IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas Mills and Ronald Stall	:	
	:	
v.	:	
	:	
City of Pittsburgh Zoning Board of Adjustment, Stephen Tobe and SM Tobe Enterprises, LLC	:	
	:	
v.	:	No. 1345 C.D. 2010
	:	
City of Pittsburgh	:	Argued: April 5, 2011
	:	
v.	:	
	:	
Stephen Tobe and SM Tobe Enterprises, LLC	:	
	:	
Appeal of: Stephen Tobe and SM Tobe Enterprises, LLC	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: May 3, 2011**

Stephen Tobe and SM Tobe Enterprises, LLC (collectively, Tobe) appeal from the Order of the Court of Common Pleas of Allegheny County (trial court) that reversed the order of the City of Pittsburgh (City) Zoning Board of Adjustment (Board), which granted Tobe a dimensional variance for his property at 816 Saint James Street (the Property) so that he could build a 10-foot by 10-foot sunroom

(Sunroom) on the back of the Property. Tobe argues that the trial court erred in holding that the Board lacked substantial evidence to support its findings of fact, on which it based its conclusion that Tobe met all the requirements for a dimensional variance.

Tobe purchased the Property with the intention of renovating and reselling it. In April of 2009, Tobe received a building permit (Permit) to remodel the Property. The Permit did not require a variance and did **not** include the Sunroom. Tobe either later decided to build the Sunroom onto the back of the Property or originally intended to include the Sunroom in the permit, but forgot to do so. While Tobe was constructing the Sunroom, the City informed Tobe that he needed an addendum to the Permit and a dimensional variance for the Sunroom. The Property is in an R1D-VL subdistrict, in which a minimum rear setback of 30 feet is required, (Pittsburgh Zoning Code (Zoning Code) § 903.03.A.2); however, the Property had a 20-foot setback when Tobe purchased it.[1] With the Sunroom, the Property would only have a 10-foot setback. On August 20, 2009, Tobe submitted an application (Application) for a dimensional variance to the Board. The Board held a hearing on the Application on October 1, 2009. Adjacent landowners Thomas Mills and Ronald Stall (Objectors) appeared at the hearing in opposition to the variance, arguing that the Sunroom would invade their privacy, obstruct their view, or otherwise impede the use and enjoyment of their property.

[1] The Property also had a deck on the back of the house, which the Board discussed as being five feet wide; however, there does not appear to be evidence in the record as to the exact dimensions of the deck.

On October 29, 2009, the Board issued a decision holding that Tobe met all the requirements for a dimensional variance, and Objectors appealed to the trial court. The trial court reversed the Board, finding that the Board erred in determining that Tobe had met *any* of the requirements for a dimensional variance under the Zoning Code. Tobe appealed to this Court.[2] Before this Court, Tobe argues that he satisfied each of the requirements for a dimensional variance under the Zoning Code.

Section 903.03.A.2 of the Zoning Code provides for a minimum rear setback of 30 feet in R1D-VL Zoning Districts, the district in which the Property is located. Section 922.09.E provides that a landowner may obtain a variance by showing:

> (1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship is due to the conditions, and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located;
>
> (2) That because of such physical conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;
>
> (3) That such unnecessary hardship has not been created by the applicant;

[2] "When a trial court reviewing the decision of a zoning hearing board takes no additional evidence, this Court reviews the zoning hearing board's decision only for an abuse of discretion or errors of law." Hamilton Hills Group, LLC v. Hamilton Township Zoning Hearing Board, 4 A.3d 788, 792 n.6 (Pa. Cmwlth. 2010).

> (4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare; and
>
> (5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

(Zoning Code § 922.09.E.) All of these requirements must be met in order for a variance to be properly granted.

We first address Tobe's argument that the Board's finding that the Property contains unique physical characteristics that created unnecessary hardship was supported by substantial evidence. As set out above, one of the factors under the Zoning Code for the grant of a dimensional variance is:

> (1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship is due to the conditions, and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.

(Zoning Code § 922.09.E(1).) As Tobe noted, the Supreme Court, in Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 554 Pa. 249, 263-64, 721 A.2d 43, 50 (1998), stated:

> [i]n determining whether unnecessary hardship has been established [for a dimensional variance], courts may consider multiple factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.

Here, the Board found the hardship to consist of the pre-existing 20-foot setback where a 30-foot setback is now required. Tobe argues, in addition, that the dimensional variance is necessary to make the Property more marketable and more comparable to the other, more modern houses in the neighborhood. However, as Objectors point out, cases such as Larsen v. Zoning Board of Adjustment of the City of Pittsburgh, 543 Pa. 415, 423-24, 672 A.2d 286, 290 (1996), and Wilson v. Plumstead Township Zoning Hearing Board, 594 Pa. 416, 431, 936 A.2d 1061, 1070 (2007), stand for the proposition that the desire to enlarge a residence or to use it in a more profitable manner does not constitute unnecessary hardship. Although the Property had a pre-existing, non-conforming setback, this is not a hardship of the Property; the inability to build an addition onto the back of the house and remain in compliance with the Zoning Code is no more of a hardship than if the house had been built flush against a conforming 30-foot setback. In other words, Tobe's inability to build the Sunroom is not caused by the non-conforming 20-foot setback. Instead, it is caused by the fact that Tobe would need to build into the setback in order to build the Sunroom, which is no different than the problem faced by any other property owner who wants to build into a setback.

The trial court was, therefore, correct that the Board lacked substantial evidence for its finding that the Property suffered from an undue hardship necessitating a dimensional variance. We, therefore, are constrained to hold that the trial court did not err on this issue.[3]

[3] Due to our holding on this issue, we need not reach the remaining issues. However, were we to do so, we would also have to hold that Tobe did not meet the second and third prongs of Section 922.09.E.

For these reasons, we must affirm the Order of the trial court.

RENÉE COHN JUBELIRER, Judge

With regard to the issue of whether the dimensional variance is necessary to develop the Property in strict conformance to the Zoning Code, it is not. As noted above, one of the factors required to be proven by an applicant for a dimensional variance is "[t]hat because of such physical conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property." (Zoning Code § 922.09.E(2).) The trial court is correct that there is not substantial evidence in the record that the Property could not be developed in strict conformity with the provisions of the Zoning Code to allow for the reasonable use of the Property. It is true that the record reflects that Tobe had spent money improving the Property. (Bd. Hr'g Tr. at 15, R.R. at 52.) In addition, Tobe argues in his brief that he would incur further costs if the dimensional variance were denied. However, there was a fully developed 3500 square-foot home on the Property that had been occupied by the prior owner before Tobe bought the Property, and Tobe's renovation of the kitchen and addition of the Sunroom would merely make the Property more valuable. (Bd. Hr'g Tr. at 16, 23, R.R. at 53, 60.) Therefore, the trial court correctly held that the Board lacked sufficient evidence upon which to find that there is no possibility that the Property could be developed in strict conformity with the provisions of the Zoning Code.

With regard to the third prong, insofar as the lack of the Sunroom might be considered a hardship, the hardship is self-created because any necessity for the Sunroom was occasioned by Tobe's renovation of the kitchen, and the money expended by Tobe is due to the fact that Tobe acquired a building permit based on a plan that did not include the Sunroom. (Bd. Hr'g Tr. at 24, R.R. at 61.) In addition, Tobe began building the Sunroom without a building permit for the Sunroom and without first seeking a variance. (Bd. Hr'g Tr. at 7-9, R.R. at 44-46; Tobe Br. at 23 ("[t]he proposed sunroom, which was being erected but was not completed . . .").) As Objectors point out, this Court, in Doris Terry Revocable Living Trust v. Zoning Board of Adjustment of the City of Pittsburgh, 873 A.2d 57 (Pa. Cmwlth. 2005) and Appletree Land Development v. Zoning Hearing Board of York Township, 834 A.2d 1214 (Pa. Cmwlth. 2003), expressed a strong disinclination to grant a landowner relief for a self-created hardship, stating "it does not matter whether Appellant mistakenly or intentionally violated the Code. There is a strong policy against assisting landowners who violate a zoning ordinance, whether negligently or intentionally, long apparent in this Court's jurisprudence." Id. at 1217-18 (footnote omitted) (quoted in Doris Terry, 873 A.2d at 64). Therefore, the trial court is correct that the Board erred in concluding that any hardship to the Property was not created by Tobe.

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O R D E R

NOW, May 3, 2011, the Order of the Court of Common Pleas of Allegheny County in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge