

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David Kineston and Kami Kineston, :
Appellants :
 :
v. : No. 1292 C.D. 2009
 : Submitted: November 20, 2009
The Zoning Hearing Board of Shenango :
Township :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: January 25, 2010

David Kineston and Kami Kineston (Landowners) appeal from the June 8, 2009, order of the Court of Common Pleas of Lawrence County (trial court), which affirmed the decision of the Zoning Hearing Board (ZHB) of Shenango Township (Township) that Landowners' use of a structure as a warehouse violated section 501 of the Township's Zoning Ordinance (Ordinance). We affirm.

Landowners own property located at 3433 Ellwood Road, New Castle, Pennsylvania, in the Township's R-1 zoning district. On February 16, 2006, the Township's zoning officer issued a building permit to Landowners "For Construction of an Accessory Storage Structure for R-1 Permitted Purposes Only." (R.R. at 86a.) On March 10, 2006, before construction of the building began, the zoning officer wrote to Landowners, referencing prior conversations and reminding Landowners

that storage of materials as an accessory use to a business is not permitted in the R-1 district. (R.R. at 87a, 88a-90a.)

After securing the permit, Landowners built a 10,000 square-foot structure in which they store two cars, a golf cart and miscellaneous merchandise. (R.R. at 40a.) Landowners purchase the merchandise from different wholesalers, transport it with their own truck and store it in the structure for eventual sale at an auction or flea market. (R.R. at 40a.) On July 26, 2007, the zoning officer issued an enforcement notice informing Landowners that their use of the building as a warehouse violated section 501 of the Ordinance. (R.R. at 69a.) Landowners appealed to the ZHB, which held a hearing on the appeal and unanimously affirmed the zoning officer's determination. Landowners subsequently filed a land use appeal to the trial court, asserting that they have a vested property right to the warehouse use and/or are entitled to a variance by estoppel. The trial court rejected these arguments and affirmed the ZHB's decision. Landowners now appeal to this court.¹

Landowners first contend that they have a vested right to use the structure as a warehouse because the building permit was issued in error. We disagree.

When a property owner acquires a land use through the expenditure of substantial, unrecoverable funds and in good faith reliance on an erroneously or

¹ Where, as here, the trial court takes no additional evidence, our scope of review is limited to determining whether the ZHB committed an error of law or a manifest abuse of discretion. *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 462 A.2d 637 (1983).

unlawfully issued building permit, that land use becomes a vested property right that cannot be extinguished or substantially impaired. *East Hempfield Township v. Brubaker*, 828 A.2d 1184 (Pa. Cmwlth. 2003). In determining whether a landowner has acquired a vested right to a land use by virtue of an erroneously issued building permit, our courts consider the following factors: (1) the landowner's due diligence in attempting to comply with the law; (2) the landowner's good faith throughout the proceedings; (3) the landowner's expenditure of substantial, unrecoverable sums; (4) the expiration of the period during which an appeal could have been taken from the issuance of the permit; and (5) a lack of evidence demonstrating that the use of the permit would adversely affect the public health, safety and welfare. *Petrosky v. Zoning Hearing Board of Upper Chichester Township*, 485 Pa. 501, 402 A.2d 1385 (1979). Landowners who satisfy these requirements have acquired a vested right to "continue to use their property in accordance with said permits." *Id.* at 511, 402 A.2d at 1390.

Here, Landowners base their argument on assertions that the building permit was issued for an accessory use, which the Ordinance defines as a use subordinate and incidental to a principal structure or use. Landowners contend that, because there is no principal structure or use on their property, the Township erred in issuing them a permit for an accessory use. Landowners further contend that consideration of the factors set forth in *Petrosky* compels the conclusion that they have a vested right to continue the warehouse use.

However, whether a primary structure is located on the property, or whether the zoning officer mistakenly believed that such was the case, is irrelevant to

our analysis. The building permit specifically limits the use of the proposed structure to those uses that are permitted by section 501 of the Ordinance, and section 501 does not permit warehousing as an accessory use; thus, Landowners' use of the property as a warehouse would violate the Ordinance in any event. Accordingly, Landowners' argument that they have a vested right to continue using the structure as a warehouse is without merit.

Citing *Kuszyk v. Zoning Hearing Board of Amity Township*, 834 A.2d 661 (Pa. Cmwlth. 2003), Landowners also argue that they are entitled to a variance by estoppel. Again, we disagree.

A landowner seeking a variance by estoppel must show: (1) a long period of municipal failure to enforce the zoning law when the municipality knew of the illegal use in conjunction with acquiescence in the illegal use; (2) the landowner acted in good faith and relied innocently upon the validity of the use; (3) the landowner made substantial expenditures under the belief that the use was permitted; and (4) denying the variance would impose an unnecessary hardship on the landowner. *Id.*

Contrary to Landowners' assertions, the record establishes that the zoning officer acted promptly when he learned that the building was being used for an impermissible purpose. In addition, the building permit clearly limits its scope to uses allowed in the R-1 district, so that Landowners could not rely innocently on the permit as authorizing their use of the structure as a warehouse. Finally, the record establishes that the zoning officer warned Landowners that warehousing is not a

permitted use before they began construction of the building. Thus, Landowners have not established that they are entitled to a variance by estoppel.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

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ORDER

AND NOW, this 25th day of January, 2010, the order of the Court of Common Pleas of Lawrence County, dated June 8, 2009, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge