IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CHOICE FUELCORP, INC.,	:	NO. 07 – 02,598
Appellant	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
ZONING HEARING BOARD OF	:	
ARMSTRONG TOWNSHIP,	:	
Appellee	:	Land Use Appeal
	:	
ARMSTRONG TOWNSHIP,	:	
Intervenor	:	

OPINION AND ORDER

Before the Court is a land use appeal filed by Choice Fuelcorp, Inc. (hereinafter "Choice") on November 21, 2007, seeking to overturn the decision issued by the Armstrong Township Zoning Hearing Board (hereinafter "the Board") on November 7, 2007. Counsel agreed to proceed on the record below and argument was heard March 5, 2008.

Choice requested an occupancy permit to use a certain premises in Armstrong Township as a "fuel facility and a bio-diesel mixing facility",[1] and also included in that request plans to construct a railroad spur to serve that facility.[2] The Zoning Officer determined that such use was "nonconforming" since the property is in both a Conservation Open Space District and a Floodway District, and informed Choice the matter would be referred to the Zoning Hearing Board.[3] Hearings on the application were held on August 6, 2007, and October 3, 2007, and the Board thereafter entered a decision denying the request on three grounds: (1) the prior use of the property as a fuel facility had been abandoned and thus the proposed use is a "new use" which does not conform with zoning requirements; (2) even if the prior use was not abandoned, the proposed use is not simply an expansion of the prior use but instead is a

[1] Choice purchased the premises, a thirty-acre parcel, from ANR Storage Company in June 2006. ANR Storage had used the property as a fuel storage and distribution facility, but had discontinued that use and put the property on the market in 2002.

[2] It was agreed at argument that the request to construct a railroad spur should be treated as a separate issue, as the Zoning Ordinance permits such in a flood zone by special exception, contrary to a fuel facility, which is not permitted by the Ordinance in a flood zone.

new use which is not permitted under the ordinance; and (3) public health and safety concerns prevent issuance of the permit. The request to construct a railroad spur was not specifically addressed but inasmuch as it had been included in the main request it was thus also denied, apparently for lack of engineering plans.[4]

In an appeal from a decision of the Zoning Hearing Board where no additional evidence is taken by the Court, the Court is limited to determining whether the Board abused its discretion or committed an error of law. Amoco Oil Co. v. Zoning Hearing Board of Middletown Township, 463 A.2d 103 (Pa. Commw. 1983). After a review of the relevant law and the record below, the Court believes the Board did indeed commit errors of law in its conclusions that the prior use had been abandoned, that the proposed use is not simply an expansion of the prior use, and that public health and safety concerns prevent the issuance of the permit.

ABANDONMENT OF PRIOR USE

The relevant section of the Armstrong Township Zoning Ordinance provides as follows:

> Abandonment. If a nonconforming use or structure is abandoned for a period of six months, the future use of such building or land shall be in conformity with the district regulations. A nonconforming use shall be judged as abandoned when there occurs a cessation of any such activity by an apparent act or failure to act on the part of the tenant or owner to reinstate such use within a period of one year from the date of cessation or discontinuance. Active listing of a property for sale, for purposes of this Section, may constitute an apparent act to attempt to reinstate such use so long as the listing occurs prior to expiration of the one year limit and is limited to not more than a one year listing.

Armstrong Township Zoning Ordinance, Article IX, Section 900(A). The parties agree that in a case such as this, where the property was not actively used as a fuel facility but was on the market, the ordinance establishes an eighteen month "deadline" for the reinstatement of the prior nonconforming use in order to continue such use without inquiry into whether the use had

[3] *See* Exhibit A1 (6/18/07 letter of Joe Eck).

been "abandoned", and that the closing of the facility by the prior owner in 2002 does raise an issue of whether the prior use was "abandoned".

It is well-settled that the burden of proof of abandonment is on the party asserting it, Pappas v. Zoning Board of Adjustment of the City of Philadelphia, 589 A.2d 675 (Pa. 1991), and that abandonment is proved only when both essential elements are established: (1) intent to abandon and (2) implementation of the intent, i.e., actual abandonment. Finn v. Zoning Hearing Board of Beaver Borough, 869 A.2d 1124 (Pa. Commw. 2005). Further, courts have long held that zoning provisions such as Section 900 (A) serve to create a presumption of a landowner's intent to abandon a nonconforming use if such use is not resumed prior to the expiration of the period set forth in the ordinance. Latrobe Speedway v. Zoning Hearing Board of Unity Township, 686 A.2d 888 (Pa. Commw. 1996). Once this presumption is raised, the burden of persuasion then rests with the party challenging the claim of abandonment. If evidence of a contrary intent is introduced, however, the presumption is rebutted and the burden of persuasion shifts back to the party claiming abandonment. Latrobe Speedway v. Zoning Hearing Board of Unity Township, 720 A.2d 127 (Pa. 1998). Finally, non-use alone will not satisfy a party's burden to prove abandonment, i.e., "actual abandonment must be demonstrated by other evidence, such as overt acts, a failure to act, or statements". Finn, *supra*, at p. 1127, quoting Latrobe Speedway, *supra*, at 890.

A review of the case law in this area leads the Court to conclude that the prior use by ANR Storage was not abandoned. In Latrobe Speedway, *supra*, Latrobe purchased the property in question in 1977 and actively operated a racetrack on the premises for several years, and then leased the premises to others who continued to use the property as a racetrack until 1982. The property was not actively used after 1982 but the physical components of the racetrack remained on the premises.[5] No improvements were made to the facility; the physical components suffered the wear of years and the premises became overgrown with weeds. Latrobe entered into a new lease agreement in 1994 and the lessee sought a permit to once again use the property as a racetrack. The Zoning Hearing Board denied such on the grounds

[4] At argument, counsel for Choice admitted that no such plans had been submitted, and that that lack of supporting documentation was indeed grounds to deny the request.
[5] These components included the track, grandstands, buildings, fence, and light stands.

that the prior use as a racetrack, which had in the meantime become nonconforming upon the enactment in 1991of a zoning ordinance, had been abandoned. On appeal, the Court held the use as a racetrack had not been abandoned, however, as Latrobe had continued to pay yearly property taxes based on an assessment as a racetrack, there had been no attempt to dismantle the structures or otherwise convert the use, and Latrobe had negotiated over the years with 23 persons for the sale or lease of the premises *as a racetrack*. Latrobe, *supra* (emphasis added).

In Finn, *supra*, one Mr. Petrush purchased a certain two-story building in 1985 and thereafter continuously occupied the first floor and used it for his law office. He leased the second floor to tenants. Since the first tenant occupied the second floor, the building had two signposts with signs in the front yard, one for Mr. Petrush and one for the tenant. Mr. Petrush's sign was in continuous use but each new tenant installed a sign on the second signpost when the tenant moved in and removed it when the tenant left. From August 2000 until August 2002, however, no sign was on the second post. In September 2002, Mr. Finn, also an attorney, installed a sign without first obtaining a permit but, since in the meantime the zoning ordinance had been changed such that only one sign was permitted, the zoning officer directed removal of the second sign and that decision was upheld by the Zoning Hearing Board based on a finding that the prior use had been abandoned by the passage of the two year time period from August 2000 to August 2002. On appeal, the Court held that although the two years created a presumption of abandonment, that presumption was rebutted by Mr. Petrush's testimony that he maintained the second signpost in place and available, that removal of the sign after the tenants left in 2000 was required by the Zoning Ordinance,[6] not a voluntary act indicating intent to abandon, and that he secured another tenant within less than a year.

In Heichel v. Springfield Township Zoning Hearing Board, 830 A.2d 1081 (Pa. Commw. 2003), Landowner's property consisted of forty acres of land, where Landowner's father had established and operated a salvage business for over fifty years. In addition, the family lived in a house on the property. After the father's death, in July of 1998, his grandson operated a salvage business on the property under a different name. Although the property had

[6] The relevant section provided: "A sign shall be removed within thirty (30) days whenever the circumstances that led to its erection no longer apply or if safety violations occur." Finn v. Zoning Hearing Board of Beaver Borough, 869 A.2d 1124, 1126 (Pa. Commw. 2005).

become nonconforming after the passage of a zoning ordinance designating the area as a Resource Protection District, annual permits were granted as a valid nonconforming use, at least until December 2001. At that time, the zoning officer denied the permit on the basis that the nonconforming use of the property as a salvage yard had been abandoned and that decision was upheld by the Zoning Hearing Board. By way of explanation, in 1998 the property had been listed with a realtor for sale as an automobile salvage yard; the asking price was $600,000. In July of 2000, one Fernando Santana, who operated a salvage facility in Lehigh County, offered $ 450,000 for the property. Landowner accepted, and an agreement of sale was drafted but was not executed because, in the interim, the Township expressed an interest in the property. Landowner's neighbor, who also was the Township Auditor, enlisted the help of the Township to acquire the property, clean it up and discontinue Landowner's salvage yard, which was less than a quarter mile down the road from her own salvage yard. When the Township failed to go forward, the neighbor established "Springfield Township 2000 Plus," an association of residents dedicated to establishing a park on the property. The neighbor then approached Landowner directly on behalf of Springfield Township 2000 Plus. In September of 2000, neighbor and Landowner signed an agreement for the sale of 37 acres of the property for $425,000.[7] The sale was contingent upon Springfield Township 2000 Plus raising the money, and the agreement required Landowner to remove the vehicles from the property. The sale was to close six months later. Subsequently, the agreement was extended to September 2001 to give the buyer more time to raise the needed funds. During this time, Landowner arranged for the removal of most of the car inventory. In September of 2001, Landowner learned that Springfield Township 2000 Plus failed to raise the money and accordingly, she contacted Santana, who remained willing and able to purchase the property so long as it was permitted as a salvage yard. As noted above, however, the very next application for permit was denied on the grounds of abandonment of use as a salvage yard. On appeal, the Court held the evidence did not support the conclusion that Landowner intended to abandon the salvage yard use, specifically pointing to Landowner's denial of any such intention, the fact the property was *marketed as a salvage yard*, and the fact the agreements to sell the property to Springfield

[7] It appears three acres were to be carved out, encompassing the house and a garage.

Township 2000 Plus and Santana were based upon the value of the property as a salvage yard.[8] The Court noted that although some of the cars stored on the property had been removed, the salvage yard facility was *physically unchanged*, and the salvage permit was in place in September 2001 when Springfield Township 2000 Plus abandoned the purchase. The Court also found no actual abandonment, citing the facts that even though the volume of junk cars had been reduced, the premises had remained operational as a salvage yard for the storage of vehicles and parts through all relevant times up to the application for a salvage yard permit in December of 2001, no attempt had been made by Landowner to convert the property to some other use, no structures had been demolished, no roads had been removed, and no equipment had been sold.

In the instant case, the property in question had been used by Choice's predecessors as a fuel facility for over 18 years when it was closed and placed on the market in 2002. With respect to the previous owner's intent, the Court notes it was marketed through Nationwide Petroleum Realty *as a fuel terminal*. Choice's president, Jason Weisz, testified that from his conversations with the previous owner during negotiations for the sale, he understood the facility was a fuel terminal and he was given no indication that such use had been abandoned. N.T., October 3, 2007, at p. 19. James Cuozzo, the former terminal manager who was hired by the previous owners as a caretaker while the property was on the market, testified that there was never an intent by the prior owners to abandon the use of the facility as a fuel terminal, "none whatsoever". Id. at p. 71. Stephen Webster, Storage Tank Section Chief for DEP, testified that to his knowledge, there had been no indication or action by the owners of the facility indicating an intent to abandon the facility as a fuel terminal. Id. at 98. While counsel for the Board emphasizes the lack of direct testimony from the prior owners regarding their intent, the Court believes the circumstantial evidence of that intent is plentiful, and leaves no question in the Court's mind that there was no intent to abandon the use as a fuel facility. For example,[9] in Exhibit A20, a January 13, 2003, letter from an air quality consultant hired by the prior owner, to the Chief of the Facilities Permitting Station with DEP, an extension of time to

[8] Indeed, the Court stated that, "This alone establishes that Landowner did not intend to abandon the salvage yard use." Heichel v. Springfield Township Zoning Hearing Board, 830 A.2d 1081, 1086 (Pa. Commw. 2003)

apply for a State Only Operating Permit was sought and it was explained that at the time the renewal package for that permit had been received renewal had not been pursued as the terminal was not operating and future plans were to sell the property. The consultant explains, however, that "upon further review, they realized that the *terminal would be more saleable* if all permits are maintained up to date." (Emphasis added.) In a follow-up letter dated January 24, 2003, the consultant provides a detailed "summary of ongoing operating activities that have continued at the Williamsport terminal from April 2001 to present" to explain why the owner did not consider the terminal to be "out of operation." Exhibit A21. The Court notes particularly his explanation that "Coastal has been trying to sell the Williamsport terminal and the tank cleanings and inspections have been conducted in preparation for the eventual sale of the terminal. *In light of the future sale, Coastal's Corporate Management in Houston, TX had made the assumption that new owners of the terminal would handle the Operating Permit renewal application, a decision that has now been reconsidered."* Id. (Emphasis added.) These letters clearly show the Prior owner's intent to maintain the use as a fuel facility. Thus, although the Board has raised a presumption of an intent to abandon that use by the passage of time, that presumption has been rebutted by evidence to the contrary.

With respect to the issue of actual abandonment, Choice presented sufficient evidence to support a finding that there was no actual abandonment. For example, after the facility was closed in 2002, the former terminal manager, James Cuozzo, was hired by the owner to keep the facility safe and secure, report to DEP as required, and show the facility to prospective buyers. Mr. Cuozzo testified he went to the facility three times a week from the date it was closed until it was sold. N.T., October 3, 2007, at p. 75. Mr. Cuozzo explained that although the tanks and pipes were drained of all petroleum products and some of the pipes were disassembled, such was necessary to remove the gasoline from the pipes, and the pipes were made to disassemble for that purpose and could be easily reassembled. The prior owner also maintained all permits necessary to operate the facility as a fuel facility. According to a witness from DEP, the prior owner paid all annual registration fees, "which is the key to determining whether you're intending to maintain the facility in an operational status, or at

[9] These examples are, of course, in addition to the fact it was marketed as a fuel facility, which the Court believes

least maintain that option." Id. at p. 96-97. While counsel for the Board points to the length of time the facility has not been used, abandonment cannot be shown by mere proof of failure to use the property for a certain period of time. Heichel, *supra*; Latrobe Speedway, *supra*. The Court believes Choice has sufficiently rebutted the presumption of abandonment raised by the passage of time, and finds that the prior use as a fuel facility has not been abandoned and may be continued by Choice as a nonconforming use.

NATURAL EXPANSION OF PRIOR USE

The Board held that even if the property's prior use as a fuel facility[10] had not been abandoned, Choice's proposal to use the facility as a "biodiesel mixing facility", bringing in not only petroleum products but also certain other substances and mixing them with the petroleum products before distribution, constitutes a new use rather than a natural expansion of a prior nonconforming use. The Court finds this determination to constitute an error of law.

It is well settled that to qualify as a continuation of an existing nonconforming use, a proposed use must be sufficiently similar to the nonconforming use as not to constitute a new or different use. Limely v. Zoning Hearing Board of Port Vue Borough, 625 A.2d 54 (Pa. 1993). The proposed use need not be identical to the existing use; rather, similarity in use is all that is required. Id. Further, in determining whether a proposed use bears adequate similarity to an existing nonconforming use, the doctrine of natural expansion must be given effect.[11] As was stated in Chartiers Township. v. W.H. Martin, Inc., 542 A.2d 985, 988 (Pa. 1988), "once it has been determined that a nonconforming use is in existence, an overly technical assessment of that use cannot be utilized to stunt its natural development and growth." The Court there also held that a change in instrumentality will not defeat the purpose or existence of a nonconforming use. Id. In other words, an operator of a nonconforming use may incorporate

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evidences an intent to maintain that use.

[10] Testimony indicated that the prior use as a fuel facility consisted of bringing in petroleum products by pipeline and distributing them by way of trucks. N.T. October 3, 2007, at p. 69.

[11] The doctrine of natural expansion permits a landowner to develop or expand a business as a matter of right notwithstanding its status as a nonconforming use. Chartiers Township. v. W.H. Martin, Inc., 542 A.2d 985 (Pa. 1988).

modern technology into his business without fear of losing that business. Id. *See also* In re Appeal of Gemstar/Ski Brothers, 574 A.2d 1201 (Pa. Commw. 1990)(citing Township of Chartiers v. William H. Martin, Inc., 542 A.2d 985 (Pa. 1988) (a proposed tire processing and chopping facility, which required the construction of a building to house a processor and shredder, and the purchase and import of truckloads of tires, held sufficiently similar to a salvage yard as to constitute the continuation of an existing use).

In the instant case, Choice's president explained the proposed "biodiesel mixing" process[12] as blending diesel fuel with either vegetable oil or liquid animal fat, adding methanol as a reagent, and heating the mixture to 140 degrees Fahrenheit, which results in the production of biodiesel and glycerol.[13] The methanol is then distilled out of the mixture to be re-used and the glycerol is separated from the biodiesel. It was indicated that both the biodiesel and the glycerol would then be marketed as fuels. The only additional construction required would be that of a tank inside the building already on the premises, which building already contains several tanks. The process itself is regulated by DEP, as are the fuel storage and distribution aspects of the facility.

While the biodiesel mixing process and the components of that process are admittedly not identical to the fuels previously stored and distributed in the facility at issue, the Court believes the process to be sufficiently similar as to constitute a natural expansion of that use, and a natural development that comports with modern technology as far as the fuel industry is concerned. Counsel for the Board argues that there is no constitutionally protected right to change a nonconforming use to another use that is not permitted under the ordinance, and points out that the Armstrong Township Zoning Ordinance precludes the bulk storage of hazardous materials in a floodway and that the new use proposed by Choice involves substances which fall within that prohibition, but this argument completely ignores the concept of natural expansion of a nonconforming use, which does allow such changes as long as they are sufficiently similar. The Court also notes in this regard the testimony of Daniel Fitzpatrick, an employee of the Pennsylvania Department of Community & Economic Development and

[12] The proposed use as a fuel storage facility for number two fuel oil, diesel fuel and kerosene is not in issue as such products were previously stored in the facility.
[13] Biodiesel and Glycerol are both fuel products. N.T. October 3, 2007, at p. 21

State Coordinator for the National Flood Insurance Program, that because it predated the ordinance, the facility at issue can exist in this floodway even though it may be storing substances which are listed as prohibited by FEMA, and that the types of substances or the activity proposed would not affect the continued compliance of a grandfathered structure in the floodway. N.T., October 3, 2007, at p. 89; Exhibit BD5 (10/9/07 letter of Dan Fitzpatrick).[14] Apparently FEMA focuses on hazardous materials in general, and considers uses which incorporate hazardous materials to be interchangeable as far as their enforcement is concerned. This view is contrary to the Board's conclusion that bringing in the additional substances proposed by Choice changes a nonconforming use to another use that is not permitted under the ordinance.[15] In conclusion, the Court finds the proposed use of the facility as a biodiesel mixing facility to be permitted as a natural expansion of the prior use as a fuel facility.

PUBLIC HEALTH AND SAFETY CONCERNS

The Board concluded that even were the prior use not abandoned, and the proposed use a natural expansion of the prior use, the proposed use constitutes a public nuisance and thus the permit cannot be issued. The Court finds this conclusion disingenuous.

Counsel for the Board argues that since the bulk storage of hazardous materials in a floodway is prohibited by the ordinance, such constitutes a nuisance, per se, and, as such,

[14] Specifically, in response to questions posed to him at the October 3, 2007, hearing, Mr. Fitzpatrick inquired of FEMA whether "a lawfully existing structure (in this case grandfathered) in the floodway that is used for the storage or production of any of the eighteen materials and substances that are considered dangerous to human life, as listed in Section 610 of Armstrong Township's Floodplain Management Ordinance, [can] continue to operate if there is a change in the specific types of materials or substances that are present? Specifically, could the presence gasoline (sic) essentially be exchanged for sulphuric acid?" According to Mr. Fitzpatrick, FEMA answered "Yes. The specific types of dangerous substances or materials present or the activity taking place (production vs. storage) would not affect the continued compliance under the ordinance of a grandfathered structure in the floodway." Exhibit BD5 (10/9/07 letter of Daniel Fitzpatrick). It seems the question was prompted by Choice's listing on its Biodiesel Process Equipment List, Exhibit A1, of the substances "sulphuric acid, sodium methylate, and sodium hydroxide", among others, as raw materials used in the biodiesel production process. Mr. Fitzpatrick was asked whether any of the substances on that list would conflict with FEMA's requirements and he responded that although sulphur and sodium are on FEMA's list of prohibited chemicals, he was not a chemist and thus could not answer and would have to check with FEMA. The record was held open for that response. N.T. October 3, 2007, at pp 91-93.

[15] As was pointed out by one board member, the ordinance section which prohibits the bulk storage of certain substances in the floodway is based on FEMA regulations. Id. at p. 88.

cannot be allowed to continue. While the Court agrees that a nuisance can be prohibited, it cannot find the bulk storage of hazardous materials in a floodway to be a nuisance, as to do so would eliminate the concept of continuation of a prior use altogether. In other words, it is only prohibited by the ordinance if it is found to be a new use rather than the continuation of a prior nonconforming use; since the use in this case is found to be a continuation and not a new use, it is not prohibited by the ordinance. It is, therefore, not a nuisance and the Board's denial of Choice's request for a permit on this basis cannot stand.

RAILROAD SPUR

According to the testimony, a hydraulic hydrologic study is required to be submitted to be reviewed by FEMA and that agency's approval given before the Board can consider Choice's request for a special exception to construct a railroad spur on its property. N.T. October 3, 2007, at p. 80. Such has not been done and thus the Board was correct in denying the request.

CONCLUSION

As Choice's proposed use of the property as a fuel storage and biodiesel mixing facility is a natural expansion of a continued nonconforming use, the Board erred in denying Choice's request for an occupancy permit. The request for a special exception was properly denied, however, and must be renewed with proper documentation before further consideration of such need be given.

ORDER

AND NOW, this 24th day of March 2008, for the foregoing reasons, the appeal filed by Choice Fuelcorp, Inc. is granted in part and denied in part. The Armstrong Township Zoning Hearing Board is directed to issue the occupancy permit requested by Choice in its application of June 28, 2007. The Board's denial of the request for special exception is affirmed, without prejudice to Choice's right to file a new application as detailed above.

cc: Scott T. Williams, Esq.
Karl K. Baldys, Esq.
J. Michael Wiley, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson

BY THE COURT,

Dudley N. Anderson, Judge