IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBERT TURNBULL & CHERYL TURNBULL and JOHN KERR & VICKI KERR	:	
v.	:	No. 2830 C.D. 1998
DOMINIC CAPPELLI	:	
JOHN KERR & VICKI KERR, Appellants	:	
JOHN KERR and VICKI KERR, his wife and ROBERT TURNBULL and CHERYL TURNBULL, his wife	:	
v.	:	No. 2829 C.D. 1998
DOMINIC CAPPELLI, Appellant	:	Argued: March 12, 1999

BEFORE: HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE CHARLES P. MIRARCHI, JR., Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY JUDGE DOYLE **FILED: June 9, 1999**

Before the Court is the appeal of Dominic Cappelli and the cross appeal of two neighboring property owners from an order of the Court of Common Pleas of Delaware County which denied the post-trial motions of both parties and

confirmed several previous adjudications of the court following a bench trial which had occurred before Common Pleas on January 6-7, 1988. The appeals themselves involve the application of the Concord Township Zoning ordinance, as well the assessment of damages by Common Pleas.

All three participants, the Kerrs, the Turnbulls and Cappelli are neighboring property owners in the R-2D area of the Township. Section 502 of the Concord Township Zoning Ordinance permits properties in that area to be used as single family detached dwellings and for agriculture and certain horticultural uses, as well as several other uses not relevant to the present appeal. The Township's zoning ordinance does not provide for or authorize the commercial use of property within this district.

In 1960, Cappelli, who at that time was operating an excavation business in another municipality in Delaware County, was considering purchasing the property on which his business currently sits in Concord Township. Prior to purchasing the property, Cappelli inquired of Joseph Hall, who at the time was the Concord Township building inspector, as to whether he could utilize the property for a commercial use. According to Cappelli, Mr. Hall orally informed him that his proposed commercial use of the property would be permitted. However, on October 7, 1960, Cappelli sent a letter to Hall asking his written assurance that he could use the property commercially;[1] Cappelli never received a reply to his letter

---

[1] The letter read as follows:

> I am sending you this letter about our understanding as to our right to use the Mitchell property on School House Lane in connection with our business

(Footnote continued on next page...)

from Hall or anyone else from Concord Township. Cappelli, nevertheless, went ahead and purchased the property and moved his commercial operation to his property.

During the period from 1960 to 1970, in addition to conducting his excavation business, Cappelli performed contract work for Concord Township, including plowing some of its roads and permitting the Township to park some of its vehicles on his property overnight. Cappelli made several improvements to the property during this time as well, including placing an office on the property and, before making the improvements, he secured the requisite building permits.

In 1975, the Turnbulls purchased the property that is directly to the south of Cappelli's property and constructed a home there. Likewise, in 1980, the Kerrs purchased property directly to the east of Cappelli's property and moved into a home which had already existed on the property.

In 1981, the County of Delaware awarded Cappelli a contract to haul solid waste from Delaware County to a transfer station in Chester County. The contract

---

(continued...)

> which as you know is now at Randal Ave [in Ridley Township, Delaware County].
>
> My reason for writing is we are going to by [sic] the Mitchell property and want something more than just your word that we will be able to use the property for our business. Please don't misunderstand we do trust your word, but we thought there should be something in writing about your promise before we buy.
>
> (Letter from Cappelli to Joseph Hall.)

expanded the extent of Cappelli's business by at least thirty-percent. To accommodate this expansion, in May of 1981, Cappelli removed the fence which had enclosed his prior business activities, removed the topsoil and brought in a large amount of fill. The expansion extended that part of Cappelli's "yard" that was used commercially thirty feet closer to the Kerr property and ninety feet closer to the Turnbull property. In addition, as a result of the new fill, the area of Cappelli's property which abutted the Kerrs' property was approximately ten feet higher than it had been in relationship to the Kerrs' property. At no point in time did Cappelli secure or even inquire about the need for a permit or special exception to effect this expansion. After the expansion, however, Cappelli did provide the Township with his plans for expansion, apparently documenting what he had already done to the property.

Cappelli's expansion of his commercial use of the property affected the Turnbulls and Kerrs in several major ways. First, during the expansion itself, traffic was backed up on Schoolhouse Lane because trucks were waiting to get into the Cappelli "yard." Also, a great deal of noise came from the Cappelli property during the very early morning hours. Finally, and perhaps most important, during the expansion, Cappelli installed a pipe on his property to facilitate the drainage of surface water flowing off of the property. Prior to the expansion, water had flowed through the property via a ditch that followed the line of Cappelli's property and the Kerr property. Following the expansion, however, water would no longer flow through Cappelli's property due to the increase in elevation. Accordingly, Cappelli installed a 25-inch pipe which discharged water from his property to a point approximately 25 feet from the Kerr property line. The discharge from this pipe

eroded portions of the Kerr property and caused the Kerrs' on-site sewage system to malfunction because a large amount of surface water was able to get into it.

During this time, the Kerrs and the Turnbulls repeatedly complained to Concord Township about Cappelli's expansion and use of his property. As a result, on September 30, 1981, Concord Township sent Cappelli a letter which stated as follows:

> The Concord Township Board of Supervisors have received complaints that you are using your property situated at 139 Schoolhouse Lane . . . for the parking, storing, and repair of commercial and industrial trucks and vehicles in violation of the Concord Township Zoning Ordinance.
>
> Your property is zoned residential (R-2D) and has been zoned for residential use since February 13, 1946. In accordance with the zoning classification, your property may only be used for single family dwellings, farming, and accessory residential uses. The Township knows of no circumstances which would permit your property to be used . . . for commercial and or industrial storage and repair of trucks and vehicles.
>
> In accordance with the above, you are hereby directed to cease all such activity prohibited by the Township zoning ordinance and to remove from the premises all trucks and vehicles improperly located thereon. The Township has directed the Zoning Officer to inspect the property on October 12, 1981 to ascertain whether you have complied with this direction. If you have not, the Township will have no alternative but to take appropriate legal action against you with no further notice.

(Reproduced Record (R.R.) at 170a.) Cappelli took no action in response to the letter, and the Township apparently never inspected his property nor did it follow

through with further legal action.[2] The Turnbulls and Kerrs continued to protest Cappelli's use of the property.

In 1982, apparently frustrated with the inaction of the Township, the Kerrs and Turnbulls filed an equity action against Cappelli seeking an injunction to restrain Cappelli from continuing to use his property for commercial uses and seeking damages for a decrease in the value of their property caused by Cappelli's operation.[3] In 1983, after the litigation had been filed, Cappelli's contract with the county expired. A bench trial was held on January 6-7, 1988.

During the trial, both the Kerrs and Turnbulls testified, each describing the impact that Cappelli's expansion had on their property. Accompanying their testimony were pictures illustrating how storm water which had been discharged from Cappelli's property laid on their property, especially following rainstorms. Specifically, the Kerrs testified that, after the 1981 expansion, they began having problems with surface water on their property. These problems included water coming into their house, water causing a malfunction in their on-site septic sewer system and water laying in their yard to the point that Mr. Kerr could not use a

---

[2] The record indicates, however, that the Township's letter fostered the negotiation of an agreement between Cappelli and the Township. In exchange for the Township's acknowledgement that Cappelli's previous and continued use of his property was appropriate, Cappelli agreed to refrain from further expansion of his property, curtail his hours of operation and perform remedial work to control the discharge of water onto his neighbors' property. This agreement, however, was never signed by all of the parties.

[3] The Kerrs and Turnbulls also filed a mandamus action which sought to compel the Township to enforce its zoning ordinance. They agreed to a voluntary non-suit of this separate action, apparently so that they could receive an expedited trial on the merits of their underlying complaint in equity.

riding lawn mower in some areas because the wheels would sink into the ground. The Kerrs also documented erosion that was taking place on their property due to the discharge of water from Cappelli's property. The Kerrs testified that they had not experienced these problems prior to Cappelli's expansion.

In addition, Lawrence Ramaika, a retired consulting engineer, testified for the plaintiffs concerning the effect of the stormwater discharge from the Cappelli property onto the Kerr property. He examined the Kerr property in 1983 during a rainstorm. He noted that the discharge coming from the Cappelli property was milky colored, suggesting the presence of oils or other chemicals in it. Based upon his observations and his research, he concluded that the discharge from the Cappelli property was damaging the Kerr property. Specifically, he stated that the stormwater was not only damaging the on-site septic sewer system, but was causing erosion on the Kerr property and concluded that Cappelli's drainage system was inadequate. Mr. Ramaika conceded, however, that he had not inspected the Kerr property prior to Cappelli's 1981 expansion, so he was unable to independently determine the amount or velocity of discharge prior to 1983.

To establish the loss in value of their properties, the Kerrs and Turnbulls presented the testimony of Oliver Armitage who sold and appraised property in the Delaware County area. Mr. Armitage identified the damage that both the Kerrs and Turnbulls experienced as "economic obsolescence." Mr. Armitage explained that this obsolescence was the depreciation of a property occasioned by its proximity to an undesirable entity. In the present case, Mr. Armitage explained that, due to their proximity to the expanded Cappelli property, the Turnbulls'

property depreciated 10% and the Kerrs' 20%. Mr. Armitage estimated the Turnbulls property to be worth $114,000 prior to the expansion, and, $102,600 after the expansion. Likewise, prior the expansion, the Kerrs' property was worth $110,000 and only $88,000 after the expansion.

In response, Cappelli offered the testimony of several of his employees, as well as his own. Both Cappelli and his employees explained that they did not obtain or inquire as to whether any zoning permits were required prior to the expansion, and all of the witnesses explained that the 1981 expansion was the result of the waste hauling contract which Cappelli secured from Delaware County.

Cappelli also presented the testimony of Daniel Daly, a civil engineer. He testified that he began working with Cappelli in 1983 to assess any storm water discharge problems that were occurring. He stated that Cappelli installed a pipe where a previous drainage ditch had existed and that this pipe actually decreased the velocity and flow of water onto the Kerr property. Mr. Daily opined that the drainage system in place was adequate and that, based upon his observations, the Kerr property was not being damaged by changes to the Cappelli property. Mr. Daly conceded that he was not familiar with the problem prior to 1983 and could not comment on whether the Kerrs had experienced problems at that time.

On April 25, 1994, Common Pleas issued an opinion and order which concluded as follows: (1) Cappelli's use of the land as a commercial enterprise did not violate the Township zoning ordinance; (2) Cappelli had acquired a vested right to use the land as a commercial enterprise; (3) although Cappelli's use of the

property was permissible, the use nonetheless constituted a nuisance to the Kerrs and the Turnbulls. On May 15, 1997, Common Pleas supplemented its original ruling by awarding damages to the Kerrs and ordering Cappelli to install a drainage line to limit the surface water discharge onto the Kerr property. Common Pleas further permitted Cappelli to deduct $3,659 from the amount of damages that it was responsible to pay because the Court determined that the Kerrs would benefit from the installation of the drainage line. Accordingly, Common Pleas entered judgment in favor of the Kerrs in the amount of $18,341. The Turnbulls and Kerrs filed exceptions to the supplemental adjudication, as did Cappelli.

On June 5, 1997, Common Pleas issued a decree nisi confirming the supplemental adjudication and denying all of the parties' objections to the supplemental adjudication. Both parties filed exceptions to the decree nisi, but Common Pleas denied the exceptions on October 6, 1997, and this appeal and cross-appeal followed.[4]

On appeal, the parties have raised the following issues: (1) whether Cappelli's use of his property violated the Township zoning ordinance; (2) whether Cappelli's use of the property constituted a nuisance; (3) whether damages were properly supported by competent evidence; (4) whether Common Pleas erred by failing to address the Turnbulls' claim.

---

[4] The parties originally filed an appeal with the Superior Court which transferred the appeals to this Court on the basis that they involved the interpretation of a zoning ordinance. Although the zoning issue is very peripheral to the other issues in this case, we declined to transfer the case back to Superior Court based upon principles of judicial economy and the expeditious administration of justice. See Commonwealth v. Tyson, 427 A.2d 283 (Pa. Cmwlth. 1981).

In reviewing these issues, we are cognizant that our standard of review of a trial court's decision is limited to examining whether factual findings are supported by competent evidence and whether the trial court committed an error of law or abuse of discretion. Marinaro v. Department of Transportation, Bureau of Driver Licensing, 703 A.2d 1066 (Pa. Cmwlth. 1997). Also, we would note that, as the finder of fact below, Common Pleas' findings are accorded the same weight as a jury verdict. Commonwealth v. Schill, 643 A.2d 1143 (Pa. Cmwlth.), petition for allowance of appeal denied, 539 Pa. 656, 651 A.2d 543 (1994).

The first issue we address is whether Cappelli's commercial use of his property violated the Concord Township zoning ordinance. As noted above, the Concord Township zoning ordinance clearly prohibits Cappelli's use of the property for any commercial purpose. It is undisputed that the zoning ordinance was in effect at the time that Cappelli bought the property in Concord Township, that the property was zoned R-2D, and that despite this zoning classification which prohibited commercial uses, he relocated his business there. Accordingly, any argument by Cappelli that his commercial use, beginning **after** the enactment of the zoning ordinance, constituted a preexisting nonconforming use is absolutely meritless, as the very essence of a preexisting nonconforming use is that the use **predates** the zoning ordinance. Lantos v. Zoning Hearing Board of Haverford Township, 621 A.2d 1208 (Pa. Cmwlth. 1993). Accordingly, the conclusion of Common Pleas that such a use was permissible is an error of law and is in contradiction to the terms of the zoning ordinance.[5] Accordingly, we vacate that

[5] Likewise, Common Pleas erred by concluding that, although Cappelli's use was permissible under the zoning ordinance, he had obtained a vested right to that use. The doctrine
(Footnote continued on next page...)

portion of Common Pleas order which concluded that Cappelli's use did not violate the Concord Township Zoning Ordinance.

Because we conclude that Cappelli's use did violate the zoning ordinance, we must further determine if Cappelli acquired a vested right to use the property commercially.

In order to establish a vested right to a particular use of a property, a party must show:

> (1) municipal failure to enforce the law over a long period of time or some form of 'active' acquiescence of the illegal use; (2) good faith

---

(continued...)

of vested rights is grounded upon the principle that the use under consideration is an unlawful use, not a lawful use, and, in order to acquire a vested right, a party's use of the land must be in violation of the zoning ordinance. Schuylkill Township v. Overstreet, 529 A.2d 551 (Pa. Cmwlth. 1987), petition for allowance of appeal denied, 517 Pa. 627, 538 A.2d 879 (1988). This is not what Common Pleas concluded in this case; rather the court concluded that the commercial use was not unlawful.

But even assuming arguendo that Cappelli did have a preexisting nonconforming use, his 1981 expansion of the commercial use would have been improper. Section 6203 of the Concord Township Zoning Ordinance provides that an extension of a non-conforming use shall be permitted only by a special exception. It is undisputed that Cappelli never applied for nor did he receive such an exception.

During oral argument, Cappelli's counsel indicated that the section of the zoning ordinance requiring a special exception was not in effect during 1981. Our review of the record, however, did not disclose any evidence whatsoever to support this statement, and, even if correct, it would not alter the incorrect conclusion that the commercial use was a preexisting nonconforming use, nor the requirement that Cappelli would have to meet the common law principles of expanding a preexisting nonconforming use which, of course, he never attempted to do.

throughout the proceedings by the property owner; and (3) innocent reliance evidenced by substantial expenditures.

Schuylkill Township v. Overstreet, 529 A.2d 551, 555 (Pa. Cmwlth. 1987), petition for allowance of appeal denied, 517 Pa. 627, 538 A.2d 879 (1988). It is undisputed that, other than the September 30, 1981 letter on which the Township never followed-up, the Township failed to enforce the zoning ordinance as it applied to Cappelli's commercial use of the property. Likewise, it seems clear that Cappelli did expend significant sums for improvements and for the overall operation of his business. Therefore, our inquiry turns to Cappelli's conduct, assuming arguendo, that Cappelli satisfied the other requirements.

In order to establish that he acted in good faith, a property owner is required to show that he made a reasonable attempt to ascertain the actual status of the property under the zoning ordinance. Skarvelis v. Zoning Hearing Board Of Dormont, 679 A.2d 278 (Pa. Cmwlth. 1996). In the present case, Cappelli offered his testimony that Mr. Hall indicated that the use was acceptable. In addition, he offered the letter that he sent to Mr. Hall seeking written assurances that no problems would exist with the use, even though no reply was ever received from the Township. Cappelli argues that this action by Hall bound the Township to his alleged oral assurances. We cannot agree.

First, by analogy, we believe that, in the same way that the opinion or assurance of a building inspector cannot justify the issuance of a variance, Kovacs v. Ross Township Board of Adjustment, 95 A.2d 350 (Pa. Super. 1953), the mere assertion that a Township officer was consulted about a particular use's compliance with the zoning ordinance, without formal Township action, cannot support the

approval of a use based upon a vested rights theory. See also Township of West Pikeland v. Thorton, 527 A.2d 174, 176 (Pa. Cmwlth. 1987) (stating that "a landowner cannot acquire a vested right by relying on the statements of [the chairman of the zoning hearing board] when he is acting merely as a ministerial officer rather than in his adjudicative capacity, and if the landowner makes expenditures for construction in reliance on those statements, he does so at his own peril").

Moreover, at the core of Cappelli's argument is the premise that the oral assurances of a Township official that there were no zoning violations can bind the Township on grounds of equitable estoppel. We cannot accept such an argument because it would lead to instances of fraud and severely compromise the principles behind zoning ordinances.[6]

Accordingly, we conclude that Cappelli did not demonstrate the requisite good faith to acquire a vested right to the commercial use of the property and, because Cappelli never acquired a vested right for the commercial use of his property, it logically follows that he had no right to expand that use absent a variance or other adjudication from the zoning hearing board which, of course, he did not seek.[7]

---

[6] Of course, property owners who rely on the issuance of a building permit, even if granted or issued in error could claim a vested right to the use if they also satisfy the other requirements. See Neshaminy Plaza II v. Kelly, 346 A.2d 884 (Pa. Cmwlth. 1975).

[7] Accordingly, we do not address Cappelli's argument that Common Pleas erred by finding that, although his use was permissible, it nonetheless constituted a nuisance. As we have concluded that Cappelli's use is, in fact, illegal, we believe that Common Pleas' ultimate result, **(Footnote continued on next page...)**

Next, we examine the issue of damages. Prior to doing so, however, we must address Cappelli's argument that the Turnbulls claim for damages has been waived because it was not raised in Plaintiffs' exceptions to the Decree Nisi, nor was it argued in their brief to this Court. We agree. Pennsylvania Rule of Civil Procedure 227.1 requires the filing of post-trial motions, identifying errors in the trial court's decision. Although the issue of the failure to award the Turnbulls damages was raised in the brief in support of Plaintiffs' post-trial motions, that issue was not raised in the motion itself. We have held that, in order to preserve an issue for appellate review, the issue must be raised in the post-trial motions and briefed or argued in the post-trial proceedings. Siegmond v. Duschak, 714 A.2d 489 (Pa. Cmwlth. 1998). Because the Turnbulls failed to raise the issue in their post-trial motion, that issue has been waived. Id. We thus will confine our examination to the damages awarded to the Kerrs.

Cappelli argues that Common Pleas erred by awarding any damages in the case because such an award was not supported by substantial evidence. It is true that, although an appellate court will not substitute its judgment for that of the trial court, any award of damages must be supported by substantial competent evidence. Refuse Management Systems, Inc. v. Consolidated Recycling and Transfer Systems, Inc., 671 A.2d 1140 (Pa. Super. 1996). Substantial evidence is that amount of evidence which a reasonable mind might accept as adequate to support

---

(continued...)

i.e., finding a nuisance was correct. See Gateway Motels, Inc. v. Municipality of Monroeville, 525 A.2d 478 (Pa. Cmwlth. 1987), petition for allowance of appeal denied, 518 Pa. 621, 541 A.2d 748 (1988).

a conclusion. Hertzberg v. Zoning Board of Adjustment of City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998).

Cappelli specifically argues that the Plaintiffs' expert, Mr. Armitage, did not provide substantial evidence because his assessment of damages for economic obsolescence was based upon a valuation made in 1984, thirteen years prior to the issuance of the decree nisi in 1997 and that his testimony was not based upon the actual market value of the homes at that time. Accordingly, Cappelli asserts that, to permit the award of damages to stand, would be inconsistent with any notion of justice and due process. We disagree.

The fact that Mr. Armitage did not examine the properties until 1984 and used figures based on surrounding home sales does not constitute grounds to reverse the award by itself. First, Mr. Armitage stated that, in real estate appraisals, it is not uncommon for studies to be applied to a previous time period, i.e., a 1984 study based upon 1982 sales figures and data. Second, we believe that the fact that Mr. Armitage did not observe the property in 1982, the year to which his study was applicable, goes to the weight of his testimony, not the substantiality of the opinion. In this respect, the case would be analogous to the opinion of a doctor in a workers' compensation proceeding who only examined a claimant once or even only consulted the claimant's medical records. In such a situation, those facts go to the weight allocated to the opinion, not the substantiality of the opinion, determinations of which are solely within the province of the factfinder. Koppers Co., Inc. v. Workmen's Compensation Appeal Board (Boyle), 536 A.2d 509 (Pa. Cmwlth.), overruled on other grounds by Bell v. Workmen's Compensation Appeal

Board (Gateway Coal Co.), 545 A.2d 430 (Pa. Cmwlth. 1988). Likewise, in this case, Common Pleas, as the trier of fact, has the duty to allocate weight and credibility to the testimony which it hears, and it is not the function of an appellate court to substitute its own judgment for that of Common Pleas. Foflygen v. Allegheny General Hospital, 723 A.2d 705 (Pa. Super. 1999).

As to Cappelli's second argument in this respect, that permitting the award of damages to stand based upon Mr. Armitage's opinion would result in an injustice and deprivation of due process, we fail to see any deprivations. Cappelli does not argue that he was denied the opportunity to cross-examine Mr. Armitage; indeed, his counsel did cross-examine Mr. Armitage regarding his opinions. Likewise, Cappelli does not assert that Common Pleas prohibited him from offering his own expert witness or other materials which would impeach Mr. Armitage or refute the opinions which he offered. The essence of Cappelli's argument in this respect appears to be that Common Pleas believed Mr. Armitage, which is hardly grounds for a reversal.

Next, Cappelli argues that the conclusion of Common Pleas that, after 1983, surface water from his property caused injury to the Kerr property was erroneous because such a conclusion is not supported by the record and that damages based upon a trespass to land theory were inappropriate because Cappelli was an upper landowner and the Kerrs did not establish that he diverted the course or increased the volume of water flowing onto the Kerr property. Accordingly, Cappelli argues that Common Pleas erred by requiring it to install a drainage system.

As to the first argument, we conclude that it is meritless. The Plaintiffs offered evidence as to the change in water volume after the 1981 expansion. Specifically, Mr. Kerr stated that, following the 1981 expansion of Cappelli's property, he could no longer cut his grass near the property line because water which was discharged from Cappelli's property sat in his yard to the point that his riding mower could not move in that area. Likewise, Mr. Kerr identified a hole on his property, 18 to 20 inches deep, which gets more severe closer to the Cappelli property. Mr. Kerr testified that the erosion escalated after the 1981 expansion of Cappelli's property. In addition, Plaintiffs presented the expert testimony of Mr. Ramaika who concluded that Cappelli's drainage system was inadequate and analogized the system to a neighbor who cleans up his own yard by throwing his garbage into his neighbor's yard. Mr. Ramaika further opined that the Kerr property would continue to deteriorate until an adequate stormwater control system was implemented.

Cappelli did present expert testimony from his own engineer who opined that the drainage system was adequate and that the Cappelli property was not the cause of the Kerrs' water problem. Although this testimony, if believed, would have supported an alternative conclusion by Common Pleas, the trial court chose to accept Plaintiffs' testimony and conclude that the 1981 expansion **was** the cause of the Kerrs' drainage problems. Our standard of review is limited to ensuring that the conclusion of Common Pleas was supported by competent evidence of record, which, as noted above, it was. Accordingly, we reject Cappelli's argument in this respect.

As to Cappelli's next argument, that the "common enemy" doctrine precludes a finding of liability and does not support the judgment of Common Pleas ordering Cappelli to install a new drainage system, we must also reject this argument. Although it is true that in some limited circumstances water is considered an enemy common to all landowners, Piekarski v. Club Overlook Estates, Inc., 421 A.2d 1198 (Pa. Super. 1980), the common enemy doctrine only applies to urban areas and has no application to exurban or rural areas. See Fazio v. Fegley Oil Co., Inc., 714 A.2d 510 (Pa. Cmwlth. 1998). In the present case, the zoning ordinance indicates that one of the uses in the district is farming (the property that Cappelli purchased already had a barn on it), and the pictures admitted into evidence clearly indicate a rural setting, rather than an urban one. Accordingly, we conclude that the common enemy doctrine is inapplicable in the present case because the properties are located in a rural area.

Finally, Plaintiffs argue that they are entitled to interest on their award beginning in 1981 when the damage to their properties occurred, but Common Pleas did not address this issue. We agree with Plaintiffs that, due to the protracted nature of the proceedings, equity dictates an award of interest, and, therefore, we will assess the interest from 1981, the year in which Cappelli expanded and the damage to the Kerrs' property accrued. In imposing interest, we loosely analogize this case to an eminent domain proceeding. In such a case, interest is assessed from the commencement of damage to a property under Section 611 of the Eminent Domain Code.[8] This is also the case where, although not deprived of all

[8] Act of June 22, 1964, Special Sess., P.L. 84, as amended, 26 P.S. §§1-611.

of his property, a property owner is deprived of the beneficial use and enjoyment of their property, i.e., a de facto taking. See Appeal of Jolly, 621 A.2d 1181 (Pa. Cmwlth.), petition for allowance of appeal denied, 535 Pa. 676, 636 A.2d 636 (1993). The amount of interest will be six-percent, which is the default legal rate of interest in the Commonwealth. See Act of January 30, 1974, P.L. 13, as amended, 41 P.S. §202.

In sum, we hold the following: (1) Cappelli's use of his property as a commercial enterprise, including the 1981 expansion thereof, violated the Concord Township zoning ordinance and should be enjoined; (2) the award by Common Pleas of damages to the Kerrs was supported by substantial evidence; (3) Common Pleas is to assess interest on the award at the rate of 6% per annum, beginning in 1981, the year in which damages accrued. The remainder of the order of Common Pleas which directed Cappelli to install a drainage system to alleviate the runoff of water onto the neighboring properties is affirmed.

JOSEPH T. DOYLE, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBERT TURNBULL & CHERYL TURNBULL and JOHN KERR & VICKI KERR	:	
v.	:	No. 2830 C.D. 1998
DOMINIC CAPPELLI	:	
JOHN KERR & VICKI KERR, Appellants	:	
JOHN KERR and VICKI KERR, his wife and ROBERT TURNBULL and CHERYL TURNBULL, his wife	:	
v.	:	No. 2829 C.D. 1998
DOMINIC CAPPELLI, Appellant	:	

ORDER

NOW, , in accord with our above opinion, that part of the Final Decree of the Court of Common Pleas of Delaware County dated October 6, 1997, which denied the post-trial motions of the cross-appellants, John and Vicky Kerr, is hereby vacated, and that part of the said Decree which denied the post-trial motions of the appellant, Dominic Cappelli and the cross-appellants, Robert and Cheryl Turnbull, is hereby affirmed.

Moreover, and in accord with our foregoing opinion, we specifically affirm that part of the Decree Nisi of the Court of Common Pleas dated June 5, 1997, which first ordered Dominic Cappelli to "install the drainage line from [Cappelli's] property through the Kerr property to the head wall on Mendenhall Drive in accordance with the engineering plan prepared and submitted to the court" and second, awarded damages in the amount of $18,341 in favor of the cross-appellants, John and Vicki Kerr, and against the appellant, Dominic Cappelli. In addition, Common Pleas, on remand, is to assess interest on the amount of the aforesaid award of $18,341 at the rate of six percent per annum, not compounded, beginning June 1, 1981.

Last, we specifically reverse the finding and/or conclusion of the Court of Common Pleas that there were no violations of the ordinances of Concord Township and specifically, henceforth, enjoin all commercial activity on the Cappelli property unless and until permitted under the ordinances of Concord Township and applicable zoning law.

Jurisdiction relinquished.

JOSEPH T. DOYLE, Judge