

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MICHAEL A. WELCH, SR.,
Plaintiff

vs.

BOROUGH OF SOUTH WILLIAMSPORT
Defendant

:
: No. 05-01906
:
: CIVIL ACTION – LAW
:
: APPEAL FROM DECISION OF
: SOUTH WILLIAMSPORT
: CONSTRUCTION CODE BOARD
: OF APPEALS

ORDER

This matter came before the Court on Michael A. Welch Sr.’s appeal from the decision of the South Williamsport Construction Code Board of Appeals. The relevant facts follow.

In August 2000, the dwelling at 395 East Second Street, South Williamsport was seriously damaged by fire. Michael Welch applied for a permit in May 2001 to make repairs to the structure. The permit expired in May 2002 with very little work done on the property. In August 2002 the Borough of South Williamsport (hereinafter “Borough”) received \$12,000 from the fire insurance company and held it in escrow. An engineer from Larson Design inspected the property and found it to be uninhabitable, but salvageable. On or about October 17, 2002 Michael Welch filed a lawsuit to determine ownership of the property at 395 East Second Street. See Lycoming County No. 02-01902. In May 2004, the Honorable William S. Kieser awarded the property to Michael Welch and Tammy Welch.

In June 2004, the Borough released the escrowed fire insurance proceeds to Mr. Welch and he obtained another permit to make repairs to the building. This permit expired in June 2005. In August 2005, another engineer from Larson Design inspected the

property. Although some re-wiring, drywall and foundation work was done on the property, some of the work that was done was not up to code and/or substandard and little or no work was done to replace or repair the burned, charred or cracked structural supports in the roof, floors and walls. The engineer issued a report, finding the dwelling was structurally unsound and incapable of being repaired or unreasonable to repair. On August 23, 2005 Codes Officer Jon Dangle sent a letter to Mr. Welch ordering him to remove the structure within 30 days. Mr. Welch filed an appeal.

On September 28, 2005, the South Williamsport Board of Appeals held a hearing and denied Mr. Welch's appeal. A written decision was mailed to Mr. Welch on or about October 19, 2005.

On October 25, 2005, Mr. Welch filed a praecipe for writ of certiorari, in which he raised the following issues: (1) the Board was not properly constituted, as it had never adopted written hearing procedures as required by law, nor was a court reporter present at the hearing; (2) the Board acted improperly and with prejudice to Mr. Welch, by inspecting the site with the Borough Officer prior to the hearing without Appellant's knowledge or participation; (3) there was insufficient evidence to support an order compelling demolition as, for example, the Borough Officer and the engineer had done no cost studies, there was no evidence that Appellant could not afford required repairs, there was no recitation of any specific Code violations, the engineer and Borough Officer clearly had misunderstandings about the extent of "elements damage" and structural support plans for the building, and Mr. Welch expressed his intention to pursue repairs satisfactory to the Borough's engineer; and (4) Mr. Welch had a vested right to complete repairs, or at the very least had a right to notice of exactly what "code violations" were being alleged and an

opportunity to address such allegations. The transcript and exhibits from the hearing before the Board were filed on November 29, 2005. On January 6, 2006, the Court ordered each side to file a brief in support of their position and scheduled an argument for March 31, 2006.

After a review of the parties' briefs and the proceedings before the Board, the Court concludes that there were sufficient procedural irregularities in this case that it should be remanded to the Board for new proceedings. The Court also finds it appropriate to note that an order of demolition of private property is a taking pursuant to the police power of the government, without compensation. As such any order requiring confiscation and destruction of privately owned property must be subject to strict scrutiny by the court. See King v. Township of Leacock, 122 Pa.Comm. 532, 552 A.2d 741 (1989).

First, there were ex parte communications between some of the Board members and Codes Officer Jon Dangle when the Board members went to look at the property prior to the hearing. Instead of simply allowing the Board members to view the property and draw their own conclusions, Mr. Dangle pointed things out and/or made comments. Record of Board of Appeals Meeting, September 29, 2005, at p. 24. Mr. Welch was not present and he did not have the opportunity to respond to Mr. Dangle's comments at the time they were made.

Second, there were no written procedures for the conduct of the hearing. At the beginning of the hearing, Mr. Welch's attorney Marc Drier asked the board if they had any written procedures for the meeting; the response was that they are no written procedures for the Board of Appeals. Record of Board of Appeals Meeting, September 29, 2005, at p.1. In its brief the Board argued that the Local Agency Law, 2 Pa.C.S. §§551-555, supplied the written procedures for the conduct of the meeting. If the Board wished to rely on the Local

Agency Law, it should have told Mr. Drier that at the meeting and provided him a copy, if requested.

Finally, the Codes Officer neither provided Mr. Welch with written notice specifying what items inside the building were in violation of the code nor gave him an opportunity to correct those items after the notice was given. Although the Codes Officer gave notices to Mr. Welch to stop work because his permits expired and informed him of violations related to dirt piles, tires and debris on site that needed to be corrected before another permit would be issued, there is no evidence in the record that the Codes Officer notified Mr. Welch that he had to remove or repair the fire damaged trusses, wall studs and floor boards within a reasonable amount of time or the property would have to be demolished. In Herrit v. Code Management Appeal Board of the City of Butler, 704 A.2d 186 (Pa. Commw. 1997), the Commonwealth Court stated: “The process to abate the unsafe structure must still be carried out in a manner that affords the property owner proper notice and the ability to abate the nuisance. ‘The purpose of [a] notice of . . . demolition is to provide the property owner . . . with a reasonable time in which to make repairs to eliminate the dangerous condition.’” 704 A.2d at 189, quoting Keystone Commercial Properties Inc. v. City of Pittsburgh, 464 Pa. 607, 347 A.2d 707 (1975).¹

In conclusion, to the extent the Borough of South Williamsport believes this structure is a danger to the public welfare, it shall communicate in writing to Mr. Welch what he must do to make the structure safe and set a reasonable time limit within which Mr. Welch shall, at his option, either make the structure safe or demolish it. Mr. Welch must promptly

¹ The Pennsylvania Commonwealth Court in Herrit also notes that the cost of compliance is the concern of the property owner. 704 A.2d at 189. (“If Herrit wants to spend unreasonable amounts of money to bring his property into compliance, that is only his concern.”).

act in order to eliminate any dangerous condition.

ORDER

AND NOW, this ____ day of October 2006, the Court GRANTS the appeal of Michael Welch and REMANDS this matter to the Construction Code Board for new proceedings in accordance with this decision.

By The Court,

Kenneth D. Brown, P.J.

cc: Joseph F. Orso, III, Esquire
Marc Drier, Esquire
Richard Gahr, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file