

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Harrisburg Gardens, Inc., :
Appellant :
 :
v. : No. 1273 C.D. 2020
 : SUBMITTED: September 20, 2021
Susquehanna Township Zoning :
Hearing Board :

BEFORE: HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE LEADBETTER**

FILED: October 14, 2021

Harrisburg Gardens, Inc. appeals from an order of the Court of Common Pleas of Dauphin County affirming the decision of the Susquehanna Township Zoning Hearing Board (ZHB) to the effect that Harrisburg Gardens failed to establish that the present use of its property constituted a continuation of the preexisting valid nonconforming use as a simple nursery enjoyed by its predecessors. In addition, in the absence of either an application for a special exception asserting an expansion or extension of that use or evidence in support thereof, the trial court also affirmed the ZHB's decision that Harrisburg Gardens failed to establish that its use constituted a natural expansion. The present case is related to *Harrisburg Gardens, Inc. v. Susquehanna Township Zoning Hearing Board*, 981 A.2d 405 (Pa. Cmwlth. 2009) (*Harrisburg Gardens I*), where this Court affirmed earlier decisions below concluding that Harrisburg Gardens' use of its property was neither a valid nonconforming use nor a natural expansion of a preexisting valid nonconforming

use as a simple nursery enjoyed by its predecessors. Now the issue has arisen once again, and once again we affirm.

Approximately seven acres in size, Harrisburg Gardens is located at 811 South Progress Avenue, Susquehanna Township, in an R-2 medium-density residential zoning district. (Apr. 14, 2020, ZHB Decision, Findings of Fact “F.F.” Nos. 4 and 9.) In 2000, current owner Brent M. Miles purchased the property from Ned Montgomery. (*Id.*, Nos. 6 and 7.) Previously, Montgomery purchased the property from Walter-Nissley-Walter (WNW). (*Id.*, Nos. 7 and 8.) When Montgomery and, before him, WNW owned the property, “the nonconforming use . . . was a simple nursery, selling flowers, plants and trees, along with a small percentage of stone and mulch and with at least 90[%] of sales being trees, shrubs, and plants.” (*Id.* at 6) (citing *Harrisburg Gardens I*, 981 A.2d at 412-13). At that time, “the lack of noise, dust, dirt, vibrations, and large truck traffic originating from the subject property was consistent with the primary use of subject property as a simple nursery.” (*Id.*, No. 12.) Once Miles purchased the property, however, all those aspects of the business “were far greater than what originated from the subject property when [it] was being used by [Miles’ predecessors].” (*Id.*, No. 13.)

As had initiated the previous litigation, once again, “in the summer of 2019, nearby residents complained to the Township about increased dust, noise, and other activities generated by [Harrisburg Gardens].” (*Id.* at 2.) Following on-site inspections, the Susquehanna Township Zoning Officer issued a notice of violation to Harrisburg Gardens for an improper expansion and change of nonconforming use in violation of Part 22, Section 2204.2 of the Susquehanna Township Zoning Ordinance providing that the ZHB shall approve any extension of a nonconforming use as a special exception subject to enumerated standards. (Zoning Ordinance §

2204.2.A-D.) Specifically, the Zoning Officer concluded that “the property is again being improperly used in violation of the Zoning Ordinance for very substantial hardscaping uses, including with the use of many large bins of rocks and stones, as well as a very substantially expanded mulch sales operation, and a substantially greater volume of heavy truck traffic at the site.” (July 19, 2019, Zoning Officer Determination at 1; Reproduced Record “R.R.” at 355.) In addition, he determined that “[t]he improper uses are creating a substantial noise and dust nuisance in the residential neighborhood.” (*Id.*) The Zoning Officer cited the ZHB’s March 2, 2007 decision and the affirmance of that decision by the respective courts as reference points for his determination that Harrisburg Gardens’ use of its property exceeded the preexisting valid nonconforming use, and that Harrisburg Gardens was bound by those decisions.

Harrisburg Gardens appealed to the ZHB. Notwithstanding the ZHB’s determination that Harrisburg Gardens was collaterally estopped from addressing previously determined issues, the ZHB permitted Harrisburg Gardens over the Township’s objection to introduce evidence to create a record. (Apr. 14, 2020, ZHB Decision at 2-3.) Following hearings and oral argument, the ZHB denied Harrisburg Gardens’ appeal from the Zoning Officer’s determination. Without taking additional evidence, the trial court affirmed. Harrisburg Gardens’ appeal to this Court followed.

On appeal, Harrisburg Gardens presents the following issues:

I. Whether the [trial court] erred by affirming the decision of the [ZHB] when even under the doctrine of natural expansion, Harrisburg Gardens’ operation has not expanded or enlarged its legal, non[]conforming use existing on the property.

1. Whether Harrisburg Gardens' operation violated Part 22, Section 2204.2 of the [Zoning Ordinance] regarding the improper extension and change of a non[]conforming use when its use of the property actually decreased from [] not only the prior use but also its own use?
2. Whether the [ZHB and the trial court] abused their discretion by not allowing and giving property [sic] weight to the unbiased testimony of any of Harrisburg Gardens' witnesses?
3. Whether the doctrine of collateral estoppel should be applied in this case when the issue before the [ZHB] today is not "identical" to the issue before [it] in 2006?

(Harrisburg Gardens' Br. at 3.)

Harrisburg Gardens' statement of issues is misleading in that it is premised on its own assertions that the preexisting valid nonconforming use before 2000 was not a simple nursery and that the predecessor owners used the property for something other than a simple nursery. However, Harrisburg Gardens is bound by the previously adjudicated final determination that a simple nursery was the preexisting valid nonconforming use of the property. The passage of time between *Harrisburg Gardens I* and the instant appeal does not negate the fact that the nature of the prior nonconforming use was previously finally adjudicated such that the doctrine of collateral estoppel applies.¹ Accordingly, to the extent that Harrisburg

¹ The purpose of collateral estoppel is to prevent relitigation of an issue in a later action. *Bortz v. Workmen's Comp. Appeal Bd. (Reznor Div. of FL Indus.)*, 683 A.2d 259 (Pa. 1996). For the doctrine to apply, it must be shown that: (1) the issue decided in the prior case is identical to the one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party or in privity with a party in the prior case and had a full and fair opportunity to litigate the issue; and (4) the determination in the prior proceeding was essential to the judgment. *C.D.G., Inc. v. Workers' Comp. Appeal Bd. (McAllister)*, 702 A.2d 873 (Pa. Cmwlt. 1997).

Gardens proffers that something other than a simple nursery was the preexisting valid nonconforming use, we conclude that it is collaterally estopped from doing so.

Moreover, as the trial court concluded, even if the ZHB erred in determining that the doctrine of collateral estoppel negated most of Harrisburg Gardens' evidence, "such error was rendered moot in light of the [ZHB's] decision" that the Township met its burden even without consideration of the doctrine. (Nov. 16, 2020, Trial Court Op. at 2.) Notably, the ZHB rejected the testimony of Harrisburg Gardens' witnesses and accepted the testimony of the objecting neighbors in support of the determination that Harrisburg Gardens improperly extended and changed the nonconforming use of the property in violation of the Zoning Ordinance. Consequently, Harrisburg Gardens' argument that the ZHB abused its discretion in not affording more weight to its witnesses constitutes an attack on the weight and credibility that the ZHB afforded the evidence. It is within the purview of the ZHB to consider the evidence, to determine credibility and weight, and to resolve conflicting evidence. *Pohlig Builders, LLC v. Zoning Hearing Bd. of Schuylkill Twp.*, 25 A.3d 1260, 1266 (Pa. Cmwlth. 2011).

As summarized by the ZHB, the relevant testimony from neighbors Carol Peters, Bo Vu, Esther Beck, and Edward S. Beck provides:

In the 2019 proceeding, Carol Peters testified that between the early 2000's and 2006 [the] subject property became more commercial. There were more trucks. A lot of noise and a lot of dust. ([Dec. 4, 2019, ZHB Hearing, Notes of Testimony "N.T."] 72). Comparing 2019 (the present time) with 2006, [she] testified there is a lot more going on. As far as noise, there is a lot of big banging at times. In the summertime, this noise can happen almost every day. There is noise from chainsaws and trucks. More noise in 2019 as compared to 2006. (N.T. 73-75). More noise in 2019 as compared with the early 2000's.

(N.T. 75, 76). Over the years, the noise of stones dumping out of trucks has increased. (N.T. 79, 20). There are strong smells Unpleasant odors. Perhaps the smell of mulch. (N.T. 77). Clouds of dust . . . accumulate both outside and inside her house. (N.T. 78, 79). The dust problem has not gotten better since mid-2006. (N.T. 79).^[2]

In the current proceeding (as [opposed to] the 2006 proceeding), Bo Vu testified that after the year 2000 (N.T. 94) when Harrisburg Gardens, Inc. began occupying [the] subject property, the use . . . gradually . . . encompassed more trucking and more noises. (N.T. 95). In the spring and summer of 2019, all day long, [he] experienced noise and dust and banging (N.T. 96). He heard metal grinding noises and chainsaws. (N.T. 96). The dust . . . was very bad. (N.T. 97). Bad enough to coat his car with dust. (N.T. 97). At one point in his testimony he described what he sometimes experienced as a dust cloud. (N.T. 98). Dirt would not only get on his car, but also on a table inside his house where he sits to drink coffee. (N.T. 98). The smells . . . are very bad in the spring. (N.T. 99). Banging . . . can be heard inside his house. (N.T. 101). The noise was so loud it prevented [him] from sleeping in late. (N.T. 101).^[3]

In the 2019 case, Esther Beck testified that the noises and smells . . . from 2000 until mid-2006 were getting worse all the time. (N.T. 128). [She] testified that at the time of the 2019 hearing . . . the noise and pounding . . . [was] incredible. (N.T. 129). She hears back-up alarms from trucks. (N.T. 131). In the spring and summer time, she can smell the mulch in her house which comes in through the ventilation system. (N.T. 129). The noise is worse now than in 2006. (N.T. 130). She can smell the dust coming from subject property; [it] covers her backyard furniture; and she has to clean [it] off of her

² (Ms. Peters' Testimony: N.T. at 66-90; R.R. at 424-30.)

³ (Mr. Vu's Testimony: N.T. at 91-110; R.R. at 430-35.)

backyard furniture. (N.T. 132). There is more dust now than in year 2003. (N.T. 132).^[4]

Edward S. Beck, husband of Esther Beck, . . . testified that when the business changed hands (presumably from Montgomery to Harrisburg Gardens, Inc.), the business went in a different direction. He started hearing noise, which has grown steadily since the business changed hands. (N.T. 143). Mr. Beck also testified that the dust from subject property has gotten into [their] HVAC system. (N.T. 145).^[5]

(Apr. 14, 2020, ZHB Decision at 5) (footnotes added).

As for the applicability of the doctrine of natural expansion,⁶ we first note that an applicant must apply for a special exception pursuant to Part 22, Section 2204.12 of the Zoning Ordinance to expand a nonconforming use in the Township. Harrisburg Gardens did not do so. In addition, it is unclear whether it preserved an

⁴ (Mrs. Beck's Testimony: N.T. at 120-39; R.R. at 438-42.)

⁵ (Mr. Beck's Testimony: N.T. at 140-45; R.R. at 443-44.)

⁶ To qualify as a continuation of an existing nonconforming use, the proposed use must be sufficiently similar to the nonconforming use so as not to constitute a new or different use. *Limley v. Zoning Hearing Bd. of Port Vue Borough*, 625 A.2d 54 (Pa. 1993). However, the proposed use need not be identical. *Id.* In ascertaining

whether a proposed use bears adequate similarity to an existing nonconforming use courts must give effect to the doctrine of natural expansion, which permits a landowner to develop or expand a nonconforming business as a matter of right The doctrine of natural expansion supports increased intensity in a property's utilization, e.g., an increase in the number of users or an increase in the frequency of a use.

Harrisburg Gardens I, 981 A.2d at 410 [quoting *Lench v. Zoning Bd. of Adjustment of City of Pittsburgh*, 852 A.2d 442, 444 (Pa. Cmwlth. 2004)].

issue regarding any alleged natural expansion.⁷ Consequently, any arguments pertaining to the doctrine of natural expansion are not appropriate at this time.

Presumably, Harrisburg Gardens did not apply for a special exception to expand the preexisting valid nonconforming use of the property because it did not wish to concede that such use was a simple nursery. As the ZHB stated: “Harrisburg Gardens, Inc. introduced no evidence to suggest that [its] use of [the] subject property was an expansion or extension of the use of [the] subject property as a simple nursery. Such evidence would also have contradicted the theory of [its]

⁷ The notice of appeal reflects only that Harrisburg Gardens wished to relitigate the determination of the preexisting valid nonconforming use of the property as a simple nursery. Harrisburg Gardens alleged:

10. The [ZHB] erred in [F.F. No.] 12 when it found that when the subject property was owned by Montgomery and [WNW], the lack of noise, dust, dirt, vibrations and large truck traffic originating from the subject property was consistent with the primary use of the subject property.

11. The [ZHB] erred in [F.F. No.] 13 when it found that when Harrisburg Gardens began using the subject property for its business, the noise, dust, dirt, vibrations, and large truck traffic originating from the subject property were far greater than what originated from the subject property when it was being used by Montgomery and WNW.

12. The [ZHB] erred by holding, as a matter of law, that without consideration of the doctrine of collateral estoppel, [the] Township has met its burden in establishing that the July 22, 2019, determination of [the Zoning Officer] is meritorious and the appeal of the determination should be denied.

13. The [ZHB] erred by holding that under the doctrine of collateral estoppel [sic], Harrisburg Gardens is precluded from successfully arguing that prior to . . . 2000 . . . , the subject property was being used in any manner other than a simply [sic] nursery described by the Commonwealth Court.

(May 12, 2020, Notice of Appeal at ¶¶ 10-13; R.R. at 519-20.)

case.” (Apr. 14, 2020, ZHB Decision at 7.) Instead, as a new starting point, it asserted a more intense use of the property as its own legal nonconforming use and alleged that its use decreased from both the prior use *and* its own legal nonconforming use. However, Harrisburg Gardens cannot rewrite history by substituting its own alleged legal nonconforming use for the adjudicated preexisting valid nonconforming use.

Accordingly, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge Emerita

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ORDER

AND NOW, this 14th day of October, 2021, the order of the Court of Common Pleas of Dauphin County is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge Emerita