

SALE # 14

Writ # A.D. 1997-156
Lowe's Home Centers, Inc.

vs

Dennis Mann and Wanda Mann
t/d/b/a Seabrook Homes

Atty: Donald L. Kornfield, Esq.

ALL the following described real estate, lying and being situate in Greene and Gullford Townships, Franklin County, Pennsylvania, with a property address of 4555 Lincoln Way East, Fayetteville, Pennsylvania, bounded and described as follows:

BEGINNING at an existing iron pin in the Northern boundary line of the Lincoln Highway known as U.S. Route No. 30 at the line between Lot No. 5 and Lot No. 6; thence along said Highway North 68 degrees 32 minutes West 75 feet to an existing iron pin at Lot No. 7; thence along Lot No. 7, now or formerly the property of C.A. Hartzell's Heirs, North 21 degrees 28 minutes East 189.7 feet to an iron pin at lands now or formerly of C.A. Hartzell's Heirs, thence by a fence line along said lands now or formerly of C. A. Hartzell's Heirs, thence by a fence line along said lands now or formerly of C. A. Hartzell's Heirs South 66 degrees 30 minutes East 75.02 feet to an iron pin at Lot No. 5; thence along Lot No. 5, now or formerly the property of C.A. Hartzell's Heirs, South 21 degrees 28 minutes West 187.28 feet to the existing iron pin in the Northern line of said Highway, the place of beginning. CONTAINING 14,136 square feet and BEING Lot No. 6 on a plan of lots laid out by John H. Atherton, C.S., dated August 13, 1951, and recorded as part of the hereinafter recited Statement of Building and Other Restrictions in the Recorder's Office of Franklin County, Pennsylvania in Deed Book Volume 419, Page 175, and also being shown on plan of survey of John Howard McClellan, C.S., dated November 25, 1968.

SUBJECT TO restrictions recorded in Franklin County Deed Book Volume 738, Page 61.

BEING the same real estate which Hardol Development Company conveyed to Dennis L. Mann by deed dated January 27, 1976, and recorded in Franklin County Deed Book Volume 738, Page 61.

SALE #15

WRIT NO. AD1997-571
FRANKLIN COUNTY AREA DEVELOPMENT CORPORATION

vs

BLAIN A. HARDY, JR.
ATTY: JOHN SHARPE, ESQ.

ALL the following described real estate with improvements thereon lying and being situate in Lurgan Township, Franklin County, Pennsylvania, and having a post office address of 11040 Roxbury Road, Roxburg, Franklin County, Pennsylvania, 17224, bounded and described as follows:

BEGINNING at a set iron pin at the southwest corner of lands of the Trustee of Roxbury Methodist Episcopal Church of Roxbury, Pa.; thence with lands of the Trustees of Roxbury Methodist Episcopal Church of Roxbury, Pa, south 80 degrees 49 minutes 18 seconds east 105.60 feet to a set iron pin; thence with the same north 1 degree 28 minutes 3 seconds west 318.48 feet to a set iron pin; thence with the southern side of an existing alley north 82 degrees 44 minutes 52 seconds east 368.73 feet to an existing iron pin; thence with lands of William David Holtry south 2 degrees 34 minutes 56 seconds east 564.30 feet to a set iron pin, thence with other lands of Edward R. Holtry through a set iron pin on line south 87 degrees 25 minutes 4 seconds west 104.21 feet to a point in Conodoguinet Creek; thence with Conodoguinet Creek north 33 degrees 35 minutes 57 seconds west 97.12 feet to a point; thence with the same north 53 degrees 24 minutes 07 seconds west 36.16 feet to a point; thence with the same north 68 degrees 06 minutes 46 seconds west 33.67 feet to a point; thence with the same north 84 degrees 42 minutes 47 seconds west 258.17 feet to a point; thence with the eastern right-of-way line of Union Street north 8 degrees 34 minutes 18 seconds west 82.50 feet to a set iron pin, the place of beginning. CONTAINING 4.1917 acres as per survey of William A. Brindle Associates dated March 27, 1989

The above described real estate is the same which Edward R. Holtry conveyed to Blain A. Hardy, Jr. and Robin D. Hardy, his then wife, dated June 21, 1989, recorded in Franklin County Deed Book 1053, Page 49, and which those grantees later conveyed to Blain A. Hardy, Jr. by deed dated May 25, 1995, recorded in Franklin County Deed Book 1268, Page 296.

TERMS

As soon as the property is knocked down to purchaser, 10% of the purchase price or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN April 27, 1998 at 4:00 PM, prevailing time. Otherwise all money previously paid will be forfeited and the property will be resold on May 1, 1998, 1:00 PM, prevailing time, in the Franklin County Court House, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be the higher, shall be paid in full.

Robert B. Wollyung
Sheriff
Franklin County
Chambersburg, Pa
03/27, 04/03, 04-10-98

SAINT THOMAS TOWNSHIP BOARD OF SUPERVISORS,
Plaintiff, vs. JAMES W. WYCKO, an individual, Defendant,
Franklin County Branch, CIVIL ACTION, VOLUME 8, PAGE 177
IN EQUITY

St. Thomas Township Board of Supervisors v. Wycko

equity - injunction - subdivision ordinance - junkyard and nuisance ordinance - nonconforming use - nuisance

1. Township seeks enjoin defendant from using property as car repair/sales business and junkyard, because it violates the subdivision ordinance and junkyard ordinance.
2. Change in use of land from residential to commercial is not a land development as defined by subdivision ordinance; rather, if township wishes to regulate use of land and buildings, it must enact zoning ordinance.
3. Because defendant used his property for storage of junked cars and parts prior to enactment of junkyard ordinance, it constitutes a nonconforming use which is constitutionally protected.
5. There is no right to continue a nonconforming use if it constitutes a nuisance; where a nuisance exists, equity may intervene to abate it.
6. Storage of over 30 uninspected or unregistered cars on the property and metal parts on the porch, which attracts rats and is a major eyesore to the community constitutes a nuisance.
7. Defendant permitted to keep maximum of 3 cars on property at any time for repair and resale since such limited number is not a nuisance; defendant is ordered to remove the remaining vehicles and car parts from the property.

John M. Lisko, Esquire, Attorney for Plaintiff
D. Lloyd Reichard II, Esquire, Attorney for Defendant

OPINION AND DECREE NISI

Walker, P.J., March 16, 1998:

1. Procedural Background and Facts Necessary to Determine the Issues

This case involves an action brought by the St. Thomas Township Board of Supervisors ("St. Thomas") against James Wycko ("defendant") for violation of the township's junkyard and nuisance ordinance and for failing to file a land development plan as required by the subdivision ordinance.

On July 13, 1987, defendant purchased a parcel of real estate located at 7074 Lincoln Way West, St. Thomas, Franklin County, Pennsylvania. (Plaintiff's exhibit 3). The land is improved with a

house and a garage. In 1992, Robert Lake, a member of the St. Thomas Township Board of Supervisors, received complaints from neighbors regarding junked vehicles and car parts being stored on defendant's property. He went out to look at the property and saw car parts being stored on the porch and when he looked in the window of the residence, he noticed that parts were stored inside as well, and that no one was living there. He also observed cars that appeared to be inoperable and that did not have valid license plates or inspection stickers. A written notice to cease and desist was sent out to defendant and the supervisor had repeated discussions with defendant. In 1992, Mr. Lake and defendant came to an agreement whereby defendant promised to erect a fence to screen the cars from view. Defendant did erect a fence, but it was not sufficient to screen all the stored cars.

In 1994 and 1995, Mr. Lake again received complaints about defendant's property, and again written notices to cease and desist were sent to defendant, but defendant did not comply. Mr. Lake went to the property in February 1995, and saw that only three out of thirteen vehicles were inspected. At a regular meeting held on June 19, 1995, the Board of Supervisors authorized the commencement of a suit to seek an injunction against defendant, and a complaint was filed on February 21, 1996, alleging defendant's violation of two St. Thomas ordinances. First, the complaint alleges defendant's violation of the subdivision ordinance based on his change of the use of the property from a residential dwelling to an automobile repair business, an automobile parts warehouse and a junkyard without filing a land development plan. Secondly, it alleges defendant's violation of the junkyard and nuisance ordinance by storing vehicles without valid registration or inspection, vehicles in inoperable state, and storing scrap metal and other salvageable materials.

On April 8, 1996, defendant filed a *pro se* answer with new matter and counterclaim, to which St. Thomas filed preliminary objections. On September 26, 1996, defendant, now represented by counsel, filed an amended answer. On October 23, 1996, a second amended answer with new matter and counterclaim was filed, to which St. Thomas again filed preliminary objections. This court granted the preliminary objections in its opinion of April 3, 1997. Defendant then filed a third amended answer on May 2, 1997, in which he has raised two defenses. Defendant argues against the

alleged violation of the subdivision ordinance that his use of the land does not constitute a land development, because it is a continuation of an existing business. Secondly, defendant argues that he did not violate the junkyard and nuisance ordinance because his use of the property existed before the enactment of that ordinance, and therefore that it is grandfathered in.

A pretrial conference was held on October 27, 1997. Pursuant to the pretrial order, both parties have submitted memoranda on the grandfather issue. Trial was held on January 22, 1998. This court's notes of the trial testimony reveal the following. Rodney Appleby, one of defendant's neighbors, testified that from his back window he has observed a lot of junk lying on the porch and around the house on defendant's property. He also testified that no one has lived there since approximately one year after defendant purchased it. He furthermore testified that before defendant bought the property, there were no cars being offered for sale on the property, and that in the last seventeen months, between 32 and 36 cars were being stored there. Additionally, Mr. Appleby testified to his belief that the condition of defendant's property attracts rats, and that he has seen a rat in his own house.

Testimony was also received from Robert Estep, who grew up in the house next to defendant's property and whose parents still live there. He testified that Mr. Strode, the previous tenant, used to keep race cars in the garage for his pleasure, but not as part of his business. He also testified that when he was inside the house on defendant's property approximately three to four months before the trial, he observed car parts, metal and tools lying around the house. The second floor was being worked on, but it did not appear to be livable at that time. He furthermore described the property as containing lots of cars without inspection stickers, and as having car parts all over the property. He testified that when Mr. Strode still lived on the property, it contained only a few vehicles, including a school bus, but he was uncertain whether they were being driven.

Pictures were introduced by Mr. Appleby and by Mary Clites, secretary for St. Thomas Township from 1987 to 1997. (Plaintiff's exhibits 6-8; 13-22). The pictures show defendant's property from varying angles, depicting many cars in different conditions varying from driveable to inoperable, and the storage of many car parts,

including tires, car seats, a car door, and many other metal parts on the porch.

Defendant testified that he has operated his car business since 1972 from his residences in York and Dauphin Counties. When he bought the property at issue in July of 1987, he intended to rent out the house and to run his business there. He testified that the last tenant to live in the house was Mr. Appleby's brother, who lived there for fifteen months and who moved out in the early 1990's. After the last tenant moved out, defendant testified that he wanted to divide the house into two apartments and decided to work on the second floor first. As to the extent of his business, defendant testified that he buys up cars which have been in accidents, and fixes them up. He takes car parts out of some of the cars, stores them on the porch, and then uses them for other cars. He subcontracts the frame repair and painting work, but does the other work himself. He uses the porch as a storage area for parts, because it is easier to load them into his truck from there. He also testified that he does not store the parts in his basement, because he does not have light there. Additionally, he testified that he kept all his cars inspected until the time St. Thomas filed suit against him in 1996.

Lastly, testimony was received from Thomas Strode, whose brother, David Strode, was the previous owner of the property. Thomas Strode lived on the property for six months in 1987. Thomas and his brother David (also known as "Ted") had started a small business approximately one year before Thomas moved out in which they painted cylinders. He estimated that each may have painted approximately 300 cylinders in the course of their business. They also worked on one of their personal cars and on a school bus. Additionally, Thomas built a trailer for himself, and a tow truck and a wood stove for others. They had a sign up on the garage door, which was visible from the alley, with the words "T & A Welding" on it. Thomas had portable welding equipment on his truck, and would do work either at the property in question or go to customer's houses. The work was mostly done at nights and on the weekends.

At the conclusion of the trial, this court ordered both parties to submit a letter to the court setting forth their positions and the relief sought.

2. Statement of the Issues

a. Whether defendant violated the St. Thomas subdivision ordinance by failing to file a land development plan, or whether defendant was excused from filing such plan because his use of the property was a continuing use of an existing business.

b. Whether defendant violated the St. Thomas junkyard and nuisance ordinance by storing car parts and unregistered and inoperable cars on his property, or whether his use of the property was grandfathered in because it existed prior to the enactment of the ordinance.

3. Discussion of the Questions of Law Involved and Conclusions of Law

a. Violation of Subdivision Ordinance

St. Thomas is seeking a permanent injunction requiring defendant to refrain from storing junked vehicles and junked parts, and from operating an automobile repair and sales business on his property. St. Thomas further seeks to impose court costs and attorney fees on defendant, as well as a fine. It also requests this court to order defendant to file a land development plan in accordance with the ordinance.

Defendant argues that he is excused from having to file a land development plan because his use of the property is a continuation of an existing business. This court does not find defendant's business to be a continuation of Mr. Strode's "business," which was composed of some welding, which was done at the property at issue or at customer's houses, and the building of a tow truck and wood stove primarily in the evening hours and on weekends. Witnesses testified that Mr. Strode at most had two or three vehicles on his property, which is very different from the thirty or more defendant keeps. Mr. Strode furthermore was not in the business of repairing and selling cars. Thus, this court does not find defendant's argument that he was excused from filing a land development on the basis of his continuation of an existing business to be persuasive.

However, this court finds that St. Thomas can nevertheless not prevail because no violation of the St. Thomas subdivision ordinance

has occurred. Section 400 of the subdivision ordinance, which was first enacted in 1974, provides as follows:

From and after the effective date of this ordinance no subdivision or development of any lot, tract, or parcel of land within the Township shall be made, and no street, sanitary sewer, storm sewer, water main or other improvement in connection therewith shall be laid out, constructed, opened or dedicated for public use or travel or for the common use of occupants of buildings abutting thereon, except in strict accordance with the provisions of this ordinance. No lot in a subdivision or land development may be sold, no permit to erect, alter or repair any building upon land in a subdivision may be issued, no building may be erected, and no changes may be made in the contour of the land; no grading, excavating, removal or destruction of the topsoil, trees or other vegetative cover of the land may be commenced in a subdivision or land development, unless and until a plan for the subdivision or land development has been approved by a Board of Supervisors . . .

Article IV, §400 of St. Thomas subdivision ordinance (plaintiff's exhibit 2)

This ordinance does not appear to apply to the situation in the underlying case. It requires the filing of a land development plan for such activities as erecting, altering, or repairing a building on the lot, or making changes in the contour of the land, or removing vegetation from the land. Here, such changes have not taken place. Defendant merely has used the existing buildings, the house and the garage, as a business rather than as a residence. This does not constitute an alteration of the land or the buildings themselves, but rather only a change in the use of the property from residential to commercial use. This is not prohibited by the subdivision ordinance. If St. Thomas wants to regulate the use of land and the buildings thereon, it must enact a zoning ordinance. It cannot, however, attempt to regulate the use of land through the backdoor by arguing that such change in use constitutes a land development.

This court thus finds that defendant, by using the land for his auto repair and sales business, did not violate the subdivision ordinance, and dismisses St. Thomas' request for relief on that ground.

b. Violation of Junkyard and Nuisance Ordinance

St. Thomas alleges that defendant violated its junkyard and nuisance ordinance by storing junk cars and parts on his property. The township is seeking a permanent injunction requiring defendant to cease and desist the storage of these cars and parts, as well as to refrain from conducting his automobile repair and sales business on the property. St. Thomas is also seeking the imposition of a fine and an order to pay its court costs and attorney fees.

The Junkyard and Nuisance Ordinance (Ordinance 98, plaintiff's exhibit 1) was passed on July 20, 1992, five years after defendant bought the property at issue in 1987. Defendant has been using the property as a car repair and sales business (although apparently on a smaller scale than currently) since he purchased it. Use of property which exists legally before the enactment of an ordinance constitutes a "nonconforming use." *Richland Township v. Prodex, Inc.*, 160 Pa. Cmwlth. 184, 634 A.2d 756, 767 (1993). "Property owners have a constitutional right to continue a nonconforming use." *Richland Township*, 634 A.2d at 767. However, there is no right to continue such nonconforming use when it is a nuisance, it is abandoned, or extinguished by eminent domain. *Id.* Where a nuisance exists, equity may intervene to abate it, even if there was compliance with ordinances. *Bradley v. Township of South Londonderry*, 64 Pa. Cmwlth. 395, 440 A.2d 665 (1982).

Defendant's use of the property as a car repair and sales business is a nonconforming use because it existed before the enactment of the junkyard and nuisance ordinance. Therefore, the ordinance cannot prohibit defendant from using his property as such. However, this court finds that the use also constitutes a nuisance and therefore has power to abate it, even if the ordinance does not apply to it.

A public nuisance is an unreasonable interference with the public's rights, and includes conduct which significantly interferes with the public health, public safety, the public peace, the public comfort, or the public convenience. *Restatement (Second) of Torts*, §821B (1979). The Pennsylvania Commonwealth Court has upheld a finding that the storage of cars without valid license plates and/or registration stickers constitutes a public nuisance, where the court, sitting in equity, found that the vehicles had become the home of rats and vermin, that the storage of nine discarded vehicles caused actual harm to the neighborhood, that the property had the appearance of a

junkyard, and that the premises were an aesthetic eyesore. *Bradley v. Township of South Londonderry, supra*, 440 A.2d at 668, fn 5.

Similarly in the underlying case, the evidence shows that the storage of the cars on defendant's property constitutes a nuisance. The evidence showed that more than 30 cars are stored on defendant's property, some of which are driveable, but others are missing vital parts such as headlights and tires. The testimony furthermore showed that most of the cars do not have valid registration or inspection stickers, and they are stored there for long periods of time. This gives the property the appearance of a junkyard, and is a major eyesore for the neighborhood. As such, it interferes with the comfort of the neighbors and the public in general. This court also took into account the testimony that the condition of the property attracts rats, and thus may constitute interference with the public health and safety. Thus, the storage of a large number of cars in varying conditions constitutes a nuisance to the public.

The running of a small repair and sales business in itself is not a nuisance. Thus, this court will not grant St. Thomas Township's request to issue an injunction to completely prohibit defendant from running his business on the property. However, the storage of a large number of vehicles in varying conditions of disrepair does constitute a nuisance, and therefore this court will restrict such use. This court will permit defendant to keep a maximum of three cars on his property for the purposes of repair and resale at one time. As defendant has done in the past, he must find another storage space for the remaining vehicles.

This court also finds that the storage of parts and junk on the porch constitutes a nuisance for the same reasons as set forth above. Those parts have also been stored there for extended periods of time, and while it appears that defendant had cleaned up the porch somewhat at the time of trial, large amounts of junk and parts still remain. Thus, defendant must remove all car parts, metal pieces, tools, and other junk from the porch and refrain from using the porch as a storage area.

Having the authority in equity to abate the nuisance this court will enter the decree nisi as hereafter set forth.

DECREE NISI

March 16, 1998, upon consideration of the evidence presented, this court orders the following with respect to the real estate located on 7074 Lincoln Way West, St. Thomas, Franklin County, Pennsylvania:

1. Defendant shall remove all car parts, metal parts, tools, and other junk from the porch and shall no longer store such parts and tools and junk on that porch or elsewhere in open view on the property; defendant is directed to store all such parts and tools inside a building on the property or elsewhere. Defendant shall remove all parts and junk within thirty (30) days of the entry of this decree.

2. Defendant shall remove all cars which are stored on his property for repair and/or sale; defendant will be permitted to keep on his property a maximum of three (3) vehicles for that purpose at a time. Defendant shall remove all cars (except the permitted maximum of three) within thirty (30) days of the entry of this decree.

3. Defendant shall pay the courts costs and the attorney's fees incurred by St. Thomas Township in the amount of \$6,264.50.

4. In the event defendant does not comply with this decree within thirty (30) days of entry, this court hereby imposes a fine of one hundred (\$100) dollars per day for each day the defendant does not comply.

5. Upon praecipe of either party, the Prothonotary shall enter this decree nisi as a final decree as authorized by Pa.R.C.P. 227.4 if no timely post-trial motions are filed.