

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

WOODWARD TOWNSHIP,	: NO. 06-00257
Plaintiff	:
	:
vs.	: CIVIL ACTION – LAW
	:
JOHN L. SELLECK and	:
FAY E. SELLECK,	: Preliminary Objections
Defendants	: Zoning Appeal

OPINION AND ORDER

This case revolves around Plaintiff Woodward Township’s attempts to enforce its zoning ordinance in regard to Defendants’ property in Woodward Township. The alleged ordinance violations concern on-lot storage and junked vehicle storage on Defendants’ property.

The Township sent Defendants an Enforcement Notice letter on March 5, 2002 notifying Defendants that they were in violation of Sections 607, 607B, 607F and 608 of the Woodward Township Zoning Ordinance. The Enforcement Notice is Exhibit A to Plaintiff’s Complaint. The Enforcement Notice was filed pursuant to 53 P.S. §1066.1 of the Pennsylvania Municipalities Planning Code.

Defendants failed to file an appeal of the Enforcement Notice to the Township Zoning Hearing Board. Thereafter, the Township, pursuant to 53 P.S. §10617.2 Enforcement Remedies of the Municipal Planning Code, filed a Complaint for civil enforcement alleging that Defendants did not remedy the code violations contained in that Enforcement Notice. The matter was heard by Magisterial District Judge Jerry Lepley, who on August 8, 2002, entered an order in favor of Plaintiff Woodward Township and against Defendants in the

amount of \$611.40 for violation of the Zoning Ordinance. *See*, Plaintiff's Complaint Averment 9.¹

Plaintiff's Complaint alleges that Defendants still did not comply with the Zoning Ordinance and Plaintiff filed a new Complaint on June 11, 2004. Plaintiff did not file a new enforcement notice in advance of the Complaint. Plaintiff and Defendants then had communication about Defendants' building a "Contractor Shop" to store automobiles on one of Defendants' parcels. *See*, Plaintiff's Complaint, Averment 12. Plaintiff Woodward Township then agreed to withdraw its Complaint on August 19, 2004. This was done as part of an agreement that Defendants would bring their property into compliance with the Zoning Ordinance. *See*, Plaintiff's Complaint, Averment 13.

The Township Zoning Hearing Board, on October 28, 2004, granted Defendants permission to construct the Contractor's Shop with the requirement it be constructed within one year from the date of the decision. Plaintiff's Complaint, Averment 13.

Plaintiff's Complaint alleges that Defendants did not comply with the Zoning Ordinance so on December 5, 2005, Plaintiff filed a third civil complaint with the Magisterial District Judge against Defendants for their alleged failure to bring the property into compliance with the Woodward Township Zoning Code. *See* Averment 16.

On January 1, 2006, Magisterial District Judge Lepley entered a judgment in favor of Plaintiff and against Defendants in the amount of \$5,152.14. Defendants filed an

¹ It appears that the Magisterial District Judge did not impose a continuing per diem fine for non-compliance nor did the Township take the matter to the Court of Common Pleas to obtain a per diem fine.

appeal from this judgment to the Court of Common Pleas on February 6, 2005. On February 23, 2006 Plaintiff filed its Complaint.

On March 10, 2006, Defendants filed their preliminary objections to Plaintiff's Complaint. The preliminary objections contend the Complaint of December 5, 2005 is defective and should be dismissed because Plaintiff did not file an Enforcement Notice for this Complaint. Defendants, in their preliminary objections also seek to strike paragraph 17 of Plaintiff's Complaint as impertinent because it reports that Magisterial District Judge Lepley issued a judgment in favor of Plaintiff for \$5,152.14. Defendants contend that the matter is now *de novo* before the Court of Common Pleas, and paragraph 17 should be stricken. The Court will now determine whether judgment will be entered against Defendants.

The Court has no problem with the inclusion in the Complaint of averment 17 and will deny that preliminary objection.

The more serious issue is whether Plaintiff's Complaint and the procedure used in obtaining the January 1, 2006 judgment before Magisterial District Judge Lepley is defective because of the Township failed to file a new enforcement notice prior to filing the Complaint on December 5, 2005.

Plaintiff contends that a new enforcement notice was not required before filing a Complaint on December 5, 2005, because an enforcement notice was filed on March 5, 2002, for the same ordinance violations. However, the Court has difficulty in accepting Plaintiff's contention. The Enforcement Notice of March 5, 2002 was filed almost four years before the filing of the Complaint on December 5, 2005. Defendants paid the judgment entered by the Magisterial District Judge. From our reading of Plaintiff's Complaint the

Magisterial District Judge did not order continuing per diem fines for the 2002 ordinance violation, nor did the Township bring the case before the Court of Common Pleas to obtain a continuing *per diem* fine. Thus, the case appeared to end at that time.

Then on June 11, 2004, almost two years later, the Township filed a second complaint against Defendants. No new enforcement notice was filed preceding this Complaint. Apparently, the Township and Defendants felt they reached a settlement of this Complaint, and the Township withdrew it on August 19, 2004.

In December of 2005, when the Township was not satisfied that Defendants complied with the settlement, the third complaint was filed on December 5, 2005, without a new enforcement notice.

While it would appear the Township felt Defendants were still in violation of the same zoning ordinance of which they were in violation it is difficult for the Court to accept an enforcement notice filed almost four years before the December 2005 Complaint as complying with the required procedures in 2005. This is especially so where Defendants in August 2002 paid the judgment and fine which resulted from the 2002 Enforcement Notice.

The enforcement notice is essential to the underlying process in a zoning violation matter. It puts a landowner on notice in a specific fashion as to how they are in violation of the zoning ordinance and what steps the landowner must take to come into compliance with the zoning ordinance. *See, Moor Township v. Cammel*, Pa. Cmwlth, 687 A.2d 1181 (Pa.Comwlth. 1997).

Plaintiff Woodward Township at argument notes in the case of *Erie v. Freitus*, 681 A.2d 840 Pa.Comwlth 1996), appeal denied, 547 Pa. 638, 690 A.2d 2383 that two penalties were imposed upon a defendant without filing a second enforcement notice. In

the *Freitus* case the defendant was sent an enforcement notice for operating a scrap yard in violation of the city zoning ordinance. Judgment was entered against the landowner in the amount of \$500 plus costs. The landowner appealed the District Justice judgment to the Court of Common Pleas. The Court of Common Pleas upheld the judgment and issued a civil penalty of \$100 per day until the defendant landowner brought the site into compliance with the zoning ordinance. When the landowner still did not bring his property into compliance the Court of Common Pleas, based upon the \$100 per day civil penalty, entered judgment against the landowner in the amount of \$14,000 (\$100 per day from April 25, 1994 to September 13, 1995). Plaintiff notes that although various penalties were entered against the defendant only one enforcement notice was utilized.

While this is correct, the Court notes under the facts of the *Freitus* case, that this was a continuous litigation process of enforcement notice, civil enforcement complaint before a District Justice and appeal to the Court of Common Pleas. Thus, there was no need for a second enforcement notice.

In this case there has not been one continuous litigation process. Rather, over time three separate civil enforcement complaints have been filed. The first complaint, which started with the March 5, 2002 Enforcement Notice, was resolved with the Defendants' payment of a fine and costs. No continuing sanctions were entered against Defendants. Nearly four years have gone by until the filing of the third complaint on December 5, 2005.

Case law makes it clear that the zoning enforcement process requires a municipality to send out an enforcement notice which satisfies the specific requirements of 53 P.S. §10616.1 of the Pa. Municipalities Planning Code. A municipality's failure to

comply with §10616.1 precludes it from seeking penalties. *See City of Erie v. Freitus, supra.*

The Court believes the Complaint filed on December 5, 2005 was defective because it was not preceded by an enforcement notice as required by the Pennsylvania Municipalities Planning Code.

While the Court makes this finding, it specifically does not accept Defendants' interpretation of 53 P.S. §10617.2 Enforcement Remedies, which indicates the penalties which may be imposed on a landowner for violating Zoning Ordinance §10617.2 each day a violation continues after the fifth day of determination of the violation by the district justice shall constitute a separate violation. Section 10617.2 permits *per diem* fines for each day of violation after the sixth day of determination of the violation. This Court does not believe that this means a separate or new enforcement notice would be needed for *per diem* fines for a landowner who does not bring his property into compliance with the zoning ordinance. Such an interpretation of §10617.2 of the Pa. Municipality Planning Code would lead to the absurd result of causing a municipality to continue to issue enforcement notices each day a violation continues. This would place an impossible burden on municipalities in enforcing zoning ordinances. If the penalties involved in this case were continuing *per diem* violations of the original complaint the Court might well find compliance with the planning code. However, where the first complaint process is resolved with payment of fines and no further *per diem* requirement is imposed, the initial complaint process would seem to be complete.

While dismissing Woodward Township's current complaint, the Township is not left without potential remedies. The Township can start a zoning violation process

against Defendants with the filing of a new enforcement notice. Alternatively, the Township can file an injunction or nuisance complaint against Defendants in the Court of Common Pleas. *See, Moor Township v. Cammel, supra*, (when a zoning violation is not remedied by a landowner, the Municipalities Planning Code provides two non-exclusive methods of enforcement: municipality may file citations before a district justice to obtain compliance with the zoning ordinance, and additionally, may seek equitable relief to enjoin violation of the zoning ordinance independent of procedures described in the Municipalities Planning Act).

Accordingly, the following Order is entered.

ORDER

AND NOW, this ___ day of December 2006, Defendants' Preliminary Objections to Plaintiff's Complaint are granted. Plaintiff's Complaint filed on or about February 23, 2006 against Defendants John L. Selleck and Faye E. Selleck is dismissed. This Order is without prejudice to Plaintiff Woodward Township to file a new action to enforce the Zoning Ordinance.

By The Court,

Kenneth D. Brown, P.J.

cc: Scott T. Williams, Esquire
Marc Drier, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)