

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)

**BOARD’S FINDINGS OF RELEVANT FACTS
AND CONCLUSIONS OF LAW FOR ADMINISTRATIVE APPEAL**

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 Summerford Land Trust I (collectively “Petitioner”) 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.

Based on the record and the evidence presented at the hearing, the Board now finds and concludes as follows:

FINDINGS OF RELEVANT FACTS

Introduction

1. Sometime in April of 2020, an individual or individuals associated with Arbor Homes complained to Adam Rude, Director of Planning and Building for the City of Shelbyville (“Director”) of possible violations of the City’s drainage standards with respect to Petitioner’s use of 34.7 acres (+/-), located directly west of 1011 N Riley Highway, Shelbyville Indiana, 46176, bearing parcel Tax ID: 73-07-32-100-004.000-002 (“**Burnside Pond**”).
2. Such complaint prompted an investigation by the Director in May of 2020.
3. The Director’s investigation revealed the absence of any permits for the activities taking place at the **Burnside Pond** and, therefore, potential violations of the Uniform Development Ordinance (“UDO”) which the City adopted in 2012.
4. In June of 2020, an individual or individuals associated with Zaxby’s Restaurant complained of possible violations of the City’s drainage standards with respect to the Petitioner’s use of 10.7 acres (+/-), located at 1568 N Riley Highway, Shelbyville

Indiana, 46176, bearing parcel Tax IDs: 73-07-29-300-080.000-002 & 73-07-29-300-097.000-002, and generally illustrated in Exhibit B to the notice (“**Northern Pond**” also sometimes referenced as the “**E Shaped Ponds**”).

5. The complaint prompted another investigation by the Director in June or July of 2020.
6. The Director’s investigation revealed the absence of any permits for the activities taking place on the **Northern Pond** and, therefore, potential violations of the UDO.
7. Subsequent to the investigations, the Director issued a Notice of Zoning Violation to the Petitioner on August 18, 2020.
8. In response to the Notice, the Petitioner, thru its agent Mr. W. Taylor Sumerford, Jr., met the Director in person to discuss the notice.
9. Additionally, one of Mr. Sumerford’s attorney, Mr. Robert Adams, also contacted the Director about the notice to inquire about specific statements in it such as the legal authority for the timeline for an appeal.
10. The Petitioner, by and thru a letter authored by Attorney Donald J. Smith, appealed the notice on September 17, 2020, on the prescribed forms provided to the Petitioner by the Director.

Director’s Relevant Evidence re the Burnside Pond

11. Exhibit A to the notice illustrated the **Burnside Pond**.
12. The Director’s notice and hearing testimony laid out the historical use of the **Burnside Pond**, in pertinent part, as follows:
 - a. Since approximately 1993, the Petitioner performed certain activities on the property without ever applying for a permit or site development plan.
 - b. Those activities included filling the pond with construction debris and other materials.
 - c. Those activities also included moving dirt to create ditches and berms to block and direct water that naturally flows across the property.
 - d. Those activities also included stock piling construction debris (mostly concrete pipes and crushed concrete from other construction sites) on the property.
 - e. The Petitioner allowed waste to accumulate on the property.

- f. Using aerial photography from 1978, 1998, 2003, 2005, 2007, 2012, 2015, 2017, and 2020, the Director opined that that these activities greatly altered the **Burnside Pond**, mostly by filling it in. (See Exhibit C for aerial photographs).

Director's Relevant Evidence re the Northern Pond

13. Exhibit B to the notice illustrated the **Northern Pond**.
14. The Director's notice and hearing testimony laid out the historical use of the **Northern Pond**, in pertinent part, as follows:
 - a. Since approximately 2007, the Petitioner performed certain activities on the property without a permit or site development plan.
 - b. Those activities included filling the pond with construction debris and other materials.
 - c. Those activities also included stock piling construction debris (mostly concrete pipes and crushed concrete from other construction sites) on the property.
 - d. The Petitioner allowed waste to accumulate on the property.
 - e. Using aerial photography from 2005, 2007, 2012, 2015, 2017, and 2020, the Director opined that that these activities greatly altered the Northern Pond over the years, mostly by filling it on. (See Exhibit F for aerial photographs).

Director's Relevant Evidence Common to Both Ponds

15. Both ponds were located within the corporate limits of the City of Shelbyville.
16. Both ponds were located within the Planning Jurisdiction of the City of Shelbyville Plan Commission.
17. Both ponds were zoned BH - Business Highway according to the Official Zoning Map of the City of Shelbyville.
18. The Petitioner never applied for permits or site plans of any kind with respect to the intermittent activities that took place at either pond.

Violations Identified by the Director

19. The notice identified the following violations of the UDO with respect to both properties:
 - a. **Zoning Violations #1 & 6: UDO 9.01, 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.

b. **Zoning Violations #2 & 7: UDO 9.02, 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

c. **Zoning Violations #3 & 8: UDO 9.05: B. Applicability:** Site Development Plan approval shall be required for all developments for which an Improvement Location Permit is required by this Ordinance and that are located in any of the following zoning districts . . . BH – Business Highway.

d. **Zoning Violations #4 & 9: UDO 5.16 O. Waste/Debris:** 1. Waste Stored Outdoors: No waste materials such as, but not limited to, garbage, rubbish, household appliances, inoperable vehicles, furniture designed for interior use, gasoline, oil, flammables, soils, tars, chemicals, greases, dead plant material, noxious weeds, industrial or agricultural waste, or any other material of such nature, quantity, obnoxiousness, toxicity, or temperature that contaminates, pollutes, or harms water bodies or groundwater, provides a habitat for disease-carrying animals and insects, or represents a public safety hazard shall be deposited, located, stored, or discharged on any lot;

e. **Zoning Violations #5 & 10: UDO 5.44 OS-01: 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.

Petitioner's Relevant Evidence

20. The Petitioner offered no evidence disputing that the activities described above in fact took place at the **Burnside Pond** and the **Northern Pond**.

21. The Petitioner's administrative appeal letter ("Appeal Letter") stated that this "appeal is based in large part on the assertion by the director (sic) that any improvements that have been done have caused drainage issues."
22. The Appeal Letter stated that "[r]elating to the **Burnside Pond**, there has never been a problem with drainage across that property, specifically coming from the fields to the north."
23. The Appeal Letter stated that "[t]o the extent the Notice alleges any improper work on the **Burnside Pond**, be advised that there has not been any work done on this property since at least 2007" thereby implying that no need existed for a permit or site plan because no activities existed by the time of the UDO's application in 2012.
24. Mr. Summerford's affidavit indicated that the "filling activit[ies]" at the **Burnside Pond** last occurred about eighteen (18) years ago. (See the Affidavit of Mr. W. Taylor Summerford, Jr. at paragraph 13).
25. The Appeal Letter stated that "[r]elating to the [**Northern**] **Pond**, as mentioned above, [Petitioner] has applied for the relevant permits to allow it to continue the work it has done on this [**Northern**] **Pond**."
26. After receiving questions from members of the BZA, the Petitioner acknowledged that it never filed any permit applications with respect to the **Northern Pond**.
27. The Appeal Letter stated that, "[a]s it relates to the **Northern Pond**, the water level has not risen to the point that the outlet is underwater, or not able to drain properly."
28. The Petitioner submitted to the BZA a drainage study authored by Jon Stolz, P.E., dated December 7, 2020, as evidence that no drainage issues exist as a result of the activities that took place on the Petitioner's properties. (See Drainage Study).
29. The Petitioner also tendered an Affidavit of Robert Adams dated January 12, 2021, in which Mr. Adams indicated that potential flooding problems, unrelated to the Petitioner's activities, existed in the area near the Petitioner's properties and that problems will only arise with respect to the Petitioner's properties if property north of the Petitioner's property is developed in the future. (See Affidavit of Robert Adams at paragraph 5).
30. By the time of the hearing, the Petitioner indicated that it decided against seeking any permit or site plan approvals for either the **Burnside Pond** or the **Northern Pond**

because the City approved those activities in 1993. (See the Affidavit of Mr. W. Taylor Summerford, Jr. at paragraphs 4, 5 and 18.)

31. The Petitioner claimed that the former director (David W. Toll) authorized “the filling of both pits” as memorialized by a letter dated August 4, 1993, that Mr. Toll sent to the Mr. Summerford.
32. The Petitioner further indicated that the Petitioner plans to construct a bridge or bridges across the **Northern Pond**. (See the Affidavit of Mr. W. Taylor Summerford, Jr. at paragraphs 14-16).
33. The Appeal Letter stated that “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 (sic), it is anticipated that it will be shortly.”
34. The Petitioner indicated at the hearing that it “substantially complied’ with the request to cure Zoning Violations 4, 5, 9 and 10 because it removed the construction debris being stored outdoors on both properties.
35. After the Director agreed that the Petitioner removed the waste and construction debris on the **Burnside Pond** relative to violations #4 and 5, the Director indicated that no action had been taken by the Petitioner to remove the construction debris being stored on the **Northern Pond** relative to violations #9 and 10.
36. The Petitioner then clarified its earlier claim by indicating that it held off on removing the waste and outdoor storage due to the difficulty in obtaining equipment to remove it and that it hoped a successful appeal might eliminate the need for doing so.
37. Any other additional relevant facts will be addressed as needed in the Conclusions of Law.
38. 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.

CONCLUSIONS OF LAW AND DECISION

39. The BZA has jurisdiction over this appeal pursuant to Indiana Code § 36-7-4-918.1 and UDO 9.04 and 10.11C.

40. Indiana Code § 36-7-4-919(a) provided in pertinent part that an “appeal filed with the board of zoning appeals must specify the grounds of the appeal and must be filed within such time and in such form as may be prescribed by the board of zoning appeals by rule.”
41. Indiana Code § 36-7-4-919(d) provided that the BZA “may reverse, affirm, or modify the order, requirement, decision, or determination appealed from.”
42. The Petitioner bore the burden of establishing the invalidity of the Director’s assertion of certain zoning violations as specified in the Director’s notice. *Bd. of Pub. Works & Safety of City of Hammond v. Alcantar*, 47 N.E.3d 1276, 1282 (Ind. Ct. App. 2015)
43. As stated in the timely filed Appeal Letter, the Petitioner appealed the portion of the Director’s notice which indicated that the activities on the **Burnside Pond** and the **Northern Pond** “have negatively impacted the drainage in this area.”
44. The Appeal Letter raised no other issues for appeal notwithstanding the fact that the Director’s notice, while it mentioned drainage issues, never identified any zoning violations related to the UDO sections or provisions concerning drainage.¹
45. Together with the Affidavit of Mr. Adams, the Petitioner offered an engineering study for the purpose of proving that the Petitioner’s activities caused no drainage problems in the area.
46. The Petitioner’s focus on the existence or non-existence of drainage issues misses the point of the Director’s notice because the specified zoning violations arose from the undisputed alterations to the Petitioner’s properties, the accumulation of waste on the Petitioner’s properties, and the outdoor storage of construction debris.²
47. The Petitioner’s focus on the drainage issues overlooks the fact that the provisions of the UDO identified in the notice exist not only to prevent immediate harm to the public, but also seek to avoid harm in the future by creating a record of the activities at those properties so that, if someone makes an application to erect a building or construct a road on the areas subject to the fill for instance, there will be a record of those fill activities

¹ The Director’s notice never identified violations of **5.16 H. Surface Water, I. Drainage Swales, J. Regulated Drains, K. Alterations to Bodies of Water, or M. Environmental Quality** of the UDO.

² Understandably, the Director therefore presented no evidence to show that the Petitioners’ activities caused drainage problems. Moreover, such analysis falls under the purview of the technical review committee during the site plan approval process.

and an informed decision can be made as to the safety and propriety of the proposed improvements.

48. Overturning the Director's determination on the basis that the Petitioner's activities caused no harm would effectively render impotent the pertinent sections of the UDO if property owners could, after the fact, simply argue that its activities failed to cause any harm.
49. With respect to the zoning violations identified in the Director's notice, the Director presented mostly uncontradicted and reliable evidence that the Petitioner engaged in activities that altered the properties over several decades without any permit or site plan approvals, allowed the accumulation of waste and stockpiled construction debris in the outdoors.
50. The Petitioner conceded that it never applied for permits or site plans, and even indicated in the Appeal Letter that it planned to file the necessary applications very soon.
51. At the hearing however, the Petitioner asserted for the first time that the Petitioner never needed to apply for an improvement location permit or a site plan based on either a defense of nonconforming use or equitable estoppel.
52. The Director objected to the presentation of evidence the Petitioner offered to support nonconforming use or equitable estoppel defenses on the basis that the Appeal Letter never specified those defenses as the grounds for the appeal.
53. The Director argued that I.C. § 36-7-4-919(a) required that the Petitioner specifically identify the grounds for appeal when it stated that the Petitioner "must specify the grounds of the appeal" on the appeal form prescribed by the BZA's rules.
54. The Director further argued that any evidence offered to support any grounds for the appeal that the Petitioner failed to "specify" should be considered irrelevant and therefore beyond the BZA's consideration.
55. The Director further argued that the appeal hearing is limited to a presentation and consideration of relevant evidence. See I.C. § 36-7-4-920(f); See also *Robertson v. Bd. of Zoning Appeals, Town of Chesterton*, 699 N.E.2d 310, 315 (Ind. Ct. App. 1998)("any interested person may appear and present relevant evidence.")

56. The BZA agrees with the Director that the Petitioner specified the grounds of the appeal as the Director's determination that the Petitioner's activities caused drainage issues to the exclusion of any other grounds for an appeal.
57. Thus, the BZA must disregard the evidence offered by the Petitioner in support of the Petitioner's contention that the use may have constituted a nonconforming use or that the Director is equitably estopped from enforcing the UDO based on the 1993 communications with Mr. Toll.
58. Nevertheless, even if the BZA considered the Petitioner's 1993 communications with Mr. Toll as well as the various submissions to state and federal authorities to support the Petitioner's argument, the Petitioner failed to prove a nonconforming use or an equitable estoppel defense.

No Proof of a Nonconforming Use

59. A nonconforming use has been construed to constitute a use of property that lawfully existed prior to the enactment of a zoning ordinance that continues after the ordinance's effective date even though it does not comply with the ordinance's restrictions. *Cracker Barrel Old Country Store, Inc. v. Town of Plainfield ex rel. Plainfield Plan Comm'n*, 848 N.E.2d 285, 290 (Ind. Ct. App. 2006)
60. The policy of zoning ordinances is to secure the gradual or eventual elimination of nonconforming uses and to restrict or diminish, rather than increase, such uses. *Id.*
61. Nonconforming uses are not generally favored because they detract from attainment of that purpose. *Id.* at 291.
62. A person who claims a legal nonconforming use has the burden of establishing his claim. *Bd. of Pub. Works & Safety of City of Hammond v. Alcantar*, 47 N.E.3d 1276, 1282 (Ind. Ct. App. 2015).
63. The Petitioner argued that it never needed to apply for a permit or site plan because Mr. Toll's conversation with Mr. Summerford in 1993 as well as the letter memorializing the conversation authorized the Petitioner's filling activities on both properties.
64. The Petitioner offered evidence of communications between the Petitioner and Mr. Toll in 1993 as well as various submissions to state and federal authorities to support such contention.

65. Mr. Toll's letter referenced certain activities such as the "dumping of concrete, dirt and or gravel on your property", but neither the letter nor any other written evidence offered by the Petitioner described in any way the scope of the filling activities that Mr. Toll discussed with the Petitioner. Was it one acre of fill materials or two acres or the entire pond?
66. Neither Mr. Toll's letter nor any other written documentation offered by the Petitioner reveals any time period associated with the filling activities – a year, two years or five years, let alone a start date or a finish date.
67. While activities seem to have commenced on the **Burnside Property** in 1993, nothing occurred on the **Northern Pond** for more than ten years after the date of Mr. Toll's letter which highly suggested that the communications with Mr. Toll had nothing to do with the **Northern Pond**.
68. Due to the fact that the Petitioner failed to offer as evidence many of the documents referenced in the various submissions to state and federal authorities, it is unclear what plans the state and federal authorities considered in those submissions or if those submissions even apply to both properties, or just one of them.
69. At best, all the BZA can determine from Mr. Toll's letter is that Mr. Toll may have simply authorized filling activities that occurred in 1993 or 1994 with respect to the **Burnside Pond**.
70. To the extent the Petitioner offered evidence to suggest that the City benefitted from the activities that occurred at the **Burnside Pond**, the Petitioner failed to describe when and how the City actively participated in the filling activities at the time of the sanitary sewer work referenced in Mr. Summerford's affidavit or any other work for that matter.
71. In response to the Petitioner's statement that the City benefitted from such filling activities at the **Burnside Pond**, the Director indicated that the City never performs its own construction work. Rather, the City lets the work to contractors who would then be responsible for the lawful placement of any construction debris or materials which is not something the City otherwise retains control over.
72. Moreover, the UDO's nonconforming use provisions defeated the Petitioner's contention.
73. The UDO stated at **8.06 C. 1. Loss of Legal Nonconfirming Use Status** the following:

Abandonment of Use: If a legal nonconforming use is abandoned or is discontinued for one (1) year or more, except when a government action impedes access to the premises, it shall lose its legal nonconforming status. Any subsequent use shall conform to the provisions of the current Unified Development Ordinance.

74. The aerial photography offered by the Director highly suggested that the Petitioner performed intermittent and sporadic fill activities on both properties over a period of several decades well beyond 2007.
75. Consequently, even if Petitioner's intermittent and sporadic filling activities constituted a nonconforming use, the aerial photographs reliably show that one year periods of abandonment intervened to end the nonconforming use after 2012.

No Proof of Equitable Estoppel

76. In general, equitable estoppel does not apply to a governmental entity. *Cablevision of Chicago v. Colby Cable Corp.*, 417 N.E.2d 348, 354 (Ind.Ct.App.1981). If estoppel were applied against a governmental official, "a dishonest, incompetent or negligent public official could wreck the interests of the public." *Id.*
77. As a threshold matter, equitable estoppel will only be permitted when "the public interest" will be threatened if the reviewing authority affirms the governmental action. *Id.* at 357.
78. The sole interest here belongs to the Petitioner, not the public. Only the Petitioner will profit from the non-application of the UDO to the Petitioner's use of the properties.
79. The public interest would be harmed if the Petitioner were permitted to ignore the provisions of the UDO governing land alterations, accumulation of waste and outdoor storage as doing so would avoid the public hearing that takes place during the site development plan review and the record keeping that occurs as a result of the application review process.
80. Even if the Petitioner could overcome the threshold requirement of harm to the public interest, the Petitioner cannot meet the actual elements of the equitable estoppel defense.
81. More specifically, "estoppel may be appropriate where 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." *Brown Cty. Indiana v. Booe*, 789 N.E.2d 1, 7 (Ind. Ct. App. 2003)

82. A party claiming equitable estoppel must show its “(1) lack of knowledge and of the means of knowledge as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) action based thereon of such a character as to change his position prejudicially.” *Story Bed & Breakfast, LLP v. Brown Cty. Area Plan Comm'n*, 819 N.E.2d 55, 67 (Ind. 2004)
83. Petitioner cannot overcome the very first element of equitable estoppel. All property owners are charged with knowledge of ordinances that affect their property. *Story Bed & Breakfast, LLP v. Brown Cty. Area Plan Comm'n*, 819 N.E.2d 55, 64 (Ind. 2004) Rarely is equitable estoppel permissible “in those cases where the party claiming to have been ignorant of the facts had access to the correct information.” *Id.*
84. The Petitioner knew very well the existence of ordinances governing land use as well as the specific improvement location provision contained in the UDO.
85. Mr. Summerford applied for and obtained an improvement location permit to “fill an existing gravel pit on property” to the north of the **Northern Pond** in 2016.
86. Mr. Summerford possessed extensive experience in highway and construction projects, including drainage matters, as a professional engineer, registered land surveyor and the elected County Surveyor for decades, not to mention his position as a member of the County Plan Commission.
87. The Petitioner touted such experience when it explained the extent of Mr. Summerford’s efforts to obtain the various approvals needed from the state and federal authorities before the filling activities ever took place.
88. Petitioner also cannot overcome the second element of equitable estoppel. The government “will not be estopped in the absence of clear evidence that its agents made representations upon which the party asserting estoppel relied.” *Id.*
89. As described above, the 1993 communications involving Mr. Toll failed to support the scope of the activities that have taken place at the properties over the years.
90. Moreover, Mr. Toll’s letter neither authorized the movement of dirt for the construction of ditches and berms on the **Burnside Pond** nor did it authorize the building of a bridge or bridges on the **Northern Pond**.

91. As part of the estoppel defense, the Petitioner also introduced evidence that the Director has ignored potential violations occurring at other properties similarly situated to the Petitioner.
92. The Petitioner failed to realize that the mere failure to bring enforcement actions against others who may be violating the zoning ordinance does not excuse Petitioner's violations or bar the Director from enforcing the UDO against the Petitioner. *Metro. Dev. Comm'n of Marion Cty. v. Schroeder*, 727 N.E.2d 742, 756 (Ind. Ct. App. 2000).
93. As properly noted in *Hameetman v. City of Chicago*, 776 F.2d 636 (7th Cir.1985), "[t]he Constitution does not require states to enforce their laws (or cities their ordinances) with Prussian thoroughness as the price of being allowed to enforce them at all. Otherwise few speeders would have to pay traffic tickets." 776 F.2d at 641; See also *S & S Enterprises, Inc. v. Marion Cty. Bd. of Zoning Appeals*, 788 N.E.2d 485, 494 (Ind. Ct. App. 2003)(even though the BZA previously granted the special exception to an applicant, an extension of the special exception is not mandated.)
94. For the reasons set forth above, the BZA affirms the Director's notice with respect to the specified ordinance violations except for violations #4 and #5 which the parties agreed that the Petitioner cured within the time frame identified in the notice.

Entered this _____ day of _____, 2021.

Signature

Printed

Title

Attest:

Signature

Printed



Title