

BEFORE THE ZONING HEARING BOARD

THORNBURY TOWNSHIP

DELAWARE COUNTY, PENNSYLVANIA

CONSOLIDATED OPINION OF THE ZONING HEARING BOARD

Re: Appeal 4-2017, Appeal 5-2017, Appeal 6-2017

Appeal 4-2017 – Appeal of Andover Homeowner’s Association, Inc. from the issuance by the Township Manager and Zoning Officer of Thornbury Township of a Zoning Permit to the dominant tenant Sunoco Logistics for the construction of a five-foot (5) high fence, installation of a utility pole and automated pipeline monitor equipment in the area of an easement in the open space area owned by the servient tenant, Andover Homeowner’s Association, Inc., which the Appellant contends would reduce the Appellant’s open space below the required forty percent (40%) on a property located at 190 Middletown Road, Thornbury Township, in the R-1 Residential Zoning District.

Appeal 5-2017 – Appeal of Andover Homeowner’s Association, Inc. from the issuance by the Township Manager and Zoning Officer of Thornbury Township of a Building Permit to the dominant tenant Sunoco Logistics for the construction of a five-foot (5) high fence, installation of a utility pole and automated pipeline monitor equipment in the area of an easement in the open space area owned by the servient tenant Andover Homeowner’s Association, Inc. which the Appellant contends would reduce the Appellant’s open space below the required forty percent (40%) on a property located at 190 Middletown Road, Thornbury Township, in the R-1 Residential Zoning District.

Appeal 6-2017 – Appeal of Andover Homeowner’s Association, Inc. from the issuance by the Township Manager and Zoning Officer of Thornbury Township of an Electrical Permit to the dominant tenant Sunoco Logistics for the construction a five-foot (5) high fence, installation of a utility pole and automated pipeline monitor equipment in the area of an easement in the open space area owned by the servient tenant Andover Homeowner’s Association, Inc. which the Appellant contends would reduce the Appellant’s open space below the required forty percent (40%) on a property located at 190 Middletown Road, Thornbury Township, in the R-1 Residential Zoning District.

A consolidated hearing of these three appeals was held on May 1, 2017. Scott Cannon, Vice-Chairman, George Morley and Vincent Iannello, Esq. alternate were present at the hearing and have participated in this decision. Appellants were represented by Mr. Rich Raiders, Esq.; Thornbury Township was represented by Mr. James Byrne, Esq., Sunoco Logistics was represented by Anthony Gallia, Esq. and Lauren Tilley. Sunoco was also represented by Edward Lawler, Esq. Appearing as witnesses were: Jeffrey Seagraves, Township Manager and Zoning Officer, John Mullin, P.E and Eric Friedman, President of Andover Homeowner's Association, Inc.

The following exhibits were admitted into the record:

- B-1 Proof of Publication
- B-2 Proof of Posting
- T-1 Zoning Permit
- T-2 Building Permit
- T-3 Electrical Permit
- T-4 Four Photographs
- A-1 Right to Know Request July 28, 2016
- A-2 Right to Know Request October 14, 2016
- S-1 Email February 27, 2017 from Eric Friedman
- S-2 Right to Know Law – Appeal of Denial, Partial Denial or Deemed Denial Form April 20, 2017

FINDINGS OF FACT

1. Appellant Andover Homeowner's Association, Inc. ("Andover") is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, operating as a planned community or homeowner's association.
2. Andover is the owner of certain common area created by the subdivision and development of the Andover Community.
3. The Andover Community was created by the subdivision of a 40-acre property under the cluster option of the Thornbury Township Zoning Ordinance.

4. Under the cluster option the minimum lot size and density of the lots of the development are reduced in exchange for the set aside of open space which is approximately forty percent (40%) of the total gross area netted for other reductions. Upon approval, the open space is to be dedicated and owned by a homeowner's association.
5. Consistent with the requirements of the cluster division of the Zoning Ordinance, the open space was dedicated to Andover following the construction of the Andover Development.
6. In 1963, Andover's predecessor in interest granted an easement to Sunoco Logistics for the location of a pipeline across the property which is now the Andover Open Space.
7. Sunoco Logistics was granted a second easement in 1990 under an agreement with Andover's predecessor in interest and Sunoco Logistics.
8. Neither easement document nor the Andover Subdivision documents contain metes and bounds description of the easement or location of the pipeline across the open space area.
9. The Township issued three permits to Sunoco: (1) a Zoning Permit identified as T-1; (2) a Building Permit identified as T-2; and (3) an Electrical Permit identified as T-3. T-1, T-2 and T-3 were all admitted into evidence by the Township at the hearing.
10. Jeffrey Seagraves ("Seagraves") is the Township Manager and Zoning Officer for Thornbury Township.
11. In his capacity as Township Manager and Zoning Officer, Seagraves issued the three permits T-1, T-2 and T-3.
12. The Zoning Permit (T-1) was issued by Seagraves to Sunoco Logistics on February 16, 2017.

13. The Building Permit (T-2) was issued by Seagraves to Sunoco Logistics on February 17, 2017.
14. The Electrical Permit (T-3) was issued by Seagraves to Sunoco Logistics on February 14, 2017.
15. Seagraves received the application for the Zoning Permit and asked Sunoco Logistics to have the area of disturbance staked by a licensed surveyor so the Township could observe the easement area and the proposed activities that Sunoco was requesting a permit to perform.
16. Seagraves also reviewed information in the Township files for the Andover subdivision and land development approval.
17. Sunoco Logistics staked out the easement area where the proposed installation and activity was to occur.
18. Seagraves inspected the area and took photographs which were admitted into evidence as Exhibit T-4. T-4 consists of four photographs depicting the area that Sunoco had marked for conducting the activities proposed in its application for Zoning and Building Permits.
19. Following Seagraves' inspection, he determined that the activity proposed by Sunoco fell within its easement rights.
20. Seagraves also considered the effect of the proposed activity on the Andover open space and whether or not the activity would adversely impact the open space to cause a violation of the Zoning Ordinance.
21. Seagraves provided testimony regarding the matter and methodology that the Township used to calculate the open space when it approved the development of the Andover subdivision.

22. The Sunoco easement was not included in the calculation of open space.
23. Upon concluding his investigation, Seagraves issued the Zoning Permit on February 16, 2017.
24. Seagraves also oversaw the evaluation and issuance of the Building Permit, T-2.
25. The Township engaged Tim Durham of Chilli's Inspections to perform an inspection of the area where the well monitoring equipment was to be placed, including the posts and footers supporting the equipment.
26. Based upon the inspection, it was determined that the necessary footers were in place for the posts required.
27. Seagraves reviewed the Building Permit application and results of the inspection and issued the Building Permit on February 17, 2017.
28. The Electrical Permit was reviewed by Len Warren and Chilli's Inspections.
29. As a result of the review performed by Mr. Seagraves and inspection conducted by Chilli's Inspections and Mr. Warren, the Electrical Permit (T-3) was issued on February 14, 2017.
30. On or about April 4, 2017, Andover filed 3 Petition and Notices of Appeal contesting the issuance of the Zoning Permit (Appeal 4-2017), the Building Permit (Appeal 5-2017), and the Electrical Permit (Appeal 6-2017).
31. Appellant introduced the testimony of John Mullin, P.E.
32. Mr. Mullin testified regarding his knowledge of the property and the preparation of plans for the Andover Subdivision application.
33. Mr. Mullin was accepted as an expert witness by the Board.

34. He testified and acknowledged that there were no metes and bounds descriptions for the easement described in the 1963 easement document or the 1990 easement document or in any of the subdivision and land development approval documents for the Andover subdivision.
35. Mr. Mullin agreed that Seagraves had adequately described the open space, including what had been netted out, for the Andover Development.
36. Mr. Mullin testified that the easement in favor of Sunoco was 23 feet wide and that it was 10 feet off of each of the existing pipes.
37. Mr. Mullin also testified regarding a proposed pipeline condemnation project and the effect of that project on the open space.
38. Mr. Mullin testified that during the subdivision and development process for the Andover Subdivision, the developer of the property was required to get an NPDES Permit and was required to perform remediation on the soil.
39. Mr. Mullin testified that he would prepare a grading plan and that he would have considered how to handle soil disturbance for the permits the Township issued.
40. Mr. Mullin did not cite to any standard or authority that would require a grading plan be submitted with an application of any of the permits under appeal.
41. Mr. Mullin testified that the identity of the property owner was not a substantial issue and would not be a problem for the issuance of the permit.
42. Mr. Mullin testified that he believed that the fence was located outside of the easement area.

43. On cross-examination however, Mr. Mullin indicated that he was unable to determine whether or not the work performed and fence installed was outside of the easement bounds.
44. Upon cross-examination, Mr. Mullin conceded that there was very limited amount of soil disturbance and that the project only involved moving a section of the fence.
45. The Appellant also called Eric Friedman, Esq. who is President of the Andover Homeowner's Association, Inc.
46. Mr. Friedman testified regarding the location of the easement, his knowledge of the granting of the permits, and the environmental conditions on the property including arsenic.
47. He testified that the arsenic had been remediated through a blending process to make the site suitable for development, however, arsenic remains below the surface of the soil on the property.
48. The Appellant did not take any soil samples or make any determination which would demonstrate that there was any harm caused by the disturbance as a result of the work performed under the grant of the Permits under appeal.
49. Mr. Friedman testified that he and members of the Association learned about the granting of the permits when equipment showed up and began working.
50. He also testified that Right to Know requests had been filed by the Association with the Township, the date on which the copies of the permits were received and the date on which these Appeals were filed.

51. Mr. Friedman testified that he doesn't know for sure whether the utility pole and fence lie outside of the easement area but that he does not believe that the person who granted the permits was able to make that determination either.

52. Neighbors, Peter Alois, Mitchell Trembicki, John Price, Jennifer Bellinger and Seth Kovak all offered comment following the hearing.

DISCUSSION

This matter comes before the Thornbury Township Zoning Hearing Board on the Appeals of Andover Homeowner's Association, Inc. from the grant of three permits by the Township Zoning Officer to Sunoco Logistics: a Zoning Permit (Appeal 4-2017); a Building Permit (Appeal 5-2017); and an Electrical Permit (Appeal 6-2017). In each of these appeals, the Appellant has claimed that the grant of the Permit by the Township Zoning Officer causes a violation of the Thornbury Township Zoning Ordinance ("Zoning Ordinance") sections 27-1204 and 27-1205 in that it causes the Appellant's open space to fall below the required 40% on a property located at 190 Middletown Road, Thornbury Township. The Appellant also contends that Sunoco Logistics has not demonstrated its right to perform work due to the failure to identify the area work was to be performed.

In each of these appeals, the Appellant bears the evidentiary burden of production and persuasion to demonstrate that the grant of each of these 3 permits resulted in a violation of the Zoning Ordinance. The Appellant must provide clear evidence that the granting of the permits by the Zoning Officer has caused the Appellant to be in violation of the Township's Zoning Ordinance. In each of these three appeals, the Zoning Hearing Board has found that the Appellant has failed to meet its burden of proof.

At the hearing, the Appellant based its case upon the following issues: (1) the failure of the Township Zoning Officer to make an adequate inquiry; (2) the failure of the Township Zoning Officer to consider any environmental issues; (3) Sunoco Logistics did not adequately demonstrate that it had the right to perform the work on the site; and (4) that the granting of the permits and the construction by the Applicant on the permits would somehow cause the Appellant to be in violation of the Zoning Ordinance.

With regard to the appeals filed by the Appellant, issues # 1 and 2 (above) were not adequately addressed in their Petition and/or Notice of Appeals. The only issues actually raised by the Appellant in its Petitions/Notices of Appeal was that Sunoco Logistics did not adequately demonstrate that it had the right to perform the work on the site and the granting of the permits at issue would cause the Appellant to be in violation of the Zoning Ordinance. Additionally, both Sunoco Logistics and the Township challenged that the Appellant had perfected a timely appeal from the grant of each of the permits. However, because the Zoning Hearing Board made its decision based upon the merits of the underlying appeal, the issue of whether or not the appeals had been timely raised has been rendered moot and will not be considered.

The evidence demonstrates that the Township Zoning Officer had performed an adequate investigation and had sufficient evidence to make the determination that the work was being performed within the easement area and that it would not cause a violation of the Zoning Ordinance by reducing the Open Space for Andover below the minimum required amount before issuing each of the Permits. Mr. Seagraves testified at length regarding the procedures that he followed to determine whether or not he should grant the Permits. He was able to determine from the subdivision and land development files for the Andover Development that there was open space approximately one-half acre greater than the minimum 40% required. Given the limited

scope of the proposed work and disturbance to the property, he was able to determine that the issuance of the requested permits would not cause the Appellants to fall below the required minimum open space. He was also able to determine that the proposed work would be performed within the easement area.

To make this determination, the Township Zoning Officer testified that he required Sunoco Logistics to have a surveyor stake out the area of disturbance around the pipeline for the area where work was to be done under these permits. He testified that he performed a site inspection and introduced photographic evidence to demonstrate that the property had been staked and measured by Sunoco Logistics. Mr. Seagraves granted the permits based upon his visual inspection and review.

The Appellant provided testimony from John J. Mullin, P.E., stating that he had a surveyor look at the area where the work had occurred and determine based upon the plans that had been used for the Andover subdivision whether or not the work was performed within the area. His testimony on whether or not Sunoco Logistics had performed work within its easement area was equivocal at best. Mr. Mullin did not take measurements at the site nor do anything further to determine whether or not the work had been performed within Sunoco's right of way. He testified that he did not believe that the Township Zoning Officer could have done so. However, most importantly, Mr. Mullin did not offer an opinion that the work was performed outside of the easement area to a reasonable degree of engineering certainty. The Appellant has the burden of proof and must provide evidence to demonstrate that the permits were improperly granted. This testimony was not persuasive or credible on this issue and was not sufficient to meet the required burden of proof.

Regarding the environmental contamination issues, Mr. Seagraves testified that the disturbance was minimal and below the level that would require a grading permit. Mr. Seagraves testified that he did not consider any environmental issues regarding this permit application for two reasons. First, in the process of obtaining subdivision and land development approval for the Andover subdivision, the DEP had required the developer to perform remediation at the site including soil mixing, whereby clean soil was mixed with the existing soils to create contaminant levels below the minimum required. Additionally, Mr. Seagraves determined that the disturbance required for this work under these permits, placing a fencepost and two posts for the electrical equipment did not constitute a sufficient disturbance of the soil to require a grading or soil disturbance plan and therefore there was no environmental consideration or issues to be considered. He was aware of the procedures performed to approve the Andover subdivision and felt that such an investigation was unwarranted.

Appellants performed no tests, provided no soil samples, or other objective evidence which would demonstrate that the work performed in this area would cause a health hazard or result in environmental contamination to the Andover property. The Applicant did not provide any credible evidence suggesting that the Township should have performed any environmental investigation before granting these Permits.

CONCLUSIONS OF LAW

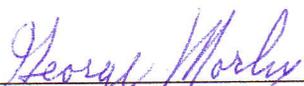
1. The Appellant, Andover Homeowner's Association, Inc., has standing to bring these Appeals.
2. The Appellant has both the production and persuasion burden of proof and must show that the granting of a permit has caused a violation of the Zoning Ordinance.

3. The Appellant, did not meet its burden of proof to establish that the granting of a zoning permit, building permit or electrical permit has caused it to be in violation of the Thornbury Township Zoning Ordinance.
4. The testimony of John J. Mullin, P.E., was credible, however, it was not sufficient nor persuasive.
5. Mr. Mullin's testimony was not adequate to meet the Appellant's burden of proof that the granting of the three permits was a violation of the Thornbury Township Zoning Ordinance.
6. Mr. Seagraves' testimony was credible and persuasive.
7. The Appellant did not meet its burden of proof that Mr. Seagraves failed to follow necessary and proper procedures when evaluating and issuing the zoning permit, building permits or electrical permits at issue in this case.

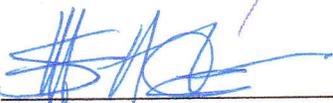
ORDER

And now on this 5th day of June, 2017 the Thornbury Township Zoning Hearing Board orders that the Appeal of Andover Homeowner's Association, Inc. 4-2017, 5-2017 and 6-2017 are denied.

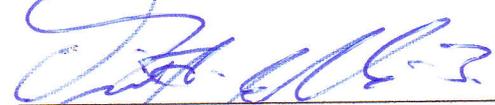
BY THE BOARD:



George Morley



Scott Cannon



Vincent Iannello, Esquire