

HARRY M. CUMMINGS, JR. and	:	IN THE COURT OF COMMON PLEAS OF
LINDA CUMMINGS,	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiffs	:	
	:	
vs.	:	NO. 04-02,098
	:	
CUMMINGS TOWNSHIP ZONING	:	
HEARING BOARD,	:	
Defendant	:	MOTION FOR ADDITIONAL EVIDENCE

Date: May 5, 2005

OPINION and ORDER

Before the court for determination is the Motion for Additional Evidence Pursuant to 53 P.S. §11005-A of Appellants Linda and Harry M. Cummings, Jr. (hereafter “Cummings”) filed February 25, 2005. The court will deny in part and grant in part the motion.

Background

Diane Prince (hereafter “Prince”) is the owner of a parcel of property located at Ramsey Barn Road in Cummings Township, Pennsylvania. Prince acquired the property from Mary Prince by deed dated April 4, 2002. Cummings are owners of property that is adjacent to Prince’s property.

Prince has been operating a campground on her property. By a letter dated July 29, 2004, the Cummings Township Zoning Officer, William L. Wolfe, informed Prince that he found a campground to have existed on her property since 1975. He found the campground to be a nonconforming use as a Recreational Vehicle Park that was not to have more than nine sites. On August 28, 2004, Prince appealed the Zoning Officer’s determination that she was

only permitted nine sites. Cummings also appealed the determination of the Zoning Officer. They asserted that he erred in finding that the campground was a nonconforming use.

A hearing was held before the Cummings Township Zoning Hearing Board (hereafter “Zoning Hearing Board”) on October 26, 2004 regarding both the Prince and Cummings’ appeals. The Zoning Hearing Board issued its written decision on November 23, 2004. The Zoning Hearing Board affirmed the Zoning Officer’s determination regarding the existence of a nonconforming use. The Zoning Hearing Board found that Prince’s operation of a campground on her property was a nonconforming use. The Cummings Township Zoning Ordinance was adopted in August 1980. The Zoning Hearing Board found that a campground had existed on the property since 1975. The Zoning Hearing Board found that neither Prince nor her predecessors in title, Harry and Mary Prince, had abandoned or intended to abandon the use of the property as a campground. However, the Zoning Hearing Board reversed the Zoning Officer’s determination regarding the number of sites, and found that Prince was permitted eleven campsites. On December 16, 2004, Cummings appealed the decision of the Zoning Hearing Board by filing a Notice of Land Use Appeal.

On February 25, 2005, Cummings filed a Motion for Additional Evidence pursuant to 53 P.S. §11005-A. In the motion, Cummings contend that the evidentiary record is incomplete because the Zoning Hearing Board excluded relevant evidence. Specifically, Cummings assert that the Zoning Hearing Board erred: by not permitting them to introduce the minutes of the Cummings Township Board of Supervisors meetings to establish that the campground use had been abandoned and that the property was not being lawfully maintained; by excluding evidence regarding compliance with federal, state, and local regulations as would relate to the

use of the Prince property; and by excluding the testimony of David L. Poust a former supervisor of Cummings Township, regarding statements made by Harry Prince in regard to the continued use of the property as a campground and compliance with federal, state, and local regulations.

Discussion

Section 11005-A of the Pennsylvania Municipalities Planning Code states, in part, as follows:

If, upon motion, it is shown that proper consideration of the land use appeal requires the presentation of additional evidence, a judge of the court may hold a hearing to receive additional evidence, may remand the case to the body, agency or officer whose decision or order has been brought up for review, or may refer the case to a referee to receive additional evidence, provided that appeals brought before the court pursuant to section 916.1 shall not be remanded for further hearings before any body, agency or officer of the municipality.

53 P.S. §11005-A. The question of whether the presentation of additional evidence is to be permitted under §11005-A is a matter within the sound discretion of the court. *Allegheny Energy Supply Co., LLC v. Twp. of Blaine*, 829 A.2d 1254, 1262 (Pa. Cmwlth. 2003). “ ‘A court of common pleas faces compulsion to hear additional evidence in a zoning case only where the party seeking the hearing demonstrates that the record is incomplete because the party was denied an opportunity to be heard fully, or because relevant testimony was offered and excluded.’” *Ibid.* (quoting *E. Consolidation and Distrib. Servs., Inc. v. Bd. of Comm’rs of Hampden Twp.*, 701 A.2d 621, 624 (Pa. Cmwlth 1997)).

The evidence Cummings contend that was improperly excluded falls into two categories. The first is evidence concerning whether the use of the Prince property was lawful

prior to the adoption of the Cummings Township Zoning Ordinance. The second category concerns whether the use of the property as a campground had been abandoned.

I. Evidence Regarding Lawfulness of Use

A non-conforming use is an activity or structure predating the relevant zoning restrictions. ***Lantos v. Zoning Hearing Bd.***, 621 A.2d 1208, 1210 (Pa. Cmwlth. 1993). The Pennsylvania Municipalities Code, 53 P.S. §10101 et seq., defines “nonconforming use” as;

a use, whether of land or of structure, which does not comply with the applicable use provisions in a zoning ordinance or amendment heretofore or hereafter enacted, where such use was lawfully in existence prior to the enactment of such ordinance or amendment, or prior to the application of such ordinance or amendment to its location by reason of annexation.

53. P.S. §10107. The burden of proving the existence of a nonconforming use is upon the proponent property owner. ***Smalley v. Zoning Hearing Bd. of Middletown Twp.***, 834 A.2d 535, 538 (Pa. 2003); ***Hager v. West Rockhill Twp. Zoning Hearing Bd.***, 795 A.2d 1104, 1110 (Pa. Cmwlth. 2002); ***Scalise v. Zoning Hearing Bd.***, 756 A.2d 163, 166 (Pa. Cmwlth. 2000). In order to establish a nonconforming use, the proponent must prove both: (1) the existence and (2) legality of the use prior to the enactment of the ordinance at issue. ***Hager***, 795 A.2d at 1110; ***Lantos***, 621 A.2d at 1210.

Proving the lawfulness of the prior use is very important because an unlawful nonconforming use enjoys no constitutional protection. ***Hager***, 795 A.2d at 1111. “It is axiomatic that the right to maintain a pre-existing non-conformity extends only to uses that

were legal when they came into existence. The enactment of a new ordinance cannot have the effect of protecting a pre-existing illegality.” *Scalise*, 756 A.2d at 166.

With the importance placed on established the legality of the use, the paramount questions becomes what is meant by “legality.” A use is lawful so long as it does not “... run afoul of a zoning restriction.” *McGeehan v. Zoning Hearing Bd. of Springfield Twp.*, 407 A.2d 56, 59 (Pa. Cmwlth. 1979); *Milford Twp. v. Di Domenico*, 18 D. & C. 3d 444, 459 (Bucks Cty. 1981); Robert Ryan, *Pennsylvania Zoning Law and Practice*, §7.2.2 (1999) (1970) (“The fact that an owner may have violated a requirement that does not relate to zoning or land development requirements does not prevent the use from being recognized as nonconforming, although it may be relevant when the owner’s intent is an issue.”); *But see, Pushnick v. Hempfield Twp.*, 402 A.2d 318 (Pa. Cmwlth. 1979) (A use was not lawful when the property owner failed to comply with a municipal ordinance by not acquiring a license to operate his junkyard). In *McGeehan*, the Commonwealth Court rejected the argument that a failure to comply with a municipal ordinance requiring a license to operate a junkyard made the use illegal for nonconforming use purposes. 407 A.2d at 59. It held that since the use did not violate any existing land use regulation it was lawful. *Ibid.*

In light of *McGeehan*, the court finds that, for purposes of determining the existence of a nonconforming use, a use is legal if it does not violate a zoning ordinance or land use regulation. As such, the evidence regarding the property’s compliance with federal, state, and local regulations unrelated to land use was not relevant to the determination of whether the use was lawful. Therefore, the Zoning Hearing Board did not err in excluding this evidence. Accordingly, the motion will be denied in this regard.

II. Evidence Regarding Abandonment of Use

The next issue is whether the Zoning Hearing Board erred in excluding testimony regarding whether the campground use had been abandoned. The protection afforded a nonconforming use is lost once the use is abandoned. Establishing abandonment of a nonconforming use is "... a question of fact that depends upon all the factors present in the case." ***Finn v. Zoning Hearing Bd. of Beaver Borough***, No. 1582 C.D. 2004, 2005 Pa. Commw. LEXIS 101, *6. The party asserting abandonment bears the burden of establishing that the landowner abandoned the nonconforming use. ***Ibid.***; ***Simonitis v. Zoning Hearing Bd. of Swoyersville Borough***, 865 A.2d 284, 287 (Pa. Cmwlth. 2005). To establish abandonment, the claimant must prove: (1) that the landowner intended to abandon the nonconforming use and (2) that the landowner actually abandoned the nonconforming use. ***Simonitis***, 865 A.2d at 287.

Evidence regarding the abandonment of the campground use was relevant to the issue before the Zoning Hearing Board. The evidence offered to establish abandonment consisted of minutes from the Cummings Township Board of Supervisors meetings and the testimony of David Poust concerning statements made by Harry Prince. The evidence was excluded on the basis that it contained statements made by the deceased Harry Prince, and, as such, was inadmissible under the Dead Man's Act, 42 Pa.C.S.A. §5930.

"The purpose of the Act is to prevent the injustice that would result from permitting a surviving party to a transaction to testify favorably to himself and adversely to the interest of a decedent, when the decedent's representative would be hampered in attempting to refute the testimony or be in no position to refute it, by reason of the decedent's death." ***In re Estate of***

Hall, 535 A.2d 47, 53 (Pa. 1987). The Dead Man’s Act concerns a witness’s competency to testify. The Dead Man’s Act provides that:

Except as otherwise provided in this subchapter, in any civil action or proceeding, where any party to a thing or contract in action is dead, or has been adjudged a lunatic and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, neither any surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of such deceased or lunatic party, shall be a competent witness to any matter occurring before the death of said party or the adjudication of his lunacy,

42 Pa.C.S.A. §5930. A witness will be declared incompetent to testify under the Dead Man’s Act only if three conditions exist: (1) the deceased must have had an actual right or interest in the matter at issue; (2) the interest of the witness, not simply the testimony, must be adverse to that of the decedent; and (3) a right of the deceased must have passed to a party of record who represents the deceased's interest. *Olson v. North Am. Indus. Supply*, 658 A.2d 358, 364 (Pa. Super. 1994).

In determining whether to apply the Dead Man’s Act, one must be careful not to confuse adverse interest with adverse testimony, for only an adverse interest will render a witness incompetent under the Dead Man’s Act. *Billow v. Billow*, 61 A.2d 817, 819 (Pa. 1948). “The mere fact that a witness, for personal reasons, may be unfriendly to the decedent's cause and partial to that of his adversary is wholly immaterial, for, while that circumstance may affect his credibility, it has nothing whatever to do with his competency.” *Olson*, 658 A.2d at 364. “ ‘In order to be adverse the interest must be one from which the witness will either gain or lose as the direct legal operation and effect of the judgment.’” *Ibid.* (quoting *In re Estate of Gelb*, 228 A.2d 367, 369 (Pa. 1967)).

The testimony of David Poust concerning statements by Harry Prince should not have been excluded under the Dead Man's Act. There is no evidence that Poust would gain or lose anything as a direct result of the Zoning Hearing Board's determination concerning the existence of a nonconforming use on the Prince property. As such, it cannot be said that Poust had an interest adverse to Harry Prince. Therefore, the Dead Man's Act would not bar his testimony as to what Harry Prince may have said concerning the abandonment of the campsite use.

The Dead Man's Act also would not preclude the admission of the minutes of the Cummings Township Board of Supervisors meetings. "The Dead Man's Act applies only to oral testimony. Written evidence offered by an adverse surviving party is not rendered incompetent by the Dead Man's Act and is admissible." *Larkin v. Metz*, 580 A.2d 1150, 1153 (Pa. Super. 1990). Consequently, the Dead Man's Act is no bar to the admission of the meeting minutes, and it was error to exclude them on this basis.

Since testimony relevant to the issue of abandonment and was improperly excluded, the court will grant the motion for additional evidence in this regard. Furthermore, the case shall be remanded to the Zoning Hearing Board to take such additional evidence and determine whether the evidence establishes abandonment of the campground use.

ORDER

It is hereby ORDERED that the Motion for Additional Evidence Pursuant to 53 P.S. §11005-A of Appellants Linda and Harry M. Cummings, Jr. filed February 25, 2005 shall be DENIED IN PART and GRANTED IN PART.

The Motion is DENIED in that the Cummings Township Zoning Hearing Board did not err in excluding evidence concerning compliance with federal, state, and local regulations concerning the use of Diane Prince's property.

The Motion is GRANTED in that the Cummings Township Zoning Hearing Board did err in excluding evidence relevant to whether the campground use had been abandoned.

The Cummings Township Zoning Hearing Board shall hold a hearing within sixty (60) days of notice of this Order to take additional evidence concerning the abandonment of the campground use.

The Cummings Township Zoning Hearing Board shall then determine whether the evidence establishes abandonment of the campground use.

BY THE COURT:

William S. Kieser, Judge

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