

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gray H. Berrier, :
Appellant :
 : No. 1765 C.D. 2009
v. : Submitted: April 16, 2010
 :
Penn Township Zoning Hearing Board :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: June 30, 2010

Gray H. Berrier (Berrier) challenges the rear setback dimensional variance approved for Jacqueline B. Radocha and her husband, Bernard P. Radocha, to construct a garage on their property (subject property). The Court of Common Pleas of the Forty-First Judicial District, Perry County Division (trial court) affirmed the Penn Township Zoning Hearing Board's (ZHB) grant of the variance. As discussed below, we conclude the ZHB erred in determining that the Radochas satisfied the requirements for a variance, but the ZHB did not err in determining that the Radochas were entitled to a variance under an estoppel theory. Accordingly, we affirm the trial court.

1. Factual and Procedural Background

At its essence, this case involves a dispute between family members about the construction of a garage near the southern border of two adjacent

properties. Although only one property is currently at issue, an understanding of the broader conflict is helpful.

The Radochas initially applied for a nonconforming use permit to replace nonconforming sheds with a garage on an adjacent property (Berrier property). The Berrier property borders the subject property on the east. Both properties are bordered on the south by a railroad right-of-way. The right-of-way contains railroad tracks that parallel the southern boundaries of both the subject property (to the west) and the Berrier property (to the east).

The Radochas are one-fourth owners of the Berrier property. The remaining owners are Jacqueline Radocha's three brothers, which include Berrier. The Radochas intended to replace two nonconforming sheds with a garage. The ZHB granted the variance for the garage on the Berrier property. Apparently, the Radochas built the garage on the Berrier property in a location equivalent to that occupied by the nonconforming sheds. Thus, the garage maintained the same setback from the southern border.

Berrier informed the ZHB that he did not consent to Radochas constructing the garage on the Berrier property.¹ The ZHB therefore revoked the variance, and the Radochas removed the garage.

¹ The Radochas introduced a document from two of the owners of the Berrier property which indicated that they both gave their sister, Jacqueline Radocha, permission to build the garage, prior to its construction.

During this time, the Radochas began the process of obtaining permission for the garage on the subject property. All the parties concede that the Radochas were essentially trying to move the garage from the Berrier property to the adjacent subject property.

The Radochas are the sole owners of the subject property. The subject property is 124 feet by 346 feet and is improved with a dwelling and accessory structures. It is located in an R-1 district. The subject property is bordered on the north by the Susquehanna River and on the south by the railroad right-of-way. A narrow, 10 foot wide private road provides access to the subject property. The road runs east and west on the property, and is parallel with, and 80 feet away from, the southern boundary. The road bisects the property into two parcels. The house is on the northern part. The garage at issue is on the southern part.

The garage is 24 feet by 32 feet. It is located approximately 15 feet from the southern boundary and 15.5 feet from the eastern boundary. The Penn Township Zoning Ordinance (Ordinance) requires 25 foot rear setbacks.

The Radochas informally consulted with a zoning officer and asked if they could build the garage on the subject property the same distance from the railroad tracks as they built the garage on the adjacent Berrier property. The zoning officer informed them that they could.

During this consultation, the Radochas sketched a drawing of the property. The zoning officer assisted them in preparing this drawing. The drawing indicated the garage would be 40 feet from the “R.R.” The zoning officer took this to mean the garage would be 40 feet from the railroad right-of-way at the southern border of the property. The zoning officer informed the Radochas the garage could be built at the proposed location. He based this decision on his belief the garage would be placed outside the 25 foot rear setback required by the zoning ordinance.

The zoning officer did not measure the actual distance between the proposed location of the garage and the southern border. The zoning officer assisted the Radochas in completing a zoning application permit for the garage. The zoning officer then signed his approval on the permit. After the permit was issued, the Radochas built the garage on the subject property.

Berrier contacted the ZHB, complaining the garage did not comply with the Ordinance’s rear setback requirements. The zoning officer measured the garage and determined the garage was 15 feet from the railroad right-of-way and 40 feet from railroad tracks within the right of way. The zoning officer issued the Radochas a written notice of violation because the garage was built within the 25 foot rear setback provision.

Subsequently, the Radochas applied for a variance from the rear setback requirement. The ZHB conducted a hearing at which the Radochas and Berrier testified. After various proceedings, the ZHB granted the variance.²

The ZHB found that the Radochas moved the garage from the Berrier property to the subject property because of a dispute among the owners of the Berrier property. ZHB Op., Findings of Fact (F.F.) No. 13. Berrier does not dispute this finding.

The ZHB also made the following relevant findings, which Berrier challenges in this appeal:

17. The [Radochas] did not intentionally erect the garage in a location which violates the rear yard setback, but did so in reliance upon mistaken advice innocently provided to them.

20. The garage could not be located elsewhere on the subject property without impairing its functionality or violating the zoning ordinance.

21. The Applicants' request is for a dimensional variance. Moving the garage an additional 10 feet from the southern

² The ZHB, with one full-time member and one temporary appointment, initially granted the variance. On appeal, Berrier requested that the trial court remand the matter because the record was confusing. Over the Radochas' objection, the trial court remanded the case, directing the ZHB to conduct another hearing primarily to allow Berrier to present additional evidence.

On remand, the ZHB conducted a second hearing at which Berrier and the Radochas provided additional testimony. The ZHB, with its three full-time members, reached the same decision as to the requirements for a variance and added an equitable estoppel rationale. It is this post-remand adjudication that is presently before this Court.

boundary would be a substantial undertaking and would involve substantial expense.

ZHB Op., F.F. Nos. 17, 20, 21.

The ZHB reasoned the “the location of the subject property between the river and railroad right of way, the location of the structures thereon, and the access drive through the southern portion of the subject property combine to create an unnecessary hardship.” ZHB Op., Concl. of Law ¶ 6. The ZHB concluded the Radochas did not intentionally build the garage in a location in violation of the setback requirements. The ZHB concluded both the Radochas and the zoning officer had been innocently mistaken as to the location of the rear boundary of the subject property.

The ZHB reasoned the rear setback is intended to benefit the adjoining rear property owner. The ZHB noted the rear property owner in this case, the Norfolk Southern Railroad, did not object to the garage. The ZHB concluded the Radochas established each of the prerequisites for a variance. Alternatively, the ZHB also concluded the Radochas were entitled to the variance under the doctrine of equitable estoppel.

Berrier appealed to the trial court. Without taking any evidence, the trial court affirmed.

II. Issues

Berrier appeals to this Court raising three issues. First, Berrier argues the ZHB’s findings of fact numbers 17, 20, and 21, are not supported by substantial

evidence. Second, Berrier argues the ZHB and trial court erred in granting the variance when the garage could have been placed on another portion of the subject property in compliance with the setback provisions. Third, Berrier argues the ZHB erred in concluding it was equitably estopped from denying the variance. The Radochas and the ZHB filed briefs challenging Berrier's arguments.

Our standard of review of an appeal of a zoning decision where the trial court did not take any additional evidence is whether the ZHB committed an abuse of discretion or an error of law. HHI Trucking & Supply, Inc. v. Borough Council of the Borough of Oakmont, 990 A.2d 152 (Pa. Cmwlth. 2010). A ZHB abuses its discretion when it makes material findings of fact not supported by substantial evidence. Id.

III. Variance Requirements

Berrier argues the Radochas did not establish the prerequisites for obtaining a dimensional variance. Berrier contends unnecessary hardship was not established because the garage could have been built in compliance with the zoning ordinance.

We agree with Berrier's arguments on the unnecessary hardship issue. However, as discussed more fully below, we agree that the Radochas satisfy requirements for variance by estoppel. Because the estoppel rationale alone is sufficient to support the ZHB's action, no further discussion of this issue is needed.

IV. Equitable Estoppel

Berrier argues the ZHB erred in concluding the Radochas were entitled to a variance under equitable estoppel. Berrier contends that the Radochas did not act in good faith. As to this issue, he argues in part that the failure of the Radochas to present a professional land survey in their possession supports a finding of bad faith. He also argues that the Radochas failed to establish substantial hardship because they failed to present evidence of what the cost of removing the garage would be.

A.

The Radochas argue that substantial evidence supports the conclusion their mistake was innocent. The Radochas argue their testimony consistently evinces an honest mistake on their part as to the boundary line.

“[E]quitable relief is available in zoning cases to rectify inequities created by a landowner’s good faith reliance on government action.” Vaughn v. Zoning Hearing Bd. of Twp. of Shaler, 947 A.2d 218, 223 n.11 (Pa. Cmwlth. 2008). Where a municipality intentionally or negligently misrepresented its position with reason to know a property owner would rely upon the misrepresentation, the remedy of equitable estoppel may preclude municipal enforcement of a land use regulation. In re Kreider, 808 A.2d 340 (Pa. Cmwlth. 2002).

The property owner bears the burden of proving entitlement to relief where the record shows the following elements of good faith action: 1) the

property owner relied to his detriment on the misrepresentation, such as making substantial expenditures; 2) based upon an innocent belief the use is permitted; and 3) enforcement of the ordinance would result in hardship, ordinarily that the value of the expenditures would be lost. Additionally, a court must consider whether the use which the landowner seeks to continue adversely affects individual property rights or the public health, safety or welfare. Petrosky v. Zoning Hearing Board of Chichester Twp., 485 Pa. 501, 402 A.2d 1385 (1979). Estoppel is an unusual remedy that a ZHB may grant only in extraordinary circumstances. Kreider.

Our cases show the good faith of the landowner is an important aspect of the analysis. Kreider; Vaughn. In Kreider, the landowners sought to operate a campground without land development approval based on the doctrine of variance by estoppel. We rejected the landowners' estoppel claim based on several specific findings that the landowners acted in bad faith.

In contrast, in Vaughn, we concluded that landowners were entitled under the doctrine of equitable estoppel to keep a retaining wall they constructed without obtaining permits. We noted the record supported findings that the landowners acted in good faith by, among other things: (1) asking zoning officials if they needed a permit prior to constructing the wall; (2) receiving oral permission from these officials that a permit was not necessary; (3) memorializing that permission in writing; (4) expending substantial funds based on the zoning officials' representations.

The present case is more like Vaughn than Kreider, and we agree with the ZHB that the Radochas sufficiently established the elements of equitable estoppel.

In this case, the ZHB found the testimony from the Radochas and the zoning officer credible. It concluded the Radochas acted in good faith and reasonably relied on assurances they received from the zoning officer. Additionally, the ZHB concluded the zoning officer was negligent in failing to measure the setback distances prior to giving his approval.

Berrier asks this court to draw inferences different than those drawn by the ZHB; however, we cannot comply with these requests. Matters of weight and credibility of testimony are within the discretion of the zoning hearing board. Collier Stone Company v. Zoning Hearing. Board for the Twp. of Collier, 710 A.2d 123 (Pa. Cmwlt. 1998). This Court may not engage in our own credibility determinations and may not disturb the zoning hearing board's findings when those findings are supported by substantial evidence. In re Brickstone Realty Corp., 789 A.2d 333, 339 (Pa. Cmwlt. 2001).

The record contains substantial evidence supporting the ZHB's findings regarding the state of mind of the Radochas and the zoning officer. In particular, the Radochas sought approval from the zoning officer before building the garage, and they acted in good faith in their dealings with the zoning officer. Thus, the Radochas testified each thought the property line extended further than it actually did. N.T. 10/11/07, at 17, R.R. at 19a. Mr. Radocha testified that based

on his conversations with the zoning officer, he thought that he could build the garage the same distance from the railroad tracks as the nonconforming sheds on the adjacent Berrier property. N.T. 10/11/07 at 5, 18, R.R. at 7a, 20a. Mr. Radocha testified the garage on the Berrier property was the same distance, or even closer, to the railroad tracks than the garage constructed on the subject property. N.T. 9/11/08 at 103, R.R. at 102a. As to the professional survey, it does not clearly show the garage with a 25 foot rear setback, and it was prepared before the ultimate location of the garage was decided. H'rg Exhibit A-3, R.R. at 116a; N.T. 10/11/07 at 9, R.R. at 11a.

Also, the zoning officer testified the Radochas could move the shed from the Berrier property to the subject property the same distance from the railroad tracks. N.T. 9/11/08 at 75-76, R.R. at 74a-75a. He further testified he did not believe the Radochas were trying to mislead him. N.T. 9/11/08 at 75, R.R. at 74a. There is no dispute that the zoning officer issued a permit on which the Radochas acted.

In short, because the ZHB's state-of-mind findings are supported by substantial evidence, they are binding on this Court.

B.

Berrier argues that the Radochas presented no direct evidence of financial hardship. The Radochas concede this. However, the record contains circumstantial evidence which supports the Board's decision. Berrier presented photographs of the garage. These photographs show a structure styled after a

typical garage in a residential area, clad with siding and roofing tiles. The zoning officer acknowledged the garage was well-constructed and was not shoddy. N.T. 9/11/08 at 69, R.R. 68a. The garage is of substantial dimension, measuring nearly 800 square feet in area.

In sum, we conclude the photographs together with the testimony describing the structure provide sufficient circumstantial evidence to support the ZHB's inference that moving the garage would be a substantial undertaking and would involve substantial expense.

V. Conclusion

We conclude the ZHB erred in its determination that the Radochas established the requirements for a dimensional variance. However, we discern no error in the ZHB's application of an estoppel rationale. Because this rationale is sufficient to support the ultimate action taken by the ZHB, we affirm the trial court's order affirming the ZHB.

ROBERT SIMPSON, Judge

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ORDER

AND NOW, this 30th day of June, 2010, the order of the Court of Common Pleas of the Forty-First Judicial District, Perry County Division in the above-captioned matter is **AFFIRMED**.

ROBERT SIMPSON, Judge