

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, :
Appellant :
v. : No. 422 C.D. 2008
: Submitted: August 15, 2008
David Kollar and Karen Kollar :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN

FILED: October 3, 2008

Bear Creek Township (Township) appeals from the September 18, 2007, order of the Court of Common Pleas of Luzerne County (trial court), which sustained the summary appeal of David Kollar and Karen Kollar (Landowners) from the determination of a district justice that Landowners were guilty of violating Township ordinances regulating the use of outdoor fuel furnaces.¹

Landowners use an outdoor wood-burning furnace to supply heat and hot water to their home. In 2006, the Township adopted Ordinance No. 4 of 2006, which amended the Township Zoning Ordinance of 1994 by adding “Outdoor Fuel

¹ Although Commonwealth of Pennsylvania is identified as the appellant in this matter, the Township is the real party in interest. The discrepancy arises due to procedural irregularities that began when the Township issued a non-traffic citation to Landowners charging them with violating two Township ordinances. Landowners concede that they have not preserved the issue of whether the Township inappropriately filed a criminal, rather than civil action; accordingly, we do not address this question on appeal. Pa. R.A.P. 302.

Furnace” as an accessory structure permitted in all zoning districts as a special exception. In pertinent part, the 2006 ordinance limits the use of outdoor fuel burning furnaces to the period from September 1 through May 31. (R.R. at 17.) The Township subsequently adopted Ordinance No. 1 of 2007, which further restricted the period during which the use of outdoor fuel furnaces is permitted.² The Township acknowledges that Landowners’ use of their outdoor furnace predates the applicable ordinances and constitutes a nonconforming use. (Township’s brief at 4, 9.)

Nevertheless, in response to complaints concerning smoke and fumes emanating from Landowners’ use of the outdoor furnace, the Township zoning officer issued Landowners a citation charging them with violating time restrictions imposed by both amending ordinances. Subsequently, a district justice found Landowners guilty of the violations and imposed a total of \$271.00 in fines and costs. Landowners filed a summary appeal with the trial court, which held a *de novo* hearing. During that brief proceeding, the trial court explained that the sole issue to be decided was whether, as a matter of law, a subsequently adopted ordinance may regulate the period of operation of a nonconforming use.³ Counsel agreed to research the issue and have the matter decided on briefs submitted. (R.R. at 1-3.) By order dated September 18, 2007, the trial court held that Landowners’ nonconforming use was not affected by subsequent amendments to the Township’s zoning ordinance and sustained Landowners’ appeal.

² Ordinance No. 1 of 2007 provides that the use of outdoor fuel furnaces is not permitted from May 15, 2007, through September 30, 2007, and from May 1 through September 30 thereafter. (R.R. at 20.)

³ The Township’s zoning officer was present at the hearing, but neither party offered testimony or other evidence.

On appeal to this court,⁴ the Township recognizes the well-settled principle that “[a] lawful nonconforming use establishes in the property owner a vested property right which cannot be abrogated or destroyed, unless it is a nuisance, it is abandoned, or it is extinguished by eminent domain.” *PA Northwestern Distributors, Inc. v. Zoning Hearing Board*, 526 Pa. 186, 192, 584 A.2d 1372, 1375 (1991). The Township also acknowledges that Landowners’ nonconforming use is not subject to ordinance provisions establishing mechanical and structural standards. However, the Township asserts that, “given the actual presence of a nuisance,” the Township has the right to impose reasonable time restrictions on Landowners’ use of the outdoor fuel furnace. (Township’s brief at 10.) In support of this contention, the Township relies on *Bachman v. Zoning Hearing Board*, 508 Pa. 180, 494 A.2d 1102 (1985) (holding that the government’s action in purchasing land, under threat of condemnation, had the effect of extinguishing the nonconforming use); *Gross v. Zoning Board of Adjustment*, 424 Pa. 603, 227 A.2d 824 (1967) (affirming property owner’s entitlement to a permit for an accessory use and concluding that a use permitted by variance or special exception is comparable and establishes in the property owner a vested right similar to that held by the owner of a nonconforming use); *Richland Township v. Prodex, Inc.*, 634 A.2d 756 (Pa. Cmwlth. 1993) (reversing that part of the trial court’s order enjoining activities permissible as part of a nonconforming use); and *Pennridge Development Enterprises, Inc. v. Volovnik*, 624 A.2d 674 (Pa. Cmwlth. 1993) (holding that a township ordinance rezoning property converted a nonconforming use into a permitted use). We find no support for the

⁴ Because this appeal presents a question of law, our scope of review is plenary. *Harman v. Forest County Conservation District*, 950 A.2d 1117 (Pa. Cmwlth. 2008).

Township's argument in these cases; in fact, our decision in *Richland Township* is factually similar to the present case and compels a contrary conclusion.

In *Richland Township*, the property owner operated a metal fabrication business on two parcels of land prior to the adoption of the township's zoning ordinance, and the township acknowledged that the area in use at that time was a lawful nonconforming use. The township brought an equity action against the property owner, alleging, in part, that the landowner was violating ordinance provisions relating to dust, light, and noise levels. With respect to those allegations, the trial court concluded that the negative effects of the metal operations were in violation of the zoning ordinance and, alternatively, constituted a public nuisance. Accordingly, the trial court granted a permanent injunction enjoining the property owner from producing glare, metal dust or excessively loud noise beyond designated boundaries. On appeal to this court, we reversed that part of the trial court's order, concluding that the ordinance cannot preclude the property owner's offending activities because these activities predate the ordinance and thus are part of the legal nonconforming use. We explained that, "by the very nature of a nonconforming use, a governing body and local citizens cannot bar through legislation the continuance of the nonconforming use, with all its undesirable interferences." *Richland Township*, 634 A.2d at 767. In addition, we concluded that the trial court erred in considering a nuisance theory because the township had not raised that issue in its pleadings.

We note that, in contrast to the circumstances in *Richland Township*, the Township has not sought equitable relief in an action sounding in nuisance.⁵ Because the Township seeks enforcement of its ordinance, rather than an equitable remedy, the trial court correctly applied the legal principles governing the continuation of a legal nonconforming use. “[I]t has long been the law of this Commonwealth that municipalities lack the power to compel a change in the nature of an existing lawful use of property.” *PA Northwestern Distributors, Inc.*, 526 Pa. at 192, 584 A.2d at 1375 (1991). Therefore, we reject the Township’s assertion that Landowners’ nonconforming use is subject to the time restrictions established by the subsequent amendments to the Township’s ordinance.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Judge

⁵ Where a proven nuisance exists, equity may intervene to enjoin it, even though the use of land is in compliance with a relevant zoning ordinance. *Mazeika v. American Oil Company*, 383 Pa. 191, 118 A.2d 142 (1955); *Bradley v. Township of South Londonderry*, 440 A.2d 665 (Pa. Cmwlth. 1982).

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ORDER

AND NOW, this 3rd day of October, 2008, the order of the Court of Common Pleas of Luzerne County, dated September 18, 2007, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Judge