

BEFORE THE SHELBYVILLE BOARD OF ZONING APPEALS

CASE NO. BZA 2020-12

IN THE MATTER OF THE ADMINISTRATIVE APPEAL BY)
)
BURNSIDE LLC & SUMMERFORD LAND TRUST I)

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FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter came for hearing before the Shelbyville Board of Zoning Appeals (the “BZA”) on January 12, 2021, on the administrative appeal filed by Burnside LLC and Sumerford Land Trust I (collectively “Petitioners”) for the properties near 1011 & 1568 N. Riley Highway, Shelbyville, IN 46176.

Attorney Donald J. Smith represented Petitioner at the hearing. Attorney Thomas W. Vander Luitgaren represented the Planning Department of the City of Shelbyville. The Board continued the matter until the regularly scheduled meeting on February 9, 2021 to allow time for the parties to submit proposed findings of fact and conclusions of law and for the Board to review and consider all evidence presented. The Board accepted additional argument at the February 9, 2021 hearing from counsel for the City and Petitioners. The Board having reviewed the record, testimony, and evidence presented at the January 12th and February 9th Hearing now finds as follows:

Findings of Facts:

1. Burnside LLC (“Burnside”) is the owner of certain real property located in the City of Shelbyville, Shelby County, Indiana, with an approximate address of 1011 N. Riley Highway (the “Burnside Property”).
2. Sumerford Land Trust I (“Sumerford Trust”, and collectively with Burnside, “Sumerford”) is the owner of certain real property located in the City of Shelbyville, Shelby County, Indiana, with an approximate address of 1568 N. Riley Highway (the “Sumerford Trust Property”, and collectively with the Burnside Property, the “Properties”).

3. The Burnside Property was acquired by Burnside on September 25, 2003 when Taylor Sumerford, Jr. (“Taylor”) conveyed the Burnside Property to Burnside LLC. Taylor had acquired the Burnside Property on May 7, 1993. Burnside is a single-member limited liability company wholly-owned by Taylor.
4. The Sumerford Trust Property was acquired by the Sumerford Trust on October 10, 2003 when North Riley LLC, Taylor, Marna Lynn Sumerford and Andrew Sumerford conveyed the Sumerford Property to Sumerford Trust. Taylor is the beneficiary of the Sumerford Trust.
5. Both the Burnside Property and the Sumerford Property contain ponds formed from gravel mining on each property. The ponds on the respective properties shall be referred to herein as the “Burnside Pond” and the “E Pond”, respectively, and collectively referred to as the “Ponds”. The City referred to the E Pond as the Northern Pond however due to an additional pond being discussed during the hearing also as the North Pond in the interest of clarity the Board will refer to it as the “E Pond”.
6. On August 4, 1993, Taylor, as the then owner of the Properties, obtained a letter from the then Director of the Shelbyville Plan Commission notifying Taylor that the “city does not see any problems with dumping concrete, dirt and or gravel on your property...” (the “1993 Letter”). The 1993 Letter does not provide a start date for the project or an end date. It also does not state the address or a specific location for the dumping only “N. State Road 9”.
7. Taylor desired to fill the Ponds in order to create land to be developed for commercial use.
8. In reliance on the 1993 Letter, Taylor did not obtain any permits from the City of Shelbyville (the “City”) for his proposed work at either the Burnside Pond or the E Pond.
9. Fill work on the Burnside Pond continued until approximately 2007, and no work has been conducted on the Burnside Pond since at least that time, perhaps earlier.
10. Taylor continued to perform work intermittently at the E Pond from 2009 until October of 2020 when work ceased after receipt of the City’s Notice of Violations.
11. On August 18, 2020 the City of Shelbyville Planning and Building Department Administrator and Enforcement Officer Mr. Adam Rude (Rude) issued a Notice of Zoning Violation to Petitioner regarding the Ponds. The Notice of Zoning Violations alleged violations of the following provisions of the City of Shelbyville Uniform Development Ordinance (“UDO”):

12. Burnside Pond Alleged Violations:

- a. Violation #1: UDO 9.01 (B) Permanent Alteration to the Land. “B. Permanent Alteration to the Land: A project that involves permanently altering the topography, drainage, floodplain, or environmental features shall have the project reviewed for compliance with the Unified Development Ordinance. Projects determined to be in full compliance with the applicable regulations will be issued an Improvement Location Permit authorizing the project to begin. See Section 9.02: Improvement Location Permit for details about this process. This process section applies to all zoning districts” The work that occurred at the Burnside Pond was a permanent alteration to the land but did not receive any formal review or approval in accordance with the City of Shelbyville Unified Development Ordinance.
- b. Violation #2: UDO 9.02: Improvement Location Permit: “ B. Permit Required: The City of Shelbyville requires that an Improvement Location Permit be obtained for any of the following actions and a single Improvement Location Permit may be issued for a combination of these actions, if they occur together: . . . 5. Surface and sub-surface drainage work and or grading (including land alteration) excluding agricultural uses. . . . No Improvement Location Permit was ever issued for the work and the land alterations that occurred at the Burnside Pond.
- c. Violation #3: UDO 9.05 Site Development Plan. “B Applicability: Site Development Plan shall be required for all developments for which an Improvement Location Permit is required by this Ordinance and that are located in the following zoning districts: . . .Business Highway.
- d. Violation #4: UDO 5.16 Environmental Standards Outdoor Storage. “1. Waste Stored Outdoors: No waste materials such as, but not limited to, garbage, rubbish , . . .shall be deposited, located, stored, or discharged on any lot.” The Burnside Pond has a pile of construction debris (mostly concrete pipes and crushed concrete from other construction sites) stored outdoors, near North Riley Highway.
- e. Violation #5: UDO 5.44 General Outdoor Storage Standards. A. Prohibited Outdoor Storage : The outdoor storage of equipment, product, supplies, materials, machinery, building materials, waste or scrap, pallets, and similar materials shall not be permitted.” The Burnside Pond has a pile of construction debris (mostly

concrete pipes and crushed concrete from other construction sites) stored outdoors, near North Riley Highway.

13. E Pond Alleged Violations:

- a. Violation #6: UDO 9.01 (B) Permanent Alteration of Land. A project that involves permanently altering the topography, drainage, floodplain, or environmental features shall have the project reviewed for compliance with the UDO. . . . The work that occurred at the E Pond was a permanent alteration to the land but did not receive any formal review or approval in accordance with the UDO.
- b. Violation #7: UDO 9.02 Improvement Location Permit: “B Permit Required: The City of Shelbyville requires that an Improvement Location Permit be obtained for any of the following actions and a single Improvement Location Permit may be issued for a combination of these actions if they occur together: . . . 5. Surface and subsurface drainage work and or grading (including land alteration) excluding agricultural uses. . . .” No Location Improvement Permit (ILP) was ever issued for the work and land alterations that occurred at the E Pond.
- c. Violation #8: UDO 9.05 Site Development Plan. “B Applicability: Site Development Plan approval shall be required for all developments for which an [ILP] is required by this Ordinance and that are located in any of the following zoning districts: . . . Business Highway . . .” Site Development Plan approval was never applied for or granted for the E Pond Property.
- d. Violation #9: UDO 5.16 Environmental Standards, Outdoor Storage. “1. Waste Stored Outdoors: No waste materials such as, but not limited to, garbage, rubbish, household appliances, inoperable vehicles, furniture designed for interior use . . . shall be deposited, located, stored, or discharged on any lot.” The E Pond has a pile of construction debris (mostly crushed concrete from other construction sites) stored outdoors, near Riley Highway.
- e. Violation #10: UDO 5.44 General Outdoor Storage Standards “A. Prohibited Outdoor Storage: The outdoor storage of equipment, product, . . . shall not be permitted. The E Pond has a pile of construction debris (mostly concrete pipes and crushed concrete from other construction sites) stored outdoors, near North Riley Highway.

14. On September 17, 2020 Petitioners Burnside LLC and Sumerford Land Trust I filed an Administrative Appeal of the Notice of Violations indicating the applicable Ordinance Sections as UDO § 9.01(B), 9.02, 9.05, 5.16 and 5.44. In their Letter of Intent they refer to the attached letter from their attorney and state the “property owners may supplement such statement with information and documents.” In their Letter of Intent Petitioners state “as of the date of this letter, action to cure Zoning Violations 4, 5, 9 and 10 has been undertaken, and to the extent that it is not completed as of the date of this Letter, it is anticipated that it will be shortly. In addition, applications for permits relating to additional violations listed in the Notice have been applied for.”
15. Any other additional relevant facts will be addressed as needed in the Conclusions of Law.
16. Any Findings of Relevant Facts that can be considered Conclusions of Law are deemed as such and any Conclusions of Law that can be considered Findings of Relevant Facts are deemed as such.

Objections to Evidence:

As a threshold matter the City has objected to the admittance of the following evidence into the record:

1. A letter dated August 4, 1993 signed by David Toll as Plan Commission Director.
2. Paragraphs 2 through 9 of Mr. Robert Adams Affidavit.
3. Paragraphs 6 through 9 of Mr. Taylor Sumerford’s Affidavit.
4. Affidavit of Ms. Michelle Hansard.

The City argues that the 1993 letter is irrelevant and is outside the scope of the appeal because the appeal only addresses drainage issues. This is incorrect. The Administrative Appeal sites all zoning ordinances relied upon in the Notice of Violation as Ordinances that are relevant for the appeal. The Administrative Appeal clearly is an appeal of all 10 alleged zoning violations. The City’s objection is overruled as it pertains to the 1993 Letter. The Board has found that the evidence contained in paragraphs 2-9 and 6-9 of Mr. Adams and Mr. Sumerfords’ affidavits respectively is not relevant and therefore any objection to their admittance into evidence is moot.

At the hearing on February 9, 2021 Mr. Lisher made a motion to uphold the Objection of the Director to exclude Ms. Hansards evidence. The motion was seconded and carried on a 4-1 voice vote.

Burnside Violations:

The City has alleged violations of the current UDO which has an effective date of February 12, 2012. The City has alleged that filling of the Burnside Pond began in approximately 1993. The evidence has shown filling of the Burnside Pond concluded approximately in 2007. The City has submitted no evidence to contradict this finding. As the evidence shows that filling of the Burnside Pond concluded prior to the enactment of the current UDO in 2012 the Notice of Violation is Vacated as to violations of UDO 9.01, 9.02 and 9.05 pertaining to the Burnside Pond. At the hearing on January 12, 2021 the Petitioners stated and the City agreed that violations of UDO 5.16 and 5.44 have been resolved.

E Pond Violations:

The parties have made substantial arguments regarding whether or not the Petitioner has a vested interest in the activities at the E Pond and hence the development of the land is a nonconforming use. As explained below these arguments are misplaced as this question is not before the Board. The only issue before the Board is whether or not Petitioners needed to apply for an ILP after February 2012 when the current UDO went into effect. The evidence before the Board is sparse in regards to the frequency, continuing nature, intent of Petitioner, and the projects that were undertaken on the E Pond after 2012. This further supports that any arguments regarding nonconforming use or abandonment or discontinuance are not ripe for our review.

Indiana law is very clear that the rights of municipalities in enacting zoning ordinances is subject to the vested rights of property owners. *City of New Haven v. Flying J, Inc.*, 912 NE 2d 420 at 424 (Ind. App. 2009), citing *Metro. Dev. Comm'n of Marion County v. Pinnacle Media, LLC*, 836 NE 2d 422, at 424 (Ind. 2006). A “non-conforming use” is one that legally existed prior to the enactment of the zoning ordinance which continues after the ordinance’s effective date even though it does not comply with the ordinance’s restrictions, and in general cannot be *terminated* due to the enactment of an ordinance, and is generally exempted from the new use restrictions. *Id. Emphasis added.* When a non-conforming use exists, the property owner has a “vested right” in the use of the property prior to it becoming a non-conforming use, and because that right has vested, the municipality cannot terminate it without due process of law. *Id.*, see also, *Jacobs v. Mishawaka Board of Zoning Appeals*, 395 NE 2d 834 at 836 (Ind. Ct. App. 3d Dist. 1979) (an ordinance prohibiting the continuation of an existing lawful use is unconstitutional as a taking of

property without due process and an unreasonable exercise of police power), *Metro. Dev. Comm'n of Marion County v. Schroeder*, 727 NE 2d 742 at 749-750 (Ind. Ct. App. 2000) (“[t]he right of a municipality to enact zoning restrictions is subject to the vested property interests acquired prior to the enactment of the ordinance”). “As a general proposition, the courts have been willing to hold that the developer acquires a “vested right” such that a new ordinance does not apply retroactively if, but only if, the developer “(1) relying in good faith, (2) upon some act or omission of the government, (3) . . . has made substantial changes or otherwise committed [**9] himself to his substantial disadvantage prior [*426] to a zoning change.” *Metro. Dev. Comm'n v. Pinnacle Media, LLC*, 836 N.E.2d 422, 425-26 (Ind. 2005)

The party claiming a non-conforming use has the burden of proving such use, and once that burden has been met, the burden of proving that use to have been terminated by either abandonment or discontinuance rests on the party opposing the use. *Jacobs*, 395 NE 2d at 839, *Dandy Co., Inc. v. Civil City of South Bend, County-City Complex*, 401 NE 2d 1380. In order to show a non-conforming use, the party claiming it must establish that, prior to the effective date of the ordinance, and while violating no law, cause either substantial improvement to be made to the property or incur substantial liabilities directly relating to the intended use. *Dandy* at 1384. The vested right in a non-conforming use goes away upon the abandonment or discontinuance of such use. *Id.* at 1383.

Petitioners rely on the 1993 Letter and their subsequent expenditure of monies to obtain all necessary county, state and federal approvals and contracting for fill for the property. Petitioners argue that the 1993 Letter prevents the City from enforcing any subsequent zoning regulations with regards to the E Pond. However, to the extent if any the 1993 Letter acts as a permit or approval by the City it does not result in a “vested right” by Petitioners. First the 1993 Letter was written in 1993 and any work did not begin on the property until at least 2009 or 2010. Any approval, to the extent the 1993 Letter may be called an approval, which this Board finds it is not, from 1993 does not give Petitioner cart blanche authority to alter the land as he sees fit in perpetuity. The Courts have found that mere filing of a building permit is not sufficient to establish a vested right. *Metro. Dev. Comm'n v. Pinnacle Media, LLC*, 836 N.E.2d 422, 428 (Ind. 2005). Therefore, the mere obtaining of the 1993 Letter also doesn’t create a vested right. Additionally, land acquisition, demolition and site preparation [are] not enough to establish a vested right. *City of New Haven v. Flying J., Inc.*, 912 N.E.2d 420, 424-25 (Ind. Ct. App. 2009). Furthermore,

[I]n the context of zoning and permits, a party generally does not gain a vested interest in the issuance of a permit. Instead, the doctrine of vested rights refers to one's right to have an application for a permit evaluated pursuant to a certain set of legal standards. As a general rule, an applicant for a permit has a right to have its application considered in accordance with the laws in effect when the application is submitted.

Steuben Cty. Waste Watchers v. Family Dev., Ltd., 753 N.E.2d 693, 702-04 (Ind. Ct. App. 2001). Here Petitioners have failed to file for an ILP. Any vested right Petitioners may have does not alleviate their need to file for an ILP. The filing for an ILP does not “terminate” any vested right and does not prohibit a use. Instead the filing of an ILP provides for a review of the activity under the applicable ordinances. UDO 9.02. Taylor’s intended use of the property was to develop the land. The City has not found that this use is prohibited in the Business Highway zoning district, they haven’t even reviewed that question as an ILP was not submitted. The City has only found that Petitioner must file an ILP for the City to review the work and the use. The requirement to file an ILP is similar to the requirement to register a nonconforming use. Our Supreme Court dealt with the issue of registering a nonconforming use in *Bd. of Zoning Appeals v. Leisz* and found:

The registration requirement takes nothing from the landowner. Rather, it merely requires the filing of a form by a designated date. Noncompliance with the regulation, not the regulation itself, results in the forfeiture of a vested property right. The power to protect the property interest rests solely with the landowner. The Supreme Court addressed a similar situation in *United States v. Locke*, 471 U.S. 84, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985), . . . Regulation of property rights does not "take" private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed.

Bd. of Zoning Appeals v. Leisz, 702 N.E.2d 1026, 1031 (Ind. 1998). The Board finds the requirement to file for an ILP is a reasonable regulatory restriction. To the extent, if any, Petitioner has a vested right in the “use” of the land for development this will be determined when he applies for an ILP and the use may be reviewed and determined as nonconforming, abandoned, or discontinued.

The City’s Notice of Violation is Upheld as to alleged violations 9.01, 9.02. UDO 9.05 requires a site development plan as a part of the ILP submission. The Board finds this review is also a reasonable regulatory restriction and therefore Petitioner must file an site development plan. The City’s Notice of Violation is Upheld as to violation 9.05.

The record does not contain any evidence of construction debris being located on the property prior to 2012. However, logic requires and the Board finds that the testimony of Taylor

is that construction debris has been used to fill the E-Pond since 2009 and unless the construction debris was dumped directly into the E Pond it had to have sat on the property for some undetermined time period. There is no evidence and the parties have made no arguments to support that the E Pond site is a waste disposal site. Only that the property is being developed. The Board finds that without an ILP and site therefore the City's Notice of Violation as to UDO 5.16 and 5.44 is Upheld.

Conclusion:

For the reasons explained above the City of Shelbyville Board of Zoning Appeals now finds and Orders:

1. Burnside Pond:
 - a. Violation #1: UDO 9.01 (B) is VACATED.
 - b. Violation #2: UDO 9.02: Improvement Location Permit is VACATED
 - c. Violation #3: UDO 9.05 Site Development Plan is VACATED.
 - d. Violation #4: UDO 5.16 Environmental Standards Outdoor Storage is MOOT.
 - e. Violation #5: UDO 5.44 General Outdoor Storage Standards is MOOT.
2. E Pond Alleged Violations:
 - a. Violation #6: UDO 9.01 (B) Permanent Alteration of Land is UPHELD.
 - b. Violation #7: UDO 9.02 Improvement Location Permit is UPHELD.
 - c. Violation #8: UDO 9.05 is UPHELD.
 - d. Violation #9: UDO 5.16 is UPHELD.
 - e. Violation #10: UDO 5.44 General Outdoor Storage Standards is UPHELD.










