IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William J. McClay and Valerie Contino-McClay, Appellants	:	
v.	:	No. 1280 C.D. 2007
	:	Submitted: November 20, 2009
Zoning Hearing Board of Upper Chichester	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: February 25, 2010

William J. McClay and Valerie Contino-McClay appeal an order of the Court of Common Pleas of Delaware County (trial court) that denied them the ability to construct a fence on their property. In doing so, the trial court affirmed the decision of the Zoning Hearing Board of Upper Chichester (Board) that the McClays failed to make the case for their requested fence because it interfered with a neighbor's easement and was located in their front yard, in violation of the Upper Chichester Township Zoning Ordinance.[1] In addition, the Board held that the McClays failed to demonstrate a hardship such as would support a variance for the fence.

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[1] TOWNSHIP OF UPPER CHICHESTER ZONING ORDINANCE OF 1991, §§101-2215 (August 8, 1991) (Zoning Ordinance).

Valerie Contino-McClay is the owner of residential property located at 4421 Garnet Mine Road, Boothwyn, Pennsylvania, where she resides with her husband, William McClay. In 2003, the McClays constructed a six-foot high fence on their property. Thereafter, the McClays were informed by Charles F. Remaley, Zoning Officer of Upper Chichester Township (Zoning Officer), that they were required to obtain a permit for the fence.

The McClays applied for a permit, but it was denied for three reasons. First, the Zoning Officer noted that a fence is not allowed in a front yard by reason of Section 1707(1) of the Zoning Ordinance.[2] Second, he noted that a fence higher than five feet is prohibited by Section 1707(2) of the Zoning Ordinance.[3] Third, the fence blocked an easement over the McClays' property belonging to their neighbors, Joseph and Patty Antonelli, whose property was subdivided from the McClays' property in 1989.[4]

The McClays appealed the denial of the permit and, as an alternative, submitted a variance application to the Board. The McClays' primary argument was

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[2] It states in relevant part: "In all residential districts, no wall, fence, hedge or other similar structure or growth shall extend into any front yard." ORDINANCE §1707(1), as amended by Ordinance No. 591, August 9, 2001.

[3] It states:

> Except as specifically noted otherwise, no wall, fence, hedge or similar growth in a residential district shall exceed five (5) feet in height, with the exception of fences required around swimming pools, in which case said fence may be no less than four (4) feet nor more than six (6) feet in height.

ORDINANCE §1707(2), as amended by Ordinance No. 585, April 13, 2000.

[4] When the property was subdivided, a 25-foot wide right-of-way was created on the McClays' property to provide access to the Antonellis' parcel. The Antonellis intervened in the trial court appeal. They were represented by counsel at the hearing before the Board, but they did not appear as witnesses.

that a variance was not necessary because their fence was not located in the front yard and, thus, did not offend the zoning ordinance. The Board conducted a hearing.

In support of her request for a fence permit, Mrs. McClay explained that her fence is located in the side yard, not in the front yard. She produced photographs that show a fence extending from either side of the architectural front of the house. The subdivision plan in the record shows four houses facing Garnet Mine Road, one behind the other. The McClay property is the third of the four lots. All four properties have access to Garnet Mine Road by an easement running along the side of each house. Mrs. McClay referred to the easement as the common "driveway." Reproduced Record at 15a (R.R. ___). At one time, all four houses were owned by members of one family.

Mrs. McClay also produced a sewer plan for the four properties burdened by the easement. This plan identified the front, side and rear yards of her property. That part of the McClays' lot next to the easement was identified as a side yard, not a front yard. Certified Record (C.R.), Exhibit 5-1-03(4). Mrs. McClay testified that she received the sewer plan from her neighbor, Elizabeth Gill.

Mrs. McClay then addressed the height of the fence. She explained that a swimming pool, for which she obtained a building permit, had been recently built. Mrs. McClay noted that Section 1707(2) of the Zoning Ordinance allows a fence required around a swimming pool to be up to six feet in height. ORDINANCE §1707(2). Accordingly, it was Mrs. McClay's view that not only was her fence height acceptable, it was required.

Finally, Mrs. McClay addressed the easement of the Antonellis, who occupy the fourth house facing Garnet Mine Road, immediately behind the McClay property. She acknowledged that the fence blocked access to the Antonellis' use of

the common driveway, but she explained that this did not inconvenience the Antonellis because they, along with several neighbors, use a joint driveway to access West Arlene Drive, which is closer to the Antonelli home. C.R., Exhibit 5-1-03(7).

The McClays' neighbor, Elizabeth Gill, testified in support of the fence. Gill testified that the sewer plan was prepared in 1986 by Rocco Romeo, her brother-in-law, who built the McClay house.

The Zoning Officer testified for the Township. He presented the approved 1989 subdivision plan showing the 25-foot easement on the McClays' property in favor of the Antonellis' parcel.[5] The Zoning Officer asserted that the Antonellis' second easement was irrelevant because that additional easement did not extinguish their right to use the driveway across the McClays' property to access Garnet Mine Road. The Zoning Officer did not testify about the other bases for his denial of the building permit, *i.e.*, the excessive height of the fence or its location in the front yard.

The Board denied the McClays' appeal. The Board agreed that the McClays were permitted to have a six-foot high fence after they installed a swimming pool. However, the Board found that the fence violated the Zoning Ordinance because (1) it was installed in the front yard and (2) it blocked an approved easement. Finding that the McClays failed to offer any evidence of undue hardship, the Board denied them a variance for their fence. The McClays appealed the Board's decision

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[5] C.R., Exhibit 5-1-03(1) is the deed to the McClays' property. It specifically grants a 25-foot right-of-way "which leads Southwestwardly to Garnet Mine Road…." *Id.* This document also references the subdivision plan addressed by the Zoning Officer.

to the trial court. The trial court rejected their claims and affirmed the Board. The present appeal followed.[6]

On appeal, the McClays argue that the Board erred. The McClays raise two specific allegations of error: first, they contend that interference with an easement is not a proper subject of a zoning decision and, second, the fence is not located in their front yard. As such, the McClays contend that they are entitled to a fence permit.

We address, first, the McClays' contention that the Antonellis' ability to use the easement is not a proper concern for the Board. The McClays note that the continued viability of the Antonellis' right to use an easement over the McClay property is the subject of a separate quiet title action, which is pending in the trial court. They contend that the Zoning Board ought not to interject itself into the easement dispute.

The trial court found otherwise, explaining that the McClays should have filed a quiet title action before erecting their fence:

> However, Appellant McClay elected not to do so and instead, sought relief from the Zoning Hearing Board of Upper Chichester, which is not vested with the legal authority to decide whether a right-of-way still exists or whether it has been extinguished as a matter of fact or law.

Trial Court Opinion at 6. The trial court's reasoning, the McClays argue, is internally inconsistent. If the Board lacked authority to determine the existence of a viable

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[6] In a case such as this, where the trial court did not take any additional evidence, this Court's scope of review is limited to whether the Board committed an error of law or an abuse of discretion. *CACO Three, Inc., v. Board of Supervisors of Huntington Township*, 845 A.2d 991, 993 n.1 (Pa. Cmwlth.), *appeal denied*, 580 Pa. 707, 860 A.2d 491 (2004). This Court's scope of review is plenary as to questions of law. *In re: Appeal of Realen Valley Forge Greenes Associates*, 576 Pa. 115, 130, 838 A.2d 718, 727 (2003).

easement, then it certainly lacked authority to enforce the Antonellis' purported easement. Stated otherwise, the protection of a private easement is a title concern, not a zoning concern. Nowhere in the Zoning Ordinance is there any reference to easements or their preservation. Indeed, the Zoning Officer did not cite to any provision in the Zoning Ordinance as authority for this stated basis, *i.e.*, easement interference, for denying the permit. The McClays' argument has merit.

In *Kaufman v. Borough of Whitehall Zoning Hearing Board*, 711 A.2d 539 (Pa. Cmwlth. 1998), the zoning hearing board denied a permit to landowners who sought to erect a fence across the rear yard of their property. Their request was denied on the basis that the fence would interfere with the legal rights of pedestrians who used a portion of the yard as a walkway, claimed by the pedestrians to be an easement. The zoning hearing board agreed with the pedestrians and denied the permit. The trial court reversed, and the pedestrians appealed. We affirmed the trial court. We held that the zoning hearing board lacked authority to determine whether or not the easement existed; that zoning laws did not apply to title disputes between private parties; and, that private title rights were not the subject of zoning.

Based on *Kaufman*, we conclude that the Board lacked authority to deny the fence permit on grounds that it intruded on the Antonellis' purported easement. The trial court erred in affirming the Board on this point.

We turn, then, to the question of whether the fence is located in the McClays' front yard. The sewer plan showed that the yard facing the easement was a side yard, not a front yard. However, the McClays did not produce evidence that this plan was ever accepted by the Township as its plan. The Board concluded, therefore, that the McClays' evidence did not establish that the fence was located in the side yard.

However, the Board did not make a specific finding of fact that the fence was located in the front yard or which portions of the McClay property constituted the front, side and rear yards. This is all the more troubling because Appendix I to the Zoning Ordinance defines a "front yard" as

> [a] yard extending the full width of the lot along the street line with a minimum depth as required in each district which is measured from the street line to the building line.

ORDINANCE, Appendix I at I-13. A "street line" is defined as

> [t]he line dividing the street and the abutting property. The street line shall be the same as the right-of-way line.

Id. at I-12. A "right-of-way" is defined as

> [l]and acquired by reservation, dedication, prescription, condemnation or other legal manner and occupied or *intended to be occupied by a street*, crosswalk electric transmission line, oil or gas pipeline, water line, watercourse or similar uses.

Id. at I-10 (emphasis added). The Ordinance includes a sketch showing that the section of the property facing the street line is to be designated as the front yard. ORDINANCE, Appendix I.

Mrs. McClay testified that the easement functioned as a driveway, not an "intended" street. At the hearing, the Board's solicitor expressed the "opinion," without specific reference to the evidence, that the easement, termed by Mrs. McClay as a driveway, was a "street" and, therefore, the "front yard is that yard that is alongside that private way, in my opinion." R.R. 62a-63a. There was no effort to reconcile the conflicts in the evidence regarding the nature of the right-of-way. That evidence shows, *inter alia*, that the easement -- or driveway -- has no name and does not provide the street address for any of the properties served by the right-of-way. By

contrast, the address for the McClays' house is Garnet Mine Road, which is the street the house faces. The Board did not explain why Garnet Mine Road is not the street to use for determining the location of the front yard of the McClays' property.

In addition, the Board did not address the conflicting provisions in the Zoning Ordinance. The Ordinance requires a fence to surround a swimming pool. If a swimming pool is allowed in a rear, side or front yard, then it follows that a fence must also be erected in that same yard.

For these reasons, we reverse the trial court's order insofar as it affirmed the Board's denial of the fence permit on the basis that the fence interfered with the Antonellis' easement. We vacate the remainder of the trial court's order and remand this matter with directions to the Board to clarify the configuration of the McClays' property and reconcile the conflicting provisions of the Zoning Ordinance related to swimming pools and fence restrictions.

MARY HANNAH LEAVITT, Judge

Judge Pellegrini concurs in the result only.

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Zoning Hearing Board of Upper Chichester	:	

O R D E R

AND NOW, this 25th day of February, 2010, the order of the Court of Common Pleas of Delaware County in the above-captioned case, dated May 30, 2007, is REVERSED IN PART and VACATED IN PART. The case is REMANDED to the trial court with instructions that it be REMANDED to the Zoning Hearing Board of Upper Chichester in accordance with the foregoing opinion.

Jurisdiction relinquished.

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MARY HANNAH LEAVITT, Judge