

Lower Paxton Township  
Zoning Hearing Board

February 24, 2022

**Members Present:**

David Dowling

Allan Hansen

Jeff Staub

Greg Sirb

Mark Emery

Joe Murphy

Ron Reeder

Also, In Attendance: James Turner, Nick Gehret, Kristi Focht

**Appeal 22-01**

Applicant: Leroy Smigel

Address: 4120 Crestview Drive, Harrisburg PA 17112

Property Owner: Leroy Smigel

Property: 4120 Crestview Drive, Harrisburg, PA 17112

For: An appeal of the Code Enforcement Officer that the bamboo on the subject property is in violation of section 203.4 of the International Property Maintenance Code (IPMC). The IPMC states all premises and exterior property shall be maintained free from weeds or plant growth in excess of 10". All noxious weeds shall be prohibited. Pennsylvania Department of Agriculture defines bamboo as a noxious weed.

Fees Paid: January 4, 2022

Property Posted: February 17, 2022

Advertised: February 9, 2022, and February 16, 2022.

The Hearing Began at 7:00 p.m.

Mr. Dowling swore in Nick Gehret, Code Enforcement Officer for Lower Paxton Township.

Mr. Dowling questioned Mr. Gehret on what Township Ordinance is at issue.

Mr. Gehret answered section 302.4 Weeds under the Property Maintenance Code.

Mr. Dowling questioned Mr. Gehret if the appropriate fees have been paid and if the application had been properly advertised and hearing notices posted.

Mr. Gehret answered that it was paid on January 4, 2022, it was posted on February 17, 2022; and advertised in the Hummelstown Sun on February 9, 2022, and February 16, 2022.

Mr. Dowling swore in Mr. Leroy Smigel, homeowner.

Mr. Dowling questioned Mr. Gehret if he had cited the homeowner.

Mr. Gehret answered that was correct.

Mr. Sirb questioned if Mr. Gehret had received a complaint.

Mr. Gehret answered yes. He noted the complained was from the Stray Winds Farm HOA.

Mr. Sirb questioned Mr. Gehret on the nature of the complaint.

Mr. Gehret stated the first complaint came in May of 2020 that bamboo was present on the wood line that abuts the common open space area.

Mr. Sirb questioned if the HOA is concerned that bamboo is on their land.

Mr. Gehret explained the complaint is that bamboo is present. Mr. Gehret continued that in 2017 under Ordinance 17-10 there was an amendment to the property maintenance code making bamboo prohibited in the Township.

Mr. Dowling questioned that before 2017 bamboo was allowed.

Mr. Gehret noted that before 2017 bamboo was simply a civil complaint between neighbors and was dealt with by private property owners.

Mr. Sirb questioned if the bamboo would begin to grow in the common space would it not just be mowed.

Mr. Gehret noted that some townships in Pennsylvania provide strict guidelines for the planting of bamboo. He continued that in 2017 Lower Paxton identified bamboo as a noxious plant. He continued that under Section 17-10 that the Township made it prohibited, and it is a policy going forward from 2017. He explained when the Township receives a complaint, they address it with the property owner to have the bamboo removed by the property owner.

Mr. Sirb questioned if the bamboo is allowed to be on the applicant's property.

Mr. Gehret explained that Mr. Smigel's testimony is that this is a pre-existing non-conforming plant. Mr. Gehret noted that Mr. Smigel had it planned by a landscaper which made the use more non-conforming and that cannot be done.

Mr. Dowling noted to Mr. Gehret that the Board understands he has a job that he must do.

Mr. Gehret noted that from May of 2020 and the original complaint to now in 2022 things have changed. Mr. Gehret approached the Board with a drawing and identified where he located the plantings. Mr. Gehret noted to a letter written by Mr. Smigel that he did plant the bamboo on the property. Mr. Gehret showed to the map and stated he feels the bamboo was planted on Mr. Smigel's property. Mr. Gehret noted to another section of property on the map and noted the plantings in this area seem to be on Stray Winds property and Mr. Gehret cannot enforce that. He explained that under the ordinance he can only address the subject on the subject's property.

Mr. Dowling stated he was out at the property and saw the plantings located in a wooded area and not in the grass area.

Mr. Gehret noted that in May of 2020, he asked for the HOA Manager to provide him a survey of the property.

Mr. Sirb questioned if there was a representative present this evening from the HOA.

Mr. Gehret noted they were unable to attend and that is why they provided a letter.

Mr. Sirb questioned Mr. Gehret that he only responds to bamboo if a complaint comes into the Township.

Mr. Gehret answered correct.

Mr. Sirb questioned Mr. Gehret if the second complaint was like that of the first complaint.

Mr. Gehret answered the HOA came back when they received a letter from Mr. Smigel that he had planted the bamboo as a screen.

Mr. Dowling questioned Mr. Gehret if the HOA has conceded to the fact the bamboo is on Mr. Smigel's property.

Mr. Gehret noted that the HOA is concerned of the bamboo growth and constant maintenance.

Mr. Dowling questioned if any of the Board members had any questions before Mr. Smigel begins his testimony.

No response was heard.

Mr. Sacks noted to Mr. Gehret that he seems to have some knowledge of bamboo.

Mr. Gehret answered he has enough working knowledge of bamboo only in the capacity for working with the Township. He noted he no expert.

Mr. Sacks questioned Mr. Gehret if he knew there are 100 varieties of bamboo, some varieties that spread and some that do not spread.

Mr. Gehret stated he was not aware of that.

Mr. Sacks questioned Mr. Gehret if he was familiar with property maintenance and has, he had any training. Mr. Sacks noted to the Department of Agriculture's list of noxious weeds. He questioned Mr. Gehret if he was aware that bamboo is not on that list.

Mr. Gehret answered he is aware of that.

Mr. Sacks questioned if Mr. Gehret is aware that the U.S. Department of Agriculture has a list of noxious which Pennsylvania follows.

Mr. Gehret stated he was not aware of that.

Mr. Sacks questioned Mr. Gehret if it would surprise him if bamboo was not on the USDA list.

Mr. Gehret noted that would surprise him.

Mr. Sacks questioned why.

Mr. Gehret answered that considered the public's perception of bamboo being invasive.

Mr. Sacks questioned Mr. Gehret if Crown Vetch was on that list.

Mr. Gehret answered it is not listed on the Township's list.

Mr. Sacks presented to the Board the list of noxious weeds from the USDA list.

Mr. Hansen questioned Mr. Sacks on his line of questioning. He noted they are not here to discuss the types of bamboo, but they are here tonight because bamboo is not to be on the property.

Mr. Sacks replied that it is important to understand something about bamboo. He noted that you could walk into a secretary's office and see a bamboo planter and under the Township Ordinance that is a noxious weed. He explained the reason and legal argument to show the Board this list is because state law preempts local law.

Mr. Sirb questioned Mr. Turner that if a building was built and is grandfathered in, would the same be true for a plant.

Mr. Turner answered that if the plant that grows for that length of time and it not an annual or a plant that only grows for two to three years it could be valid.

Mr. Sirb commented to Mr. Sacks he understands his point that if something has been there and the ordinance changes, they should not have to mow it down if it was already there.

Mr. Gehret answered if there is bamboo that has been pre-existing or grandfathered in, he understands that. He noted the issue is that if you have a landscaper come in and plant bamboo after the adopted date then that bamboo would be prohibited because you made something that is non-conforming more non-conforming, and you cannot do that. He continued that if the bamboo that was existing was spreading on its own without the help of someone planning it then there is a good argument for pre-existing.

Mr. Sacks followed by stating two principals of law, if you have a nonconforming use, and this was a legitimate use, the Township passed a law that made it nonconforming and every nonconforming under your ordinance has a right to expand and you cannot deny it, that is a constitutional principal. Mr. Smigel noted to his second point, the Pennsylvania Constitution states you cannot make a law retroactive. Mr. Smigel noted to his third point, if you were to deprive the applicant of a use, even it if nonconforming, that is like eminent domain. He

noted that when Mr. Smigel testifies, he will tell you that it has been on the property for 40 years and was in that location, but Mr. DiSanto built Stray Winds it was bulldozed, and Mr. Smigel was merely replacing it.

Mr. Emery requested to move to the testimony.

Mr. Sacks presented a packet to the Board members.

Mr. Sacks questioned Mr. Smigel when he purchased the property.

Mr. Smigel answered 1995.

Mr. Sacks questioned Mr. Smigel when it was built and by whom.

Mr. Smigel answered it was built in 1962 by Fred Grayson who was a student of Frank Lloyd Wright.

Mr. Sacks requested Mr. Smigel to describe the design.

Mr. Smigel explained the house has an oriental design with extensive bamboo on the property. He noted the bamboo that was replaced was on the boundary line. He explained that the DiSanto's bulldozed they went into the tree line and even knocked over a few of Mr. Smigel's trees. Mr. Smigel noted to photos taken of his property that shows the bamboo.

Mr. Sacks requested to approach the board and use the map that was provided by Mr. Gehret. Mr. Sacks requested Mr. Smigel to show the board where the tree line has been taken out by the bulldozer and figure out how they will get their privacy back. Mr. Smigel noted they are trying to regain the privacy they once had. Discussion followed with viewing the map and showing the photos from the packet provided to the Board.

Mr. Sirb questioned if the bamboo comes into the HOA property can the HOA just mow it. He questioned why this is not a civil suit and why it is coming before the Zoning Hearing Board.

Mr. Gehret noted he is not an expert in bamboo and has the knowledge from the work performed in the Township. Mr. Gehret explained that it can take a few years before bamboo will begin to grow and the concern is when it does grow how quickly it grows and neighbors do not want it on their property to maintain. He noted once the established bamboo is on the property it is difficult to get rid of.

Mr. Sacks stated he will respectfully disagree with Mr. Gehret and noted to section 805 of the ordinances and allow nonconforming uses to expand. Mr. Sacks noted the developer of Stray Winds destroyed trees and bamboo that was already there. He questioned why the homeowner should be punished for replacing what was there.

Mr. Dowling questioned Mr. Gehret if he was aware that SKH Nursery on Linglestown Road sells bamboo.

Mr. Gehret noted he was not aware of that.

Mr. Dowling questioned if the Township prohibits bamboo, then how can SKH, a large nursery sells it. He questioned are we to assume that everyone who buys it, takes it out of the township.

Mr. Gehret questioned Mr. Dowling if the Township is prohibiting the sale or the planting of bamboo. He answered that under the Township Ordinance the township also identifies poison ivy, poison oak and poison sumac, they grow naturally and that is something Mr. Gehret is actively enforcing but since it is an ordinance Mr. Gehret is responsible to enforce it and to make sure the issue gets addressed.

Mr. Dowling noted that the Board understands Mr. Gehret job.

Mr. Sirb stated he feels this should be a civil issue.

Mr. Dowling noted it will become a civil issue when the bamboo crosses the property line but at this time the bamboo has not done that.

Mr. Gehret stated that the HOA has not provided him with any documentation that proves the bamboo is on their property.

Mr. Dowling questioned Mr. Smigel that if these plantings are on the neighboring property could the neighbor not simply dig them up.

Mr. Smigel responded that the neighboring property could do whatever they wanted because it is their property just like he should be able to do what he wishes on his property.

Mr. Smigel noted to other properties that you drive by, and you can see bamboo, but nothing is done about that.

Mr. Sirb noted that there have not been any complaints about those properties.

Mr. Smigel noted that they have lived on this property since 1995 and the bamboo was taken away by the developers and they were simply replacing it for privacy. He noted that since they have lived at that property the bamboo is not out of control. He does not feel there is any harm to the neighboring property.

Mr. Reeder questioned Mr. Smigel if there are photos of his property with the bamboo prior to it being bulldozed.

Mr. Smigel answered no.

Mr. Dowling questioned when the townhouses were constructed.

Mr. Gehret suggested it may have been 2018.

Mr. Emery questioned Mr. Gehret that in the past he has cited people with bamboo, he questioned if it was because the bamboo had trespassed onto the other property or just because of the bamboo itself.

Mr. Gehret answered that it is twofold. He explained that it is mostly because the bamboo has trespassed on the other property or started to spread on the property. Mr. Gehret noted that the decision that is made tonight will make his job more difficult going forward when needing to have bamboo removed from a property.

Mr. Dowling noted to a fundamental issue it appears the Department of Agriculture in Pennsylvania does not have a problem.

Mr. Reeder noted that the Department of Agriculture does have a problem. He explained he checked their web site a few hours ago and bamboo is not referred as noxious weed but invasive plant.

Mr. Smigel noted that the HOA could have come and spoken with him. He was simply working to restore the privacy.

Mr. Hansen questioned if he will be planting any additional.

Mr. Smigel answered no. He explained the soil is no good.

Mr. Turner noted that if the Board was inclined to grant relief, it would need to be specific so it would not have value to set a president for anyone else that may need to enforce.

Mr. Murphy questioned why the new bamboo is not growing where the old bamboo had been.

Mr. Smigel explained that when they bulldozed, they took the topsoil off that had been there and what is left is clay.

Mr. Dowling questioned if a member of the Board wished to act on the appeal.

Mr. Sirb motioned to sustain the appeal based on one the bamboo is a preexisting condition, and it would have to be invasive, condition no new bamboo to be planted, condition that if it dies it will not be replanted, condition that if the bamboo does become invasive to the HOA property Mr. Smigel will act in good faith to rectify the issue.

Mr. Dowling questioned if the Board understood the motion and the conditions.

No response was heard.

Mr. Emery seconded the motion.

Mr. Dowling questioned if there were any further questions or comments by members of the Board.

No response was heard.

Mr. Dowling requested Mr. Turner to conduct a roll call vote: Mr. Hansen, no; Mr. Emery, aye; Mr. Staub, aye; Mr. Sirb, aye; Mr. Dowling, aye.

Mr. Dowling noted the appeal has been sustained.

This hearing ended at 8:08 p.m.

Respectfully Submitted,

*Kristi Focht*

Kristi Focht, Recording Secretary