IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Latimore Township	:	
	:	
v.	:	
	:	
Parminder Singh and Paramjit Kaur	:	
	:	
Parminder Singh and Paramjit Kaur,	:	
	:	
Appellants	:	
	:	
v.	:	No. 355 C.D. 2012
	:	No. 356 C.D. 2012
Latimore Township	:	Argued: December 12, 2012

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE McCULLOUGH FILED: January 14, 2013

Parminder Singh (Singh) and Paramjit Kaur, husband and wife, (collectively Owners) appeal from the January 26, 2012 order of the Court of Common Pleas of Adams County affirming the Latimore Township (Township) Board of Supervisors' decision denying Owners' land development final plan approval, and granting the Township's request for preliminary injunctive relief with an award of attorneys' fees and costs. Owners essentially raise two issues for this Court's review: (1) whether the trial court erred when it held that the Township had properly required the submission of a land development plan, and (2) whether the

trial court erred when it concluded that Owners had failed to file an appeal from an enforcement notice. In addition, the Township requests if this Court affirms the trial court, to order Owners to pay all reasonable attorneys' fees the Township incurred as a result of this appeal, and to remand the matter to the trial court to ascertain the reasonableness of said fees.[1] We affirm and remand for determination of appropriate attorneys' fees and costs.

Owners hold title to property located at 250 Ridge Road, York Springs (Property). They purchased the Property in 2004 and operate a gas station and convenience store on the Property which is located within a Commercial-Industrial (C-I) zoning district, pursuant to the Latimore Township Zoning Ordinance (Zoning Ordinance).[2] There are bathrooms and laundry and shower facilities located within the convenience store. In August 2009, Owners placed a 20' x 20' structure on the Property behind the convenience store. The structure was connected to electrical service and there were also satellite dishes attached to it. Jimmy Cragg (Cragg), a constable and member of the Latimore Township Zoning Hearing Board (Zoning Board), saw the structure, and upon investigation, observed a refrigerator, a fully-made king or queen-sized bed, a dining table, chairs and a large flat-panel television inside the structure. Cragg reported his findings to a Township supervisor and shortly thereafter, Latimore Township Zoning Officer, John L. Shambaugh (Shambaugh), received an anonymous letter that the structure behind the convenience store was being used as a residence by employees. On September 3, 2009, Shambaugh visited the Property and observed a bed. That same day, Shambaugh sent a certified letter to the Owners' residence in Reading indicating that a zoning permit application had not

[1] The Township raised said requests in its brief and at oral argument.

[2] The Zoning Ordinance was enacted on October 13, 2008.

been received for the structure. Shambaugh's letter informed Owners that before the application could be processed, Owners must submit a land development plan to the Township. The letter also directed that Owners must either remove the structure or submit a land development plan and a zoning permit application within 90 days of the date of the letter.

On September 23, 2009, Shambaugh's letter was returned as "unclaimed." On the same day, the letter was forwarded to Owners by regular mail. Shambaugh also personally hand-delivered a copy of the letter to an individual working at the Property. Within two weeks, Singh visited Shambaugh's office and expressed that he wanted to resolve the issue.

On November 2, 2009, Singh submitted an aerial photograph of the Property without the structure present, as a land development plan, but did not include an application or fees therewith. On November 13, 2009, Shambaugh wrote to Owners stating that the structure had been installed without proper zoning permits, that the photograph did not meet the requirements for a land development plan under the 1992 Latimore Township Subdivision and Land Development Ordinance (SALDO),[3] and that either the structure be removed or a land development plan and zoning application submitted by December 3, 2009. On November 17, 2009, professional land surveyor, Jerry LaRue (LaRue), responded to the November 13, 2009 letter on behalf of Owners. LaRue reported that he was working on a land development plan and requested a 90-day extension. By letter dated November 27, 2009, Shambaugh denied LaRue's request. On December 3, 2009, Owners submitted to the Township a drawing entitled "Final Land Development Plan" (Final Plan), as

[3] The 1992 SALDO was enacted on November 2, 1992.

an amendment to the photograph previously submitted by Owners' as their original land development plan.

On December 7, 2009, the Township issued an Enforcement Notice to Owners, alleging that Owners had placed the structure without a zoning permit or building permit and used the structure without a Certificate of Occupancy. The Enforcement Notice stated that compliance must be completed within 30 days, and that Owners had the right to appeal from the Enforcement Notice within 30 days. The Enforcement Notice was sent to Owners' residence as well as the Property. Also on December 7, 2009, Shambaugh reviewed Owners' Final Plan. On December 17, 2009, Shambaugh submitted his review to the Township Supervisors, recommending rejection of the Final Plan. On December 23, 2009, LaRue, unaware of Shambaugh's concerns that the structure was being used as a residence, sent a letter to the Board of Supervisors in response to Shambaugh's December 17, 2009 comments, averring that Owners were willing to treat the structure as a storage unit, but felt that other concerns raised by Shambaugh regarding Owners' use of the Property were "grandfathered" into the Zoning Ordinance and SALDO. On January 4, 2010, Shambaugh wrote to Owners, restating that the December 7, 2009 Enforcement Notice deadline was January 7, 2010, and that they had the right to appeal. On January 14, 2010, due to the fact that no appeal from the Enforcement Notice had been filed, the Township filed a civil action against Owners in Magisterial District Court.

On June 17, 2010, the Board of Supervisors voted to deny Owners' Final Plan and issued a written decision on July 2, 2010. On July 21, 2010, Owners filed an appeal with the trial court from the Board of Supervisor's decision under Docket No. 10-S-1202 (Final Plan Appeal). On July 30, 2010, in the civil action, the Magisterial District Judge awarded the Township fines, attorneys' fees and costs

arising from the Enforcement Notice. On August 10, 2010, Owners appealed from the Magisterial District Judge's decision to the trial court under Docket No. 10-S-1343 (Enforcement Appeal) and praeciped for entry of a rule to file a complaint. On that same date, Owners submitted a request for a zoning permit and paid the applicable fee. On August 31, 2010, the Township filed its Complaint in the Enforcement Appeal, seeking injunctive relief against Owners for violation of the Zoning Ordinance, and for payment of fines, fees and costs. On September 16, 2010, the Township filed a Petition for Preliminary Injunctive Relief in the Enforcement Appeal. An Amended Complaint was filed on October 18, 2010, in the Enforcement Appeal.

The trial court conducted hearings on both the Final Plan Appeal and the Enforcement Appeal on March 25 and June 20, 2011. By order docketed January 27, 2012, the trial court, concluding that the Township had properly requested a land development plan, affirmed the Board of Supervisors' denial of Owners' Final Plan in the Final Plan Appeal. The trial court, finding that no appeal had been filed from the Enforcement Notice, also granted the Township's request for preliminary injunctive relief with an award of attorneys' fees and costs in the Enforcement Appeal.[4] Owners appealed to this Court.[5]

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[4] Owners did not raise or discuss in their brief the issue of whether the trial court properly granted the preliminary injunction, and therefore, it is waived. Pa.R.A.P. 2116(a); *see also Oliver v. Unemployment Comp. Bd. of Review*, 5 A.3d 432 (Pa. Cmwlth. 2010).

[5] "In appeals from a trial court's decision in a land development matter, we must review the trial court's findings and legal conclusions for error of law or abuse of discretion, if the trial court has taken additional evidence on the merits." *Borough of Jenkintown v. Bd. of Comm'rs*, 858 A.2d 136, 138 (Pa. Cmwlth. 2004).

> In analyzing appeals from a trial court's granting of mandatory preliminary injunctive relief, the role of an appellate court does not permit an inquiry into the merits of the controversy. Rather, the courts

(Footnote continued on next page…)

Owners argue that the trial court erred when it held that the Township had properly required the submission of a land development plan. Specifically, Owners contend that the structure does not constitute a dwelling or any other structure that would require a land development plan. Owners further assert that even if a land development plan might ordinarily be required in such a situation, in the instant action, the Property was grandfathered. We disagree.

Section 1101 of the Zoning Ordinance provides, "[n]o building or other structure shall be erected, moved, added to, structurally altered, nor shall any building, structure or land be established or changed in use without a permit therefore, issued by the Zoning Officer."[6] Reproduced Record (R.R.) at 314a.

Section 901 of the 1992 SALDO dictates that, "[p]ermits required by the [T]ownship for the erection or alteration of buildings . . . or use of the land shall not be issued by [the Township] until it has been ascertained that the site . . . is in accordance with [the SALDO]." Original Record (O.R.), 1992 SALDO at 60.

(continued…)

> should examine the record to determine if there were any apparently reasonable grounds for the action of the court. The only circumstances warranting a reversal of a trial court's decision granting or denying a preliminary injunction are when it is clear that no grounds exist to support the decree or that the rule of law relied upon was palpably erroneous or misapplied.

Hatfield Twp. v. Lexon Ins. Co., 15 A.3d 547, 551 (Pa. Cmwlth. 2011) (citations and quotation marks omitted).

[6] Section 501 (D) of the Zoning Ordinance provides that "[a] zoning permit is not required for an accessory building having a floor area of one hundred (100) square feet or less." R.R. at 224a. Section 202 of the Zoning Ordinance defines Accessory Building as "[a] building subordinate to and detached from the principal building on the same lot and used for such purposes as are customarily incidental to the principal building." R.R. at 172a. Thus, even if the structure in the instant matter were deemed to be an accessory building to the convenience store, a permit would be required because the structure measures 20' x 20'.

Sections 304-A(25) and 306-A(26) of the 1992 SALDO require "statements of intended use of all lots" be contained in all preliminary and final land development plans. O.R., 1992 SALDO at 15, 20.

The 1992 SALDO applies to all "land development" in the Township. 1992 SALDO, Article I, Section 103. O.R., 1992 SALDO at 1. Article II(34) of the 1992 SALDO defines "land development" to include, "the improvement of one (1) lot . . . for any purpose involving . . . a single non-residential building on a lot or lots regardless of the number of occupants or tenure." O.R., 1992 SALDO at 6. As noted by the trial court, the 1992 SALDO does not define the term "building,"[7] but does define the term "structure," as "anything constructed or erected with a fixed location on the ground or attached to something having a fixed location on the ground, including but not limited to buildings, factories, *sheds*, cabins and other similar items." O.R., 1992 SALDO at 9 (emphasis added).

The trial court rejected Owners' argument that because the structure was not affixed to the ground it was not a building and therefore could not constitute a land development under the 1992 SALDO.[8] The trial court noted that there was

[7] Notably, Section 202 of the Zoning Ordinance defines building as "[a]ny construction on a lot . . . having a roof supported by columns and walls and intended for the shelter, housing or enclosure of persons, livestock or chattels. . . . ." R.R. at 177a. Further, Section 202 defines "structure" as "[a]ny man-made object having an ascertainable stationary location on or in land or water, whether or not affixed to land . . . ." R.R. at 193a.

[8] Although the 1992 SALDO definition of "structure" requires that there be a "fixed location," there is no requirement that the structure be "affixed" to the ground. O.R., 1992 SALDO at 9. Thus, at the very least, the structure at the Property would constitute a "structure" under the 1992 SALDO. Owners assert in their brief that Shambaugh's September 2009 letter describes the structure as an "accessory building," however, such is not determinative under the applicable SALDO. While Section 301 of the *December 2009 SALDO* excludes from the definition of "Land Development," "[t]he addition of an accessory building . . . on a lot, or lots subordinate to an existing principal building," the December 2009 SALDO is inapplicable to the instant matter since the structure was placed on the Property in August 2009. O.R., 2009 SALDO at III-8.

"substantial confusion regarding the actual use of the [p]roperty and the structure . . . ." Trial Ct. Op. at 16. While acknowledging that the structure did not meet the specific definition for "dwelling" under the Zoning Ordinance, the trial court, as fact finder, concluded that "Owners' use of the structure clearly conform[ed] more closely with the uses traditionally associated with [a] dwelling."[9] Trial Ct. Op. at 15. Given the possibility that Owners were illegally using the structure as a residence in an area zoned for commercial and industrial use, and because Section 901 of the 1992 SALDO requires that compliance with the 1992 SALDO be confirmed prior to the grant of a zoning permit, the trial court concluded that the Township was justified in requiring a land development plan pursuant to the 1992 SALDO before issuing a zoning permit for the structure.

The Pennsylvania Supreme Court has noted:

> While the Statutory Construction Act is not expressly applicable to the construction of local ordinances, the principles contained therein are nevertheless useful. The objective of statutory construction is to determine the legislative intent. . . . Furthermore, the courts of this Commonwealth generally use dictionaries as source material to determine the common and approved usage of terms.

Phila. Eagles v. City of Phila., 573 Pa. 189, 219 n.31, 823 A.2d 108, 127 n.31 (2003) (citations omitted). Section 1903 of the Statutory Construction Act[10] states in relevant part, "[w]ords and phrases shall be construed according to rules of grammar

[9] While it is clear that in order to constitute a "dwelling" under the Zoning Ordinance, a building must be "resting directly on and securely anchored to a concrete or bonded masonry foundation extending below the frost level," such is not the case under the 1992 SALDO. R.R. at 180a. In contrast to the definition in the Zoning Ordinance, the 1992 SALDO defines "dwelling" as "a building or a portion thereof designed for residential purposes and used as living quarters for one or more persons." O.R., 1992 SALDO at 5. Thus, under the SALDO, there is no requirement that a dwelling be "securely anchored."

[10] 1 Pa.C.S. §1903.

and according to their common and approved usage." *Merriam Webster's Collegiate Dictionary* 162 (11th ed. 2004) defines "building" as "a roofed and walled structure built for permanent use." Similarly, Section 202 of the Zoning Ordinance defines building as "[a]ny construction on a lot . . . having a roof supported by columns and walls and intended for the shelter, housing or enclosure of persons, livestock or chattels . . . ." R.R. at 177a. Given the aforementioned, it is reasonable to conclude that the structure is indeed a "building" under the 1992 SALDO. Accordingly, the installation of the structure constituted a "land development" under the 1992 SALDO and the Township properly required the submission of a land development plan in accordance with Section 901 of the 1992 SALDO.

Owners' argument that the trial court erred in affirming the land development plan requirement because the Property was grandfathered based upon pre-existing use, is also without merit. The land development plan was requested in response to a *new use* of the Property. Owners placed the new structure on the Property in August 2009. The placement of that structure constituted land development under the 1992 SALDO. In order to approve that new use of the Property, the Township required Owners to submit the land development plan. Further, a zoning permit was required for the structure under the Zoning Ordinance. Because Section 901 of the 1992 SALDO required that the Township confirm compliance before the issuance of a zoning permit, a land development plan was properly requested. Regardless of whether a prior use may have been grandfathered, the new use of the Property required Owners to adhere to the ordinances in place at the time of the new use. Accordingly, the trial court did not commit an error of law or abuse its discretion.

Owners further argue that the trial court erred when it concluded that Owners had failed to appeal from the Township's Enforcement Notice. We disagree.

Section 911 of the Zoning Ordinance provides for appeals to be filed with the Zoning Board. R.R. at 310a. Section 909.1 of the Municipalities Planning Code (MPC)[11] specifies that the Zoning Board has exclusive jurisdiction of such matters. *See Johnston v. Upper Macungie Twp.*, 638 A.2d 408 (Pa. Cmwlth. 1994). Notwithstanding that there is no record evidence that Owners filed an appeal from the Enforcement Notice, Owners argue that LaRue's December 23, 2009 letter acted as an appeal. However, as the trial court concluded, the letter, which was addressed to the Board of Supervisors rather than the Zoning Board, is:

> insufficient to constitute an appeal. The enforcement notice is never mentioned in LaRue's letter and no logical inference can be made that would lead one to believe that the letter was intended to function as an appeal of the Notice. On its face, the letter appears to be exactly what it purports to be – a response from LaRue regarding engineering comments made by the Township on the land development plan he submitted on December 3 – and not a notice of appeal.

R.R. at 158a.

The trial court's characterization of LaRue's letter as a response to Shambaugh's December 17, 2009 letter and not an appeal from the Enforcement Notice is supported by the record. LaRue's December 23, 2009 letter begins: "I have received Engineering comments on the plan I prepared for Mr. Singh which was an attempt to resolve the permit issue on the Shell Station property. I have reviewed the comments with Mr. Singh and offer the following view." R.R. at 674a. As noted by the trial court, there is absolutely no mention of the Enforcement Notice in the letter and no expression of any intent to appeal from the Enforcement Notice. A further

[11] Act of July 31, 1968, P.L. 805, added by the Act of December 21, 1988, P.L. 1329, *as amended*, 53 P.S. § 10909.1.

indication that LaRue's letter was merely a response to Shambaugh's letter is that LaRue's letter was sent to the Board of Supervisors, the same body to which Shambaugh's December 17, 2009 letter was sent, rather than the Zoning Board, where appeals are properly filed. Owners' failure to appeal from the Enforcement Notice constituted a conclusive determination of a violation. *See Borough of Bradford Woods v. Platts*, 799 A.2d 984 (Pa. Cmwlth. 2002). Thus, the trial court properly found that Owners did not file an appeal from the Enforcement Notice and may not now raise a challenge thereto.[12]

Pursuant to the MPC, the Township requests that this Court remand the Enforcement Appeal to the trial court for modification of its award of fees and costs so as to reflect the additional expenses incurred in this appeal. We believe there is merit to this request.

This Court has stated:

> [A]s provided in Section 616.1 of the MPC [added by the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10616.1], an enforcement proceeding is initiated as soon as an enforcement notice is sent to the property owner. An appeal to the zoning hearing board regarding such a notice is part and parcel of the enforcement proceeding because a property owner may not be found liable unless there is a conclusive determination of a violation, either through the appeal process or by a failure to appeal the notice. Thus, we hold that **an award of costs and attorney fees pursuant to Section 617.2 of the MPC [added by the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10617.2] is not limited to costs and fees incurred as a result of the action before the district justice but includes all costs and attorney fees incurred as a result of the violation,**

[12] The trial court also concluded that because LaRue was not aggrieved by the Enforcement Notice, he did not have standing to appeal. Because the document submitted by LaRue could in no way be construed as an appeal from the Enforcement Notice, it is unnecessary for this Court to address the standing issue.

> **which may encompass appeals from the enforcement notice.**

Borough of Bradford Woods, 799 A.2d at 991 (citations omitted) (emphasis added). Given the disposition of this case as discussed herein, we shall remand the Enforcement Appeal to the trial court solely for the purpose of determining the appropriate attorneys' fees and costs inclusive of this appeal.

For all of the above reasons, the trial court's order denying Owners' final plan approval, and granting the Township's request for preliminary injunctive relief with an award of attorneys' fees and costs is affirmed, and the Enforcement Appeal is hereby remanded to the trial court for a determination of appropriate fees and costs.

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PATRICIA A. McCULLOUGH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Latimore Township	:	
	:	
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Parminder Singh and Paramjit Kaur	:	
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O R D E R

AND NOW, this 14th day of January, 2013, the Adams County Court of Common Pleas' January 26, 2012 order is affirmed, and the matter at Docket No. 10-S-1343 is remanded for a determination of appropriate fees and costs.

Jurisdiction relinquished.

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PATRICIA A. McCULLOUGH, Judge