IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

| | |
|---|---|
| DANIEL J. WINNER,<br>*Appellant*,<br><br>vs.<br><br>ARMSTRONG TOWNSHIP<br>ZONING HEARING BOARD,<br>*Appellee*,<br><br>vs.<br><br>ARMSTRONG TOWNSHIP,<br>*Intervenor.* | : NO. CV-18-1225<br>:<br>:<br>:<br>:<br>:<br>: CIVIL ACTION - LAW<br>: LAND USE APPEAL<br>:<br>:<br>:<br>:<br>: *Zoning Board Appeal* |

**MEMORANDUM OPINION**

Before the Court is an administrative appeal filed by Appellant Daniel Winner ("Appellant") from a decision rendered by Appellee Armstrong Township Zoning Hearing Board ("Appellee"), which denied Appellant a building permit. The crux of Appellee's denial was based on conditions the Lycoming County Planning Commission ("LCPC") placed on Appellant's 43.343 acre residual tract ("residual tract") in 1997. The Court heard argument in this matter on April 8, 2019 and reserved decision. Since both parties have agreed that the record below is complete, the Court will rely on the record below in this opinion.[1] This is the Court's Memorandum Opinion on Appellant's Appeal.

**FACTS & PROCEDURE**

Appellant owns approximately 84 acres of private property in Armstrong Township, Lycoming County. The property is zoned as a Conservation Open Space ("COS") District.[2] On May 15, 1997, the LCPC granted final conditional plan approval of

[1] 2 Pa.C.S.A. § 754.

[2] Armstrong Township Zoning Ordinance § 2.2.3 (Jan. 2014) [hereinafter "Ord."] ("The Conservation Open Space District is intended to include all large tracts of public land including State Forest, Game Lands and Water Authorities' lands along with other woodland and steep slope areas with the Township. This district

Appellant's multi-lot subdivision plan, resulting in a 26.988 acre lot #1, 13.699 acre lot #2, and the residual tract.[3] On May 27, 1997, the LCPC placed additional conditions on the subdivision plan ("1997 decision"). Relevant to the matter *sub judice*, the conditions included: "The residual parcel was not tested for sewage suitability *and has been dedicated for the express purpose of agriculture/forestry use*, as stated on the plan."[4] The 1997 decision reiterated said condition on the second page as a deed restriction – "prohibit any use of the residual parcel for other than agricultural or forestry uses [. . .]"[5] Both Appellant and his mother, Barbara Schramm ("Ms. Schramm"), indicated their acceptance of this plan by signature.

On February 16, 2001, the LCPC approved modifications to the original plan ("2001 decision") for the addition of a septic disposal area on lot #2. However, in this approval, the LCPC specifically stated, "[p]lease also note that this re-approval does not in any way nullify the original conditions of approval as contained in the recorded letter from our Office dated May 27, 1997."[6] Both Ms. Schramm and Appellant indicated their acceptance of this re-approval by signature. Neither Ms. Schramm nor Appellant sought reconsideration from the LCPC regarding the 1997 decision and 2001 decision.

---

recognizes the topography attraction for commercial communication facilities. This district recognizes the value of conserving land as a natural resource and the severe problems that can be created by over-utilization and development of these areas of the Township [. . . .]").

[3] The Lycoming County Planning Commission ("LCPC") appears to have been presiding over this matter because Armstrong Township did not possess its own appropriate governing body at this point in time. *See* 53 P.S. § 10502(c) ("Further, any municipality other than a county may adopt by reference the subdivision and land development ordinance of the county, and may by separate ordinance designate the county planning agency, with the county planning agency's concurrence, as its official administrative agency for review and approval of plats.").

[4] Ex. A6 (emphasis added).

[5] *Id.*

[6] Ex. A5.

They also failed to appeal either the 1997 decision or 2001 decision to this Court within thirty (30) days of the opinions' promulgations.[7]

On May 17, 2017, Ms. Schramm and Appellant filed a declaratory judgment action ("original action") in this Court, requesting that the Court interpret the 1997 decision as permitting them to construct a single-family dwelling on the residual tract " 'without the necessity of applying for a single-family home and zoning permit and having it denied by the zoning officer subject to appeal to the zoning hearing board.' "[8] In the original action, Ms. Schramm and Appellant noted in their Complaint that the Armstrong Township Board of Supervisors informally disagreed with Ms. Schramm's and Appellant's interpretation that the 1997 decision permits such construction.[9]

On August 1, 2017, Intervenor, by its Board of Supervisors, filed preliminary objections, seeking a demurrer based on the fact that "Plaintiffs appear to be appealing an alleged oral decision of the Board of Supervisors regarding a matter of zoning." On November 20, 2017, this Court granted two of Intervenor's preliminary objections, which were dispositive. Relying on *Board of Supervisors v. Diehl*,[10] the Court dismissed the amended complaint because Ms. Schramm's and Appellant's request would result in the issuance of an advisory opinion.[11] This was because Ms. Schramm and Appellant

---

[7] 53 P.S. § 10909.1(b)(6) ("Where the applicable land use ordinance vests jurisdiction for final administration of subdivision and land development applications in the planning agency, all appeals from determinations under this paragraph shall be to the planning agency and all appeals from the decision of the planning agency shall be to court."); *see also* 53 P.S. § 11002-A(a); *accord Miravich v. Twp. of Exeter*, 6 A.3d 1076, 1078–79 (Pa. Commw. Ct. 2010) (noting that § 11001-A governs appeals from land use disputes and zoning disputes). A subdivision decision must be in writing, and the thirty (30) day appellate right begins to run when the written decision is mailed. *See First Ave. Partners v. City of Pittsburgh Planning Comm'n*, 151 A.3d 715, 721-22 (Pa. Commw. Ct. 2016) (quoting *Narberth Borough v. Lower Merion Twp.*, 915 A.2d 626, 636 n.19 (Pa. 2007)).

[8] *Winner & Schramm v. Armstrong Twp.*, No. 17-0788, Opinion & Order: Preliminary Objections 1, 4 (Lyco. Com. Pl. Nov. 20, 2017) [hereinafter "2017 Opinion"].

[9] *Winner & Schramm v. Armstrong Twp.*, No. 17-0788, Plaintiffs' Amended Complaint, ¶15 (Aug. 1, 2017).

[10] 694 A.2d 11 (Pa. Commw. Ct. 1997).

[11] 2017 Opinion at 4.

had only informally asked the Board of Supervisors how it interpreted the LCPC's 1997 conditions and failed to apply to the zoning board for building permits.[12]

On March 8, 2018, Appellant applied for a building permit from Intervenor, noting a proposed use of a "private woodland with a forest caretaker's residence."[13] Appellant included a map of the property with an approximate residence location hand drawn on the map.[14] On April 5, 2018, Joe Eck ("Mr. Eck"), the Armstrong Township Zoning Officer, denied Appellant's request based on the LCPC's 1997 decision.[15] On May 4, 2018, Appellant appealed Mr. Eck's decision to Appellee.[16] Appellee held a hearing on June 20, 2018.[17]

At the hearing, Mr. Eck testified that he denied Appellant's building permit based on the LCPC's 1997 decision, but noted that he did not consult the Armstrong Township Ordinance definitions for "Forestry" or "Land development."[18] Appellant also testified at length. He testified that the residual tract is "all wooded except for an existing road," yet the tract is not sufficiently wooded to be deemed a "wood lot."[19] Appellant testified that he interpreted the 1997 decision to allow him to build a property amidst the forest on the residual tract if he obtained the installation of a sewage system.[20] To this end, Appellant introduced documentation that the Commonwealth's Department of Environmental Protection had deemed Appellant's residual tract "suitable" for an "onlot

---

[12] *Id.*
[13] ZHB-1, at 1; Ex. A12.
[14] Ex. A12.
[15] ZHB-1, at 2 ("Upholding Lycoming County Planning [Commission] Land Development Decision.").
[16] *Id.*
[17] Notice was sent to the interested parties regarding the June 20th hearing and public notice was posted on June 3rd and 10th in the Williamsport Sun-Gazette. ZHB-2, 3 (public notice document), 4 (proof of publication). Karl Baldys, Esq., solicitor for Appellee at that time, noted that two interested parties had been overlooked; however, they were individually contacted and did not request to participate. Transcript at 4 [hereinafter 'Tr."].
[18] Tr. at 5-13. Mr. Eck testified that he only consulted the LCPC's "drawing." Tr. at 13.

sewage disposal system" on November 3, 2017.[21] Appellant further commented that it was not his intent to subdivide the property further, and his idea of a caretaker in this proposed context was an individual who owned the residence and forest and "maintain[ed] the road and trees."[22]

Related to the residual tract's topography, Appellant testified "most" of the residual tract "is probably 35 percent slope and there is some level area with stone that's pretty suitable for housing [. . .]"[23] Regarding the proposed residence location, he stated that the proposed area is a:

> [F]lat area run[ning] through the middle. Steep coming from Route 15 then somewhat levels off ten or [twelve] percent and goes back up and joins state ground. There's a long bend, probably 175 yards wide and 500 yards long. Fairly level.[24]

On cross-examination, Appellant stated that it was his intent for his son to live at the residence with his son's family; however, he could not "predict" whether his son would sell the property, despite such sale being adverse to Appellant's wishes.[25] Appellant testified that the proposed residence location had not yet been officially marked; nevertheless, he asserted the distance between the proposed septic system and residence would not be an issue since the proposed location was three-hundred yards from the gully.[26] Appellant reiterated that the slope of the ground on the residential tract was not consistently thirty-five percent.[27] Appellant described the propositions of the proposed residence and repeated that his son would use the forestry residence to

---

[19] Tr. at 26-27.
[20] Tr. at 26.
[21] Tr. at 32-33; Exs. A10, A11.
[22] Tr. at 33.
[23] Tr. at 38-39, 43.
[24] Tr. at 39.
[25] Tr. at 40. Appellant's son has two children. Tr. at 51.
[26] Tr. at 41-42.

facilitate "[b]uilding care, maintenance, [chopping] firewood, building furniture, [and] keeping the trees clean, [and] the roads clean."[28]

At the conclusion of the hearing, Appellee retired to a private, executive session for approximately half-an-hour.[29] Thereafter, Appellee verbally denied the motion on three grounds: (1) the LCPC's 1997 decision, (2) "Failure to provide any information for the critical environmental overlay, critical environmental area requirements," and (3) the self-imposed nature of the variance request since Appellant signed the LCPC's decisions.[30] On August 3, 2018, Appellee promulgated a written decision that supported its verbal remarks.

**DISCUSSION**

Appellant raises the following issues on appeal:

1. "There is no actual, unambiguous 'no building' rule, enforceable by the Township, that prohibits the intended use.

2. The proposed use falls within the Township Ordinance's definition of 'forestry.'

3. Even if unambiguously prohibiting a forest caretaker's residence as written in 1997, that restriction is now obviated by the perc approval, by being obsolete, or else should have been disregarded by variance.

4. It was wrong or premature for the Board to deny the appeal based on the invocation of Ordinance Section 5.4."[31]

Conversely, Appellee and Intervenor argue that Appellee did not commit an error of law or abuse its discretion in denying Appellant's appeal based on Mr. Eck's determination as zoning officer.[32]

---

[27] Tr. at 43.
[28] Tr. at 45-46, 49. He clarified that the furniture was for personal use, not commercial. *Id.*
[29] Tr. at 70.
[30] Tr. at 71.
[31] Appellant's Brief, Table of Contents (Feb. 7, 2019).

Related to land use appeals, the Commonwealth Court of Pennsylvania has stated:

> In a land use appeal, where, as here, the trial court does not take additional evidence, this Court's scope of review is limited to determining whether the local governing body committed an error of law or an abuse of discretion. The governing body abuses its discretion when its findings of fact are not supported by substantial evidence. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[33]

The Court agrees with Appellant that the LCPC's 1997 decision does not indicate a "no building rule." While the LCPC's conditions specifically limit the residual tract to "agriculture/forestry use,"[34] the definition of "Forestry" does not expressly prevent the building of a "forest caretaker's residence." Moreover, the definition of "Forestry" related to Mr. Eck's determination is ambiguous as to whether the construction of a single residential building, unrelated to forestry activities, is prohibited. The building of a "forest caretaker's residence" is not prohibited under the definition of "Forestry" as detailed in the current Armstrong Township's Zoning Ordinance ("ATZO"), the current Lycoming County Subdivision and Land Development Ordinance ("LCSLDO"), or the current Pennsylvania statutes. ATZO § 14.2 defines "Forestry" as "[t]he management of forests and timberlands when practiced in accordance with accepted silvicultural principles, through developing, cultivating, harvesting, transporting and selling trees for

---

[32] Brief of Appellee and Intervenor/Appellee 4 (Mar. 11, 2019).
[33] *In re Thompson*, 896 A.2d 659, 666 n.4 (Pa. Commw. Ct. 2006) (internal citations omitted) (relying on *Herr v. Lancaster Cnty. Planning Com'n*, 625 A.2d 164 (Pa. Commw. Ct. 1993), *petition for allowance of appeal denied*, 649 A.2d 677 (Pa. 1994); *Valley View Civic Ass'n v. Zoning Bd. of Adj.*, 462 A.2d 637, 640 (Pa. 1983)).
[34] Ex. A6 ("The residual parcel was not tested for sewage suitability and has been dedicated for the express purpose of agriculture/forestry use, as stated on the plan.").

commercial purposes, which does not involve any land development."[35] ATZO § 14.2 defines "Land Development" as:

> (1) The improvement of one lot or two or more contiguous lots, tracts or parcels of land for any purpose involving:
>
> (i) a group of two or more residential or nonresidential buildings, whether proposed initially or cumulatively, or a single nonresidential building on a lot or lots regardless of the number of occupants or tenure; or
>
> (ii) the division or allocation of land or space whether initially or cumulatively, between or among two or more existing or prospective occupants by means of, or for the purpose of streets, common areas, leaseholds, condominiums, building groups or other features.
>
> (2) a subdivision of land.
>
> Except that the following shall be excluded from this definition [. . .][36]

Similarly, LCSLDO § 7.0 defines "Forestry" as "[t]he management of forests, timberlands, and woodlands when practiced in accordance with accepted silvicultural principles, through developing, cultivating, harvesting, transporting, and selling trees for commercial purposes that do not involve any *land development*."[37] LCSLDO § 7.0 defines "Land Development" as:[38]

> (1) The improvement of one (1) lot or two (2) or more contiguous lots, tracts or parcels of land for any purpose involving:

---

[35] Armstrong Township's Zoning Ordinance § 14.2, p. 12 (Jan. 2014) [hereinafter "Armstrong Ord."].
[36] Armstrong Ord. § 14.2, pp. 15-16.
[37] Lycoming County Subdivision and Land Development Ordinance § 7.0, p. 92 (Jan. 23, 2014) [hereinafter "Lycoming Ord."] (emphasis in original).
[38] Land Development (minor)" is defined as "[a]ny land development involving no more than the placement or construction of one *additional* single-family detached dwelling and customarily related improvements and accessory structures on a lot of record; or other land development not involving required infrastructure improvements and involving no more than 2,500 square feet of proposed building footprint improvement to the land surface area." Lycoming Ord. § 7.0, p. 94 (emphasis added). Likewise, "Land Development (major)" is defined as "Any land development not qualifying as a minor land development." Lycoming Ord. § 7.0, p. 95.

> (a) a group of two or more residential or nonresidential buildings, whether proposed initially or cumulatively, or a single non-residential building inclusive of multi-family dwellings in a single structure on a lot or lots regardless of the number of occupants or tenure; or
>
> (b) the division or allocation of land or space, whether initially or cumulatively, between or among two or more existing or prospective occupants by means of, or for the purpose of streets, common areas, leaseholds, condominiums, building groups, or other features.
>
> (2) A subdivision of land into lots for the purpose of conveying such lots singly or in groups to any person, partnership or corporation for the purpose of the erection of buildings by such person, partnership or corporation.
>
> (3) Development in accordance with Section 503 (1.1) of the [Pennsylvania Municipalities Planning Code].[39]
>
> Land development types include [. . .][40]

The language of the Pennsylvania statutes mirrors the language utilized in the ATZO.[41]

Based on the definitions above, the LCPC's use of the term "forestry" does not prevent the building of a "forest caretaker's residence." The Court finds that there was sufficient evidence in the record that Appellant sought to build a residence for his son to

---

[39] 53 P.S. § 10503(1.1) ("The subdivision and land development ordinance may include, but need not be limited to: [. . .] Provisions for the exclusion of certain land development from the definition of land development contained in section 1075 only when such land development involves: (i) the conversion of an existing single-family detached dwelling or single family semi-detached dwelling into not more than three residential units, unless such units are intended to be a condominium; (ii) the addition of an accessory building, including farm buildings, on a lot or lots subordinate to an existing principal building; or (iii) the addition or conversion of buildings or rides within the confines of an enterprise which would be considered an amusement park. For purposes of this subclause, an amusement park is defined as [. . .]").

[40] Lycoming Ord. § 7.0, pp. 93-94.

[41] "Forestry" is defined as "the management of forests and timberlands when practiced in accordance with accepted silvicultural principles, through developing, cultivating, harvesting, transporting and selling trees for commercial purposes, which does not involve any land development." 53 P.S. § 10107. "Land Development" is defined as: "(1) The improvement of one lot or two or more contiguous lots, tracts or parcels of land for any purpose involving: (i) a group of two or more residential or nonresidential buildings, whether proposed initially or cumulatively, or a single nonresidential building on a lot or lots regardless of the number of occupants or tenure; or (ii) the division or allocation of land or space, whether initially or cumulatively, between or among two or more existing or prospective occupants by means of, or for the

engage in silviculture. In addition, regarding the construction of a single residential building unrelated to forestry activities, Appellee's own ordinance is unclear as to whether such construction is prevented. The ATZO's definition of "Land development" appears unconcerned with the building of a single residence, as it is written to focus on the expansion of the tract for commercial purposes—i.e. a residential development of two or more residences. Based on Pennsylvania law, ambiguities in a zoning ordinance should be resolved in favor of Appellant.[42] Moreover, the ATZO permits a "Single Family Dwelling" in a COS District, which renders Appellant's predictions of the future irrelevant.[43] Thus, Appellant's building permit request was a valid one.

Notwithstanding, there is insufficient evidence in the record related to whether AZTO § 5.4 would apply to the proposed area where Appellant desires to build the caretaker's residence. Appellee stated in its decision that

> [Appellant] agreed that most of the subject parcel has steep slopes of 35%. He did not clearly identify a specific building site. And, he did not submit a building plan or other information regarding the Ordinance requirements for building in a Critical Environmental Area. See ordinance sec. 5.4.[44]

Appellant did identify a specific building site; however, it is not clear on the face of the record that Appellant met the requirements of § 5.4. Appellant's testimony that "most" of the ground slope of the residual tract is thirty percent is insufficient to establish that the area Appellant seeks to build on possesses a slope percentage greater than twenty-

---

purpose of streets, common areas, leaseholds, condominiums, building groups or other features. (2) A subdivision of land. (3) Development in accordance with section 503(1.1)." *Id.*

[42] 53 P.S. § 10603.1 ("In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.").

[43] Armstrong Ord. § 3.9.

[44] Armstrong Township Zoning Board Decision, ¶9 (Aug. 4, 2018).

five percent.[45] At this juncture, it is unclear to this Court whether Appellant sought to build on a "severe slope" as defined by ATZO § 5.4.1.

**CONCLUSION**

This Court finds that the Armstrong Township Zoning Hearing Board committed an error of law when it failed to properly interpret the definition of "forestry" and abused its discretion when it denied Appellant's application based on his failure to meet the requirements of § 5.4. Because further testimony is required surrounding Appellant's building intentions and the requirements of § 5.4, this matter shall be **REMANDED** to the Armstrong Township Zoning Hearing Board.[46]

**IT IS SO ORDERED this 7th day of June 2019.**

BY THE COURT:

_____
Eric R. Linhardt, Judge

cc:
Marc Drier, Esq. (Appellant's counsel)
Fred A. Holland, Esq. (Appellee's counsel)
J. Michael Wiley, Esq. (Intervenor's counsel)
Gary Weber, Esq. (Lycoming Reporter)

[45] Tr. at 43.
[46] *Smedley v. Zoning Hearing Board of Lycoming County*, No. 18-0996, Memorandum Opinion 19 n.114 (Dec. 17, 2019) (citing 53 P.S. § 11006-A; *Soble Const. Co. v. Zoning Hearing Bd. of Borough of E. Stroudsburg*, 329 A.2d 912, 916 (Pa. Commw. Ct. 1974)).