Petition No. BZA 2020-12

CITY OF SHELBYVILLE
BOARD OF ZONING APPEALS

IN RE: BURNSIDE LLC AND SUMERFORD LAND TRUST I

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Board of Zoning Appeals for the City of Shelbyville, Indiana (the "Board"), and the Board, having conducted a public hearing on this matter on January 12, 2021, and having considered all of the testimony and evidence before it, hereby finds as follows:

I. FINDINGS OF FACT

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".

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 "Toll Letter").

7. Taylor desired to fill the Ponds in order to create land to be developed for commercial use.

8. In reliance on the Toll Letter, Taylor did not obtain any permits from the City of Shelbyville (the "City") for his proposed work.

9. In further reliance on the Toll Letter, Taylor did expend large sums of money to obtain permits and/or approvals from, among others, the Wetlands Protection Agency, Indiana Department of Environmental Management, Indiana Department of Natural Resources, U.S. Army Corps of Engineers, U.S. Department of the Interior – Fish and Wildlife Service and the Sierra Club relating to the fill of the Ponds (the "Burnside Approvals").

10. Upon obtaining the Burnside Approvals, and in reliance on the Toll Letter, Taylor commenced fill operations on the Burnside Pond.

11. 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.

12. At no time while fill operations were proceeding on the Burnside Pond did the City ever notify either Taylor or Burnside that the fill operations required any permits or approvals from the City in order to continue.

13. In 2009, Taylor desired to commence fill operations at the E Pond. In continued reliance on the Toll Letter, Taylor did not obtain any approvals from the City of Shelbyville other than the Toll Letter.

14. Taylor, again at significant cost to him, approached several local, state and federal agencies regarding fill work on the E Pond, including but not limited to the U.S. Army Corps of Engineers, Shelby County Soil and Water Conservation District, Indiana Department of Natural Resources, and Indiana Department of Environmental Management (the "E Pond Approvals").

15. Upon obtaining the E Pond Approvals, and in continued reliance on the Toll Letter, Taylor commenced fill work on the Sumerford Pond.

16. Fill work on the E Pond continued until approximately October, 2020. Since that time, no further fill work has been done to the E Pond.

17. At no time prior to August, 2020 did the City ever notify Taylor that there were any permits or approvals required to commence and/or continue any work on the E Pond.

18. Throughout the time that work has been done on the Ponds, fill material has been provided, from time to time, from the City and from Shelby County, at no cost to either the City or Shelby County.

19. Throughout the time that Taylor performed fill work on the Ponds, he expended extensive amounts of money to conduct such work.

20. On or about August 18, 2020, Taylor received a Notice of Zoning Violations from the Planning and Building Department of the City of Shelbyville (the "Notice").

21. The Notice contained several alleged zoning violations relating to both of the Ponds.

22. As it relates to the Burnside Pond, the alleged violations are as follows:

a. Violation of Unified Development Ordinance ("UDO") Section 9.01(B) – Permanent Alteration of the Land ("Violation 1"). Section 9.01(B) requires that any permanent alteration of land must be reviewed for compliance with the UDO, and that an Improvement Location Permit ("ILP") must be obtained for such work.

b. Violation of UDO Section 9.02 – Improvement Location Permit ("Violation 2"). Section 9.02 requires that an ILP must be obtained for, among other things, "surface and sub-surface drainage work and/or grading (including land alteration) excluding agricultural uses."

c. Violation of UDO Section 9.05(B) – Site Development Plan ("Violation 3"). Section 9.05(B) requires that "Site Development Plan approval shall be required for all developments for which an [ILP] is required…"

d. Violation of UDO Section 5.16 – Environmental Standards ("Violation 4"). Section 5.16 requires that, among other things, materials such as garbage and rubbish not be stored outdoors on any lot.

e. Violation of UDO Section 5.44 – General Outdoor Storage Standards ("Violation 5", and collectively with Violations 1-4, the "Burnside Violations"). Section 5.44 prohibits the "outdoor storage of equipment, product, supplies, materials, machinery, building materials, waste or scrap, pallets and similar materials…"

23. Violations 1-3 relate specifically to the fill work on the Burnside Pond. According to the Notice, these alterations "negatively impacted the drainage in this area" that "threatens the general welfare of the community at large."

24. Taylor relied on the Toll Letter in conducting the work on the Burnside Pond, and in reliance on the same, did not obtain any additional approvals or permits from the City, as

he reasonably believed that they were not required. At no time from 1993 until work on the Burnside Pond was complete, did the City inform Taylor that any permits or approvals were required in order to continue work on the Burnside Pond.

25. All work on the Burnside Pond was completed no later than 2007, and no additional work has occurred on the Burnside Pond since that time.

26. The allegation that the fill work on the Burnside Pond negatively affected drainage in the area is supported by a letter, without supporting data, dated August 12, 2020 from Matthew House, P.E., City Engineer for the City of Shelbyville (the "House Letter").

27. In response to the Notice, Taylor retained Jon Stolz, P.E. of Christopher B. Burke Engineering, LLC to conduct a study of the Ponds and the impact of the fill activities at both the Burnside and E Ponds (the "Stolz Report").

28. The Stolz report concluded that the fill activities only increase the water surface elevation of the Burnside Pond by up to 1.2 feet during a 24-hour, 100-year flood event. The Stolz Report also notes that there have been a couple of improvements to the Burnside Pond which allow for drainage from the north to enter the Burnside Pond at times. The Stolz Report did not conclude that the filling of the Burnside Pond posed any threat to the general welfare of the community.

29. Violations 4-5 relate specifically to the storage of construction debris and other material on the Burnside Property.

30. Subsequent to Taylor's receipt of the Notice, the construction debris and other material, has been substantially cleaned up.

31. As to the E Pond, Violations 6-10 are virtually identical to Violations 1-5.

32. Violations 6-8 repeat the allegations that the work on the E Pond has "negatively impacted the drainage in this area" that "threatens the general welfare of the community at large." The Notice further points out that the E Pond, unlike the Burnside Pond, "provides for the drainage needs of many of the roadways, commercial properties, and neighborhoods to the north and west [of the E Pond]."

33. The House Letter alleges that the filling of the E Pond has caused the water elevation to rise to the point that water "constantly sit[s] in the outlet pipe on the northern side of the pond" causing upstream structures and pipes to consistently hold water.

34. The Stolz Report concluded that the impact of fill on the E Pond is 0.9 feet during a 24-hour, 100-year flood event and that the "entire rainfall" from such an event can be "contained and still have extensive storage available within the [E Pond]." In other words, the effect on the water levels is minimal.

35. The House Letter contained no data or evidence to support either of its conclusions as they relate to, respectively, the Burnside Pond or the E Pond.

36. As it relates to Violations 6-8, Taylor has ceased all fill activities on the E Pond subsequent to receiving the Notice. Taylor will do no further work on the E Pond until this matter is resolved.

37. Taylor reasonably relied on the Toll Letter in conducting the work on the E Pond, and in reliance on the same, did not obtain any additional approvals or permits from the City, as Sumerford reasonably believed that they were not required.

38. As it relates to Violations 9-10, Taylor has substantially cleaned up the debris and material. The remaining material is being stored on the Sumerford Trust Property for future development use.

39. The Director of the Plan Commission, Adam Rude, states in his staff report to the BZA that complaints were made to the Planning Staff regarding drainage issues relating to the Ponds in April and June of 2020.

40. Investigation of these complaints led to the Notice, and this appeal.

41. The current UDO was adopted by the City in 2011 and was updated in 2014, 2017 and most recently, 2018.

42. Taylor served on the Shelbyville Plan Commission for approximately 21 years, and is familiar with the zoning and permitting process in the city of Shelbyville.

43. At the time that Taylor received the Toll Letter, Taylor was unaware of any additional permits or approvals that may be required for conduct of work on the Ponds.

44. Based on his experience in planning and zoning matters for the City, and in reliance on the Toll Letter, Taylor reasonably believed that no additional permits or approvals were required for the work on the Ponds.

45. In 2016, with knowledge of the then existing requirements for approval and permits, Taylor filed for and obtained development plan approval and an ILP from the City for fill work on another pond owned by him.

46. At the time of the adoption of the UDO, the work on the Ponds was a pre-existing non-conforming use.

II. CONCLUSIONS OF LAW

A. Taylor has a vested right in the use of the Properties.

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.* 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").

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.

The UDO defines a non-conforming use as follows:

> "The use of a structure or land…that was legally established and has since been continuously operated, that is no longer permitted by the [UDO] in the zoning district in which it is located, shall be deemed a legal nonconforming use. Legally established includes uses approved by use variance, special exception, *or other special approval* as long as they continue to conform to the terms of approval." *City of Shelbyville Unified Development Ordinance* 8.02(B)(3) (*emphasis added*).

In this case, in August, 1993, Taylor received express permission from the, then Director of the Plan Commission, David Toll, to dump "concrete, dirt and or gravel" on the Properties. The Toll Letter clearly is a "other special approval" as defined in the UDO, which creates the legal right of Taylor to perform the work on the Properties. In reliance on the Toll Letter, Taylor expended substantial amounts of money to, not only, obtain all necessary county, state and federal approvals for his work, but also in contracting for the fill work on the Properties. At no time over the past 27 plus years has he ceased work on the Properties. As Taylor's right to perform the work vested prior to the 2011 enactment of the UDO, it is exempt from the operation of the UDO and cannot be taken away. Any effort of the City to do so would be a violation of Taylor's due process rights and an unreasonably exercise of the City's police powers.

B. <u>The City is estopped from retroactively enforcing the UDO in regards to the Ponds.</u>

As a general rule, the equitable remedy of estoppel does not apply to governmental entities. *Brown County Indiana v. Booe*, 789 NE 2d 1, 7 (Ind. Ct. App. 2003). Regardless, in certain circumstances, estoppel may be appropriate when the party asserting estoppel has detrimentally relied on the governmental entity's affirmative assertion or on its silence where there was a duty to speak up. A party asserting estoppel as a defense must show: 1) lack of knowledge and of the means of knowledge as to the facts in question; 2) reliance on the conduct of the party sought to be estopped; and 3) action based in reliance of such a character as to change that party's position to its prejudice. *Id.*

Booe is analogous to this matter in several important respects. In that case, Mr. Booe purchased land in Brown County and began operating a sawmill on the property, for which he received a special exception in 1976. *Booe*, at 2. While the sawmill operated on Booe's property, members of the plan commission and other local governmental officials utilized the sawmill. Booe later sought to subdivide his property, and obtained approvals, with many modifications requested by the County, of such subdivision. This subdivision contained 3 tracts that were noted as being zoned industrial, despite the fact that the property was not so zoned. A later re-platting also included these notations, which were not corrected by the plan commission. *Id.* at 3. In 1999 – some 23 years after obtaining the special exception for the sawmill, Booe sold a portion of the property owned by him to Breckmeyer. Mr. Breckmeyer received a letter from the Brown County Plan Commission notifying him that the sawmill special exception went with the property, and that Breckmeyer would be allowed to continue using the property for such industrial uses, including custom millwork, and in reliance theron, began operating his business and storing cars and other equipment there. *Id* at 4.

Thereafter, Brown County filed suit against Booe and Breckmeyer, essentially claiming that: (a) the use and operation of the sawmill was in violation of the zoning ordinance and/or the special exception, or had been modified such that Booe was now required to seek an amended special exception since he was now in violation of the ordinance; (b) that Booe, when he subdivided his property, was required to obtain a new special exception; and (c) that Breckmeyer's proposed operation of a commercial millwork operation on the property was in violation of the ordinance. *Booe,* 789 NE2d at 5.

The trial court found, and was affirmed by the Court of Appeals, in relevant part: (1) the 1976 special exception was valid, and Brown County was estopped from revoking it; (2) Booe's

use of the property had not changed since the special exception was granted; (3) Brown County was estopped from challenging Booe's industrial use of the property owned by him; (4) Booe made substantial expenditures in improving his property; (5) Brown County did not meet its burden of proving that Breckmeyer had actually used his property for an industrial use, and therefore no violation of the zoning ordinance existed; and (6) Brown County was estopped from denying Breckmeyer's use of the property for an industrial purpose. *Booe*, 789 NE 2d at 6-7.

In affirming the trial court, the Court of Appeals found that Booe had satisfied all of the requirements for the application of an estoppel defense in that: (1) the county was on notice that Booe's use of the sawmill property was in violation of the zoning ordinance as it had twice been presented with plats noting that the sawmill and other tracts were zoned industrial, making Booe truly unaware that the property was not properly zoned; (2) Booe had relied on the conduct of the plan commission in that not only did the plan commission have more than one occasion to inform him that his property was not zoned property, members of the plan commission and other local government officials had used the sawmill over the years, and never indicated that there was a problem with the use despite its actual knowledge of the use; and (3) in reliance on all of this, Booe invested large amounts of money in improvements to his property throughout the years, resulting in prejudice to him when the County decided that it had a problem with the use. *Id.* at 8-12.

The Court of Appeals further held that, as part of applying the estoppel defense, there needed to be a "public interest" that was served. *Id.*, at 11. The Court held that the public clearly has an interest in the reliability of recorded documents (in this instance, the subdivision plats), and also in relying on the County's affirmative actions over a period of more than 20 years. *Booe*, at 11.

The *Booe* Court also relied heavily on the Indiana Supreme Court's decision in *Equicor Dev. Inc. v. Westfield-Washington Township Plan Comm'n,* 758 NE 2d 34 (Ind. 2001), in case, the Supreme Court found that Equicor had relied on the Plan Commission's silence relating to the required number of parking spaces for a site plan in holding that the Plan Commission was then estopped from using that as a basis for denying Equicor's subdivision plat. *Booe*, at 8; see also, *Equicor*, 758 NE 2d at 40.

As it relates to the instant matter, Taylor obtained express approval from the City for the conduct of fill operations on the Properties. For more than 25 years, this work was consistently done. Taylor invested extensive amounts of time and money to the improving (via filling) the Properties, including but not limited to purchasing fill material when the City and county were not providing it. The City and Shelby County not only contributed fill material, at no cost, throughout Taylor's conduct of fill activities on the Properties, but was and always has been aware that such work was being continuously done throughout that period.

At no time during this period did the City ever notify Taylor that the work that was being done on the Properties required any approvals or permits, or that he was no longer entitled to rely on the Toll Letter. Taylor was well aware of the fact that, since 1993, the permitting and approval requirements had changed, and thus his obtaining proper permits and approvals in 2016 for another property on which he wished to conduct fill operations.

Furthermore, throughout the entirety of the time that Taylor was conducting fill operations on the Properties, many entities – again, including the City and Shelby County – dumped fill material. This material was maintained on the Properties until it could be properly placed in the gravel pits. Again, the City and Shelby County were well aware that this material was being stored on the Properties, and for more than 25 years said nothing relating to this being a problem.

Taylor has clearly met the standard for a defense of estoppel in this matter. As such, the City should be estopped from enforcing the UDO against him.

C. <u>A clear reading of the UDO prohibits the City from requiring an Improvement Location Permit for work that has already been completed.</u>

The work on the Burnside Pond has been completed since at least 2007. The City, in its Notice, is attempting to require Taylor to obtain development plan approval and an ILP for this Property. This requirement is not only illogical, but it serves no rational basis, as the UDO itself states that the purpose of an ILP is:

> "A permit allowing a person to erect, construct, enlarge, alter, repair, move, improve, remove, convert, or demolish any structure; alter the condition of the land; change the use or occupancy of a property; or otherwise cause any change to occur that is subject to the requirements of the Unified Development Ordinance." *City of Shelbyville Unified Development Ordinance, Article 11.*

Statutes are to be interpreted by giving effect to the plain meaning of the language that is being used. *Steuben County v. Family Development, Ltd.,* 793 NE 2d 693, 701 (Ind. Ct. App. 2001). The plan meaning of the language that is used in the definition of an Improvement Location Permit clearly indicates the intent that it applies to someone who wants to do something in the future – "allowing a person to erect, construct…improve…alter", etc. The *Family Development* case states that: "it is well established that a municipality may require that permits be obtained…as a *prerequisite* to the erection of buildings." *Family Development*, at 701 (*emphasis added*). Clearly, by referring to future construction or improvements, the City intended that ILPs be required as a *prerequisite* to any such improvements, and not once those improvements have been completed.

Accordingly, the City cannot not, 27 years after the fact and more than 13 years after the completion of work, require that an ILP be obtained for the Burnside Pond. Requiring an ILP at this point serves no rational basis, and would frankly, be an arbitrary and capricious action on the

part of the City. *Equicor Development, Inc. v. Westfield-Washington Tp. Plan Com'n,* 758 NE 2d at 37.

III. CONCLUSION

For the reasons stated above, the Notice of Violations against Burnside LLC and Sumerford Land Trust I are hereby dismissed.

Dated: _____, 2021

CITY OF SHELBYVILLE BOARD OF ZONING APPEALS

By:_____

Printed:_____

Title:_____

4838-3529-2121, v. 2