IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Oleksandr Gyrych and Leah Gyrych	:	
	:	
v.	:	No. 72 C.D. 2008
	:	
The Zoning Hearing Board of Ferguson Township	:	Argued: September 11, 2008
	:	
Appeal of: The Township of Ferguson	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: October 9, 2008

The Township of Ferguson (Township) appeals from an order of the Court of Common Pleas of Centre County (trial court) which finds that the motor cross track located on the property of Oleksandr and Leah Gyrych (Owners) is an accessory use and reverses the Zoning Hearing Board of Ferguson Township's (Zoning Hearing Board) decision finding that Owners' use of their property as a motor cross race and/or practice track is prohibited and not specifically provided for in the Ferguson Township Zoning Ordinance (Ordinance). We affirm.

Owners have owned and occupied a fifty-one acre farm in the Township since 1991. The farm is located in the Rural Agricultural (RA) Zoning District and is Owners' primary residence. The property is primarily used for farming purposes and is improved with a residence, various out buildings used for

farming, and a motor cross track. The motor cross track was built by Owners' sons using a skid steer to mound up the earth, creating turns and bumps. The track is not a full size motor cross track. The highest mounds on the track are approximately six to seven feet tall and the track measures between one half mile and one mile.

One of Owners' sons is a professional motor cross racer. Another son aspires to be a professional motor cross racer and was allowed to leave school early in order to practice and train for his chosen profession. Owners' sons use the motor cross track for recreation and practice for approximately two to four days a week when the ground is not frozen. The track is used solely by Owners' sons and a few close friends. The track is not open to the public and no professional motor cross racers are invited to train there.

On April 5, 2006, the Township Zoning Officer had a telephone conversation with Owners regarding the track. In an April 25, 2006, follow up letter, the Zoning Officer informed Owners that the motor cross track was not a permitted use in the RA Zoning District and requested that Owners remove the track within thirty days to address the zoning violation. Owners did not remove the motor cross track.

On July 28, 2006, the Zoning Officer issued Owners a violation notice which stated that Owners were in violation of the Ordinance, Chapters 27-301 and 27-204.[1] The violation notice required Owners to take steps toward compliance within thirty days. Owners appealed the violation notice to the Zoning Hearing Board, which held a hearing on September 19, 2006. The Zoning Hearing Board

[1] Chapter 27-204 of the Ordinance contains Use Regulations. Reproduced Record (R.R.) at 113a-115a. Chapter 27-301 of the Ordinance governs the Rural Agricultural (RA) District. *(Continued....)*

issued a decision on October 13, 2006 denying Owners' appeal. Owners appealed to the trial court which took additional evidence and heard the matter *de novo*.[2] The trial court determined that the issue before it was whether the motor cross track qualified as an accessory use under the Ordinance.

Based on the evidence presented, the trial court found that the motor cross track was an accessory use. The trial court found that the track was not a primary use but a subordinate use and that the track was incidental to the primary use as a residence. The trial court found that the track is not full size; that it is not open for public use; that no other professional riders practice at the track; that Owners have sufficiently proven that their sons resided on the property when the track was built; that Owners have proven that their sons built the track for recreation and practice; and that a motor cross track is logically incidental to a motorcycle enthusiast's residence.

The trial court compared Owners' sons' enthusiasm for riding motorcycles to other hobbies of Township residents such as gardening, hiking, and cutting firewood. The trial court determined that all activities characterized as "hobbies" are accessory to the primary use of a property as a residence. The trial court found further that a hobby cannot be prohibited because it is an intrusive hobby but only if the use no longer remains a hobby. Here, the trial court reasoned, the noise is not the issue, nor the terrain changes, nor frequency of use.

Id. at 116a-120a.

[2] Where the trial court in a zoning case receives additional evidence it must decide the case *de novo*, and this Court's scope of review is limited to determining whether the trial court committed an error of law or an abuse of discretion. Pennridge Development Enterprises, Inc. v. Volovnik, 624 A.2d 674 (Pa. Cmwlth. 1993); DeCray v. Zoning Hearing Board of Upper Saucon Township, 599 A.2d 286 (Pa. Cmwlth. 1991).

"So long as the motorcycle riding remains a hobby – an accessory use – it must not be prohibited."

Thus, the trial court found that Owners did show that the motor cross track is subordinate to and customarily incidental to their use of the property as a residence; therefore, the track was a permitted use on Owners' property. Accordingly, the trial court, after a non-jury trial, found that Owners' motor cross track was an accessory use and reversed the Zoning Hearing Board's decision. This appeal followed.[3]

Herein, the Township raises the following issue: whether the trial court abused its discretion or committed an error of law when it held that the construction and use of a motor cross track qualified as a permitted accessory use in a Rural Agricultural District under the Ordinance because such use is incidental to the permitted primary use of the property as a single family residence.

In support of its appeal, the Township argues that in order to be an accessory use under the Ordinance, the use must be incidental and subordinate to the principal use. The Township contends that the Owners failed to meet their burden of proving that a motor cross track constructed and used to practice for professional racing is customarily incidental to a residential property in the RA District. The Township argues that for a use to be "incidental", it would usually be found with the principal use. The Township points out that the principal use of Owners' property is as a primary residence and a motor cross track is without question subordinate to that primary use. However, the construction and use of a motor cross track on the property in the RA District is not incidental to its primary

[3] The Zoning Hearing Board filed a notice of non-participation with this Court on July 16, 2008.

use as a single family dwelling; therefore, it is not a permitted accessory use and the Owners failed to prove otherwise.

The Township contends further that uses which are accessory to residences traditionally include swimming pools, storage sheds, gardens and similar uses; however, it is difficult to see any analogy between such uses and Owners' motor cross track. The Township argues that the accessory use doctrine is in essence, only an acknowledgment that certain general types of real estate usage have a natural and reasonable tendency to lead to certain other more specific uses. See Klavon v. Zoning Hearing Board of Marlborough Township, 340 A.2d 631, 634 (Pa. Cmwlth. 1975). The Township contends that there is simply no evidence that a motor cross track used to prepare for professional racing would customarily or commonly be found in Owners' neighborhood. The Township also argues that the trial court erred in its characterization of the motor cross track as a hobby thereby making it an accessory use, as it ignores the long standing principle that the use needs to be incidental to the principal use.

It is the landowner or applicant that has the burden of proving that a disputed use is an accessory use to his or her property. Smith v. Zoning Hearing Board of Conewago Township, 713 A.2d 1210 (Pa. Cmwlth. 1998), petition for allowance of appeal denied, 558 Pa. 604, 735 A.2d 1271 (1999); AWACS, Inc. v. Zoning Hearing Board of Newtown Township, Delaware County, 702 A.2d 604 (Pa. Cmwlth. 1997), aff'd, 559 Pa. 104, 739 A.2d 159 (1999). In order to establish an accessory use, the landowner must show that the use is secondary to the principal use and that the use is usually found with that principal use. AWACS. The fact that a majority or a substantial number of lots do not maintain a use does not mean that such use may not be considered a valid accessory use. Thomas v. Zoning Hearing Board of Benner Township, 550 A.2d 1045 (Pa. Cmwlth. 1988).

What is important is the examination of the true nature of the community and the surrounding area. Id.

"Accessory use" is defined in Chapter 27-1202 of the Ordinance as "a use of land which is incidental and subordinate to the primary use, and located on the same lot with such unless specifically permitted elsewhere therein." Chapter 27-301 of the Ordinance permits as accessory uses in a RA District "customary uses accessory to the above; essential." R.R. at 120a.

Upon review, we conclude that the trial court did not err by finding that the motor cross track was an accessory use. It is undisputed that the motor cross track is secondary to the principal use of Owners' property. The Township contends that the Owners failed to establish that a motor cross track is usually found with the principle use of their property as a primary residence. As stated herein, what is important in determining whether the proposed accessory use is usually found with the principle use, is the examination of the true nature of the community and the surrounding area. Thomas.

Our review of the record reveals that the true nature of the community and surrounding area in this case is that of large rural properties upon which farming operations and gardening are common. As the record shows, Owners property alone is fifty-one acres. In other words, this is not an area where residences are located in close proximity on small lots or in residential developments.

Owner testified that her children have always had motorcycles and ridden them on the property since they moved there in 1991. Notes of Testimony, R.R. at 26a; 30a. Owners' seventeen year old son testified before the trial court that he has always had a motorcycle/dirt bike and has been racing for about eight years and that his friends that have motorcycles come over and use the track about

once every two weeks. Id. at 43a; 48a-49a; 62a-64a. Therefore, it is apparent that Owners' sons are not the only ones in the community or surrounding area that regularly ride dirt bikes or motorcycles for recreation. In addition, the record shows that there is a motor cross track or dirt bike track on at least one other property in the area. Id. at 92a.

As such, it is not uncommon for motor cross activities to be conducted in the area or for a motor cross track to be located in the community and surrounding area. Given the true nature of the community and surrounding area in this case, the presence of a motor cross track for the purpose of bettering one's abilities or for recreation is akin to having a tennis court, swimming pool, or riding horses in order to improve one's skills in these areas or for pure enjoyment.

Moreover, it is of no moment that Owners' sons are professional motor cross racers or aspiring professional racers.[4] The trial court found that the track is not full size; that it is not open for public use; that no other professional riders practice at the track; that Owners have sufficiently proven that their sons resided on the property when the track was built; that Owners have proven that their sons built the track for recreation and practice; and that a motor cross track is logically incidental to a motorcycle enthusiast's residence.

[4] The record shows that Owners' older son, who is a professional racer, no longer resides on the property and therefore, no longer uses the motor cross track for practice. Owners' seventeen year old son, who testified before the trial court, is an amateur not a professional racer.

Accordingly, the trial court's order is affirmed.

JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Oleksandr Gyrych and Leah Gyrych	:	
	:	
v.	:	No. 72 C.D. 2008
	:	
The Zoning Hearing Board of Ferguson Township	:	
	:	
Appeal of: The Township of Ferguson	:	

O R D E R

AND NOW, this 9th day of October, 2008, the order of the Court of Common Pleas of Centre County in the above-captioned matter is affirmed.

_____

JAMES R. KELLEY, Senior Judge