardless of how any individual parcel of property along the road is being used. It is absurd to suggest that the Township only maintains the road because Bucks Cove purchases a permit for a change in use once a year.

inspection and administration expenses and \$.04 for each square foot of changed use, but did not cover any “special” services, was unreasonable and invalid as an improper revenue generating tax.¹²

For all of the foregoing reasons, we reverse the trial court’s order.

MARY HANNAH LEAVITT, Judge

¹² Had the permit fee only included Krause’s inspection and administrative charges, or the Township provided some additional service to Bucks Cove based upon the square footage of the change in use, *e.g.*, police coverage or EMS personnel, we may have reached a different decision.

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ORDER

AND NOW, this 14th day of September, 2011, the order of the Court of Common Pleas of Wayne County, dated November 24, 2010, in the above-captioned matter is hereby REVERSED.

MARY HANNAH LEAVITT, Judge