

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Hazel Baron and	:	
Brian K. Marshall,	:	
Appellants	:	
	:	
v.	:	No. 1256 C.D. 2010
	:	Argued: November 9, 2010
Zoning Board of the Borough	:	
of Pleasant Hills and	:	
Borough of Pleasant Hills	:	

**BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON**

FILED: January 5, 2011

Appellants Hazel Baron (Baron), the now-deceased owner of land in the Borough of Pleasant Hills (Borough), and Brian Marshall, Baron’s nephew (hereafter owner or Marshall), appeal from an order of the Court of Common Pleas of Allegheny County (trial court). The trial court affirmed a decision of the Borough’s Zoning Hearing Board (ZHB), which denied Marshall’s application for a variance to permit him to use a parking lot on owner’s property to park commercial trucks. We affirm the trial court’s order.

The property in question is located in a C-3 Commercial District in the Borough. Section 374-88(C) of the Borough’s zoning ordinance provides in

pertinent part that “no lot area shall be used for the parking and placing, either permanently or temporary, of . . . truck trailers.” The property consists of an improvement (a building used over the years for various commercial establishments, with the commercial entity on the ground floor and a residential dwelling on the second floor) and a large open lot. The Borough’s Code Enforcement Officer sent a letter to owner on March 27, 2008. The Enforcement Officer stated that questions had arisen in the past regarding whether truck trailers were permitted to park on the property.

The Enforcement Officer also referenced a 1978 “Planning Commission” “memorandum of opinion” (memorandum) that, on its face, appears to relate to an application for a zoning permit for the property. The memorandum pertains to a proposal purportedly made by Baron (or her sister, who may have owned the property) in 1978 to use the first floor of the building as a pizza shop, and also indicates that the owner (at that time) intended for the second floor to be used as a residential dwelling. The memorandum provides that “[t]he owner and tenant have agreed that there will be no truck trailer parking in the parking lot.” (Reproduced Record (R.R.) at 4a.) The last numbered paragraph of the recommendation in the memorandum provides that “[t]he tenant and the landlord will be jointly responsible to the Borough to enforce the no parking of trailers in the area.” (*Id.*) In the letter, the Enforcement Officer advised that “complete

compliance with this recommendation will be enforced by the Borough within 7-days of receipt of this notice Failure to comply with this notice constitutes a violation.”

In response to the letter, Marshall first filed an application for a zoning permit,¹ which the zoning officer denied on July 14, 2008. Marshall then sent a letter to the ZHB, dated July 24, 2008, in which he sought a variance to permit him to park trucks on the property. In his variance request, Marshall stated that Baron had owned the property for many years, that he parked trucks in the lot, and that he was seeking the variance in order to be able to continue to park trailer trucks there. On July 28, 2008, Marshall submitted to the ZHB an application for a *variance* from the no-parking provision of the zoning ordinance.

The ZHB held a public hearing on August 28, 2008, during which Marshall testified.² At the conclusion of the hearing, the ZHB voted unanimously on the record to deny the variance request. On September 8, 2008, however, the ZHB sent a letter to Marshall, indicating that the ZHB was vacating its decision after discovery that it had based its decision on the mistaken belief that the property is in an R-1 zoning district, rather than the C-3 district in which it actually

¹ At the time of the application, four tractor trailers were being parked on the property, including one that is Marshall’s and three owned by Marshall’s employer. Marshall or his employer paid Baron \$100 per month per truck to park the vehicles on the property.

² Because Marshall was not then represented by counsel, this “testimony” was more in the nature of colloquy with the ZHB.

is located. The ZHB then sent a letter on November 10, 2008, informing Marshall that it would conduct another hearing on December 4, 2008. At the December 4th hearing, Marshall asserted that he did not believe he needed a variance because the property is located in a C-3 commercial district and he had been parking trucks there for thirty years. The ZHB denied Marshall's request for a variance. The ZHB followed up its announcement with a written decision in which it concluded that Marshall had not submitted evidence that would support the grant of a variance under Section 910.2 of the Pennsylvania Municipalities Planning Code (MPC).³ Further, although the only application before the ZHB was Marshall's application for a variance, the ZHB additionally proceeded as if Marshall, who had been acting *pro se*, had formally applied for a nonconforming use approval and had formally requested approval under a theory of a vested right to a variance.

Marshall appealed the ZHB's decision to the trial court, asserting that (1) parking of truck trailers is a permitted use in a C-3 district; (2) the Borough had not objected to the parking of trucks for over thirty years; (3) the ZHB erred in denying the variance, if one was needed; and (4) the ZHB erred by failing to accept certain evidence into the record. The trial court affirmed the ZHB's decision, concluding that Marshall had failed to establish a right to a variance under a theory

³ Act of July 31, 1968, P.L. 805, *as amended*, added by Section 89 of the Act of December 21, 1988, P.L. 1239, 53 P.S. § 10910.2.

of variance by estoppel and had failed to demonstrate that the use constituted a valid nonconforming use.

On appeal to this Court,⁴ Marshall raises the following issues: (1) whether he established a right to a variance by estoppel based upon alleged on-going use of the property for parking tractors and trailers over a period of thirty years; and (2) whether he established the existence of a nonconforming use that predates the truck trailer parking ordinance. For the reasons explained below, we conclude that the ZHB erred in proceeding to consider issues other than those appropriate for resolution of Marshall's variance application, which technically was the only matter before the ZHB.

With regard to alleged nonconforming uses, Section 374-104 of the Borough's zoning ordinance provides that the ZHB has the power to render final adjudications in appeals from decisions of the Borough's zoning officer following the acceptance by the zoning officer of a nonconforming use registration or from the refusal of the zoning officer to register a nonconforming use. The process the Borough's zoning ordinance anticipates with regard to consideration of a property

⁴ When a trial court takes no additional evidence in an appeal from a zoning board decision denying a variance, this Court's standard of review is limited to determining whether the zoning hearing board abused its discretion or committed an error of law. A zoning hearing board errs as a matter of law if its necessary factual findings are not supported by substantial evidence. *Freedom Healthcare Serv., Inc. v. Zoning Hearing Bd. of the City of New Castle*, 983 A.2d 1286, 1290 (Pa. Cmwlth.), *appeal denied*, ___ Pa. ___, 995 A.2d 355 (2010).

owner's nonconforming use claim is that a zoning officer must first consider a request to register an alleged nonconforming use.

Thus, although the zoning ordinance provides the ZHB with jurisdiction over appeals from a zoning officer's refusal to register an alleged nonconforming use, in this case, Marshall never specifically requested the zoning officer to render a decision regarding whether his use constitutes a valid non-conforming use. Therefore, the ZHB should not have addressed the issue, and by proceeding to consider the issue without having jurisdiction, the ZHB preempted any opportunity Marshall would have had to make a proper case in favor of a valid nonconforming use. We believe that Marshall is entitled to pursue this claim in the proper procedural posture, and the ZHB erred by addressing a claim Marshall did not specifically raise.

With regard to the variance by estoppel issue, we also believe that the ZHB erred by addressing an issue that Marshall did not specifically place before it. Marshall did not seek a variance by estoppel from the ZHB, but only requested a variance. Although there are various ways by which a property owner may seek to have such a claim litigated,⁵ in this case Marshall did not request approval under a

⁵ In *Pietropaolo v. Zoning Hearing Board of Lower Merion Township*, 979 A.2d 969 (Pa. Cmwlth. 2009), the property owner raised a variance by estoppel claim in defending a zoning enforcement action. In *Hafner v. Zoning Hearing Board of Allen Township*, 974 A.2d 1204 (Pa. Cmwlth. 2009), the property owner filed a specific action with the ZHB seeking approval of a use under a theory of variance by estoppel.

variance by estoppel theory. He asserted various factual matters that the ZHB elected to consider as defensive positions unrelated to a traditional variance request, but the only matter that Marshall specifically placed before the ZHB was Marshall's request for a variance.⁶

In this case, the Borough first initiated an enforcement action against Marshall on March 27, 2008, but the record appears to indicate that the Borough deferred its enforcement action pending the outcome of Marshall's request for a variance. The record includes a letter from the Borough, dated January 8, 2009, indicating that the Borough had not received any notification that Marshall had appealed the ZHB's decision, and ordering Marshall to remove all trucks, trailers, campers, and other similar vehicles from the property on or before January 26, 2009. Presumably, once the Borough received notice that Marshall appealed the ZHB's decision, it either deferred or discontinued the enforcement action it initiated by its January 8, 2009 letter.

Thus, it appears to this Court that, because the ZHB addressed these claims when it should have only addressed Marshall's request for a traditional variance, Marshall has two potentially concurrent avenues he may take in seeking

⁶ If Marshall, a non lawyer, had known that the ZHB would address a theory he did not raise in his *variance* application, he could have presented additional evidence that might have supported his claim. Because the ZHB, perhaps with the best of intentions, considered a claim that Marshall did not specifically raise, we conclude that the ZHB erred in reaching a determination on the merits regarding any claim Marshall may have under the variance by estoppel theory.

approval of his use. He may seek to register his use with the zoning officer as a valid nonconforming use, and pursue appeals of a negative decision to the ZHB. In the context of the Borough's enforcement action, he may also seek to raise variance by estoppel as a defense.

Accordingly, we will vacate the trial court's order, which affirmed the ZHB's decision to deny nonconforming use status. This result does not mean that we believe that the use is a valid nonconforming use, but only that Marshall may seek to register the property with the zoning officer as a valid nonconforming use, and, if the zoning officer refuses to register the use as a valid nonconforming use, Marshall may then appeal that refusal to the ZHB for proper consideration of the zoning officer's action.⁷

We will also vacate the trial court's decision as to its conclusions regarding Marshall's variance by estoppel argument, because Marshall did not file a specific request for a variance by estoppel, and he did not place the issue before the ZHB as part of a defensive response to any enforcement action. Again, however, our conclusion that the trial court (and the ZHB) erred does not provide Marshall with the ultimate relief he seeks. If Marshall decides to pursue a variance

⁷ Marshall did not have an adequate opportunity to present evidence regarding this issue, as the sole issue Marshall brought before the ZHB related to the elements of traditional variance relief. Consequently, if Marshall elects to seek relief through the zoning officer, is unsuccessful, and appeals an adverse decision to the ZHB, the ZHB must permit Marshall to present evidence pertinent to the question of whether his desired use of the property constitutes a valid nonconforming use.

by estoppel claim in an affirmative action before the ZHB (or in defense of the Borough's enforcement action) he will have to bring a discrete action raising the claim.⁸

Based upon the foregoing, we vacate the trial court's order as to its decision affirming the actions of the ZHB, except with regard to the ZHB's denial of Marshall's application for a variance under traditional variance requirements, which Marshall has not appealed.

P. KEVIN BROBSON, Judge

⁸ Additionally, for the same reasons expressed in footnote 7 of this opinion, if Marshall elects to pursue a claim under a variance by estoppel theory, the ZHB should permit Marshall to present evidence pertinent to that theory.

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ORDER

AND NOW, this 5th day of January, 2011, the order of the Court of Common Pleas of Allegheny County (trial court) is affirmed as to its conclusion that the Zoning Hearing Board of the Borough of Pleasant Hills did not err in denying Marshall's request for a traditional variance. The trial court's decision affirming the Zoning Hearing Board's determination that Marshall is not entitled to continue his use as a nonconforming use or under a variance by estoppel theory is hereby vacated.

P. KEVIN BROBSON, Judge