

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John DeSantis, :
Appellant :
 : No. 2143 C.D. 2009
v. :
 : Argued: November 8, 2010
Zoning Board of Adjustment of the :
City of Pittsburgh and Thomas W. :
Schweitzer :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JIM FLAHERTY, Senior Judge¹

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: January 6, 2011

John DeSantis appeals from the October 5, 2009, order of the Court of Common Pleas of Allegheny County (trial court) which affirmed the decision of the Zoning Board of Adjustment of the City of Pittsburgh (Board) directing the Chief of the Bureau of Building Inspection (BBI) to issue an occupancy permit to Thomas W. Schweitzer for an office use on the first and second floors of his property at 920 North Lincoln Avenue, Pittsburgh, Pennsylvania. For the reasons that follow, we affirm.

Schweitzer purchased the subject property, consisting of a three-story structure in the City's Allegheny West neighborhood, in June of 2002. At the time, the property was located in an NDI-Neighborhood Industrial zoning district. The property originally was constructed as a single-family residence and had been used

¹ This case was decided before Senior Judge Flaherty's retirement on December 31, 2010.

most recently as a combination boarding house and apartment building. The property, however, was unoccupied at the time of Schweitzer's purchase.

On July 15, 2002, the City's zoning administrator granted Schweitzer's application for occupancy of the structure as a three-story, multiple family dwelling with six dwelling units, a one stall detached garage, and six rear parking stalls. A note attached to this approval indicated that the third floor of the structure was to remain vacant until it was brought up to code. There is no evidence that a building permit was issued at that time. Nevertheless, in 2003, Schweitzer commenced construction/renovation work on the first and second floors of the subject property. Schweitzer thereafter engaged in discussions with a BBI building inspector. Schweitzer informed the building inspector of his intended uses for the property. The building inspector nevertheless advised Schweitzer to seek a residential building permit, and Schweitzer followed this advice. On January 3, 2005, BBI issued Schweitzer a building permit for residential renovations.

On February 1, 2006, Schweitzer applied to the City's zoning administrator for approval to use the first and second floors of the structure for commercial purposes with a dwelling unit on the third floor.² The zoning administrator approved Schweitzer's application that same day. Also on that day, Schweitzer sought a building permit from BBI relating to commercial renovations, but his request was denied because his plans/drawings had not been stamped by an architect. However, Schweitzer did obtain a document from BBI entitled "Voucher-Build," which identified work to be done at the structure relating to the use of the first and second floors as office space and the third floor as a dwelling unit.

² Schweitzer resides on the third floor.

In August of 2006, the subject property was rezoned from NDI-Neighborhood Industrial to Multi-Family Moderate Density (RM-M), in which office use is not permitted. On August 11, 2006, BBI issued Schweitzer a temporary occupancy permit for use of the third floor as a residential dwelling unit, and his permit noted a commercial build-out of the first and second floors. In 2007, Schweitzer applied for a commercial building permit, but BBI denied his application due to the 2006 zoning reclassification. Schweitzer appealed to the Board, seeking a variance. Schweitzer later amended his appeal to include a claim of vested rights to the proposed office use. Allegheny West Civic Council (AWCC), a neighborhood organization, opposed Schweitzer's requests.

The Board held a public hearing on January 31, 2008, which included testimony from Schweitzer and several neighboring property owners, including members of AWCC. Following this hearing, Schweitzer and AWCC reached an agreement to resolve their differences and advised the Board of the same. The Board thereafter issued a decision on March 27, 2008, sustaining Schweitzer's appeal and directing the Chief of BBI to issue an occupancy permit for the use of the first and second floors as an office, subject to certain conditions.³ The Board concluded that Schweitzer had established a vested right to use the first and second floor of the property for office use.

Following the issuance of this decision, John DeSantis, a neighboring property owner and member of AWCC, notified the Board that he did not agree with

³ The conditions imposed by the Board were drawn from the settlement agreement between Schweitzer and AWCC and included the following: the certificate of occupancy for the office use would become void in thirteen years; Schweitzer would not seek to renew a claim of entitlement for such office use; the maximum number of office employees would be eighteen; Schweitzer shall maintain ten on-site parking spaces; Schweitzer will not park trucks or allow others to park trucks overnight on the property; and the third floor of the property shall be limited to residential use.

the settlement between Schweitzer and AWCC and wished to order a transcript and file proposed findings. The Board thereafter notified the parties that a second hearing would be held on May 8, 2008. A copy of the settlement agreement between Schweitzer and AWCC was introduced and admitted into the record at this hearing. Minutes of an AWCC meeting on February 12, 2008, also were submitted, reflecting that six members, including DeSantis, voted against approving the settlement agreement. Schweitzer testified that he voluntarily agreed to the conditions outlined in this agreement and the Board's original decision. The Board then issued an amended opinion on June 5, 2008. With the exception of additional findings relating to the matters just described, this amended decision was identical to the Board's original decision. DeSantis appealed to the trial court. By decision and order dated October 5, 2009, the trial court affirmed the Board's decision and dismissed DeSantis' appeal.

On appeal to this Court,⁴ DeSantis argues that the Board abused its discretion and/or erred as a matter of law in concluding that Schweitzer established a vested right to use his property as an office. We disagree.

Under Pennsylvania land use/zoning law, a landowner may seek an equitable remedy precluding municipal enforcement of a land use regulation. In re Kreider, 808 A.2d 340 (Pa. Cmwlth. 2002). Courts have generally labeled the theory under which a municipality is estopped as: (1) a "vested right" where the municipality has taken some affirmative action such as the issuance of a permit,

⁴ Where, as here, a trial court does not take any additional evidence, this Court's scope of review is limited to determining whether the zoning board committed an error of law or abused its discretion. Vaughn v. Zoning Hearing Board of Township of Shaler, 947 A.2d 218 (Pa. Cmwlth.), appeal denied, 599 Pa. 713, 962 A.2d 1199 (2008). This Court may conclude that the zoning board abused its discretion only if its findings of fact are not supported by substantial evidence. Id.

Chateau Woods, Inc. v. Lower Paxton Township, 772 A.2d 122 (Pa. Cmwlth. 2001); (2) a “variance by estoppel” where there has been municipal inaction amounting to active acquiescence in an illegal use, Skarvelis v. Zoning Hearing Board of Dormont, 679 A.2d 278 (Pa. Cmwlth. 1996); or (3) “equitable estoppel” where the municipality intentionally or negligently misrepresented its position with reason to know that the landowner would rely upon the misrepresentation, Cicchiello v. Bloomsburg Zoning Hearing Board, 617 A.2d 835 (Pa. Cmwlth. 1992), appeal denied, 537 Pa. 625, 641 A.2d 589 (1994).

Estoppel under each of these theories is an unusual remedy granted only in extraordinary circumstances and the landowner bears the burden of proving his entitlement to relief. Kreider; Skarvelis. Under each theory, a landowner must establish the following elements of good faith action on the landowner’s part: (1) that he relied to his detriment, such as making substantial expenditures, (2) based upon an innocent belief that the use is permitted, and (3) that enforcement of the ordinance would result in hardship, ordinarily that the value of the expenditures would be lost. Kreider; Chateau Woods; Skarvelis; Cicchiello. A landowner relying on the vested right theory must also present evidence of a municipal act that induced his reliance. Petrosky v. Zoning Hearing Board of the Township of Upper Chichester, 485 Pa. 501, 402 A.2d 1385 (1979); Ferguson Township v. Zoning Hearing Board of Ferguson Township, 475 A.2d 910 (Pa. Cmwlth. 1984).

In vested rights cases, the municipal act that induces reliance has generally been the erroneous issuance of a permit. Petrosky; Mirkovic v. Zoning Hearing Board of Smithfield Township, 613 A.2d 662 (Pa. Cmwlth. 1992). In Petrosky, our Supreme Court set forth five factors for determining whether a landowner has acquired a vested right: (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 funds; (4) the expiration without appeal of the period during which an appeal could have been taken from the issuance of a permit; and (5) the insufficiency of the evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the use of a permit. However, we have previously indicated that these five factors are not absolute requirements. Mirkovic; Highland Park Community Club v. Zoning Board of Adjustment of the City of Pittsburgh, 475 A.2d 925 (Pa. Cmwlth. 1984), affirmed, 509 Pa. 605, 506 A.2d 887 (1986).

In Kreider, Kenton and Charlene Kreieder (the Kreiders) were granted a special exception in 1984 to operate a campground on their property in South Londonderry Township subject to certain conditions, including the submission of a land development plan. In the late 1990s, the Kreiders obtained a sewage permit from the township relating to the installation of bath houses on the property and a special exception to expand the campground. However, the Kreiders never submitted a land development plan. In 2000, the township denied the Kreiders application for an occupancy permit. The Kreiders appealed to the local zoning hearing board, which rejected their testimony and found that the Kreiders intended to mislead and acted in open disregard of the above condition. The common pleas court affirmed the denial and rejected the Kreiders' claim that, under a theory of estoppel, they were entitled to continue to use their property as a campground.

This Court affirmed, noting that, despite the township's inaction regarding the submission of a land development plan for fifteen years and the later grants of a sewage permit and a special exception, the Kreiders lacked good faith and specifically intended to mislead in failing to submit the land development plan. Based on their failure to establish good faith, we concluded that the Kreiders were not entitled to a variance by estoppel.

In Skarvelis, John Skarvelis purchased a two-family dwelling in the Borough of Dormont in January of 1987. The dwelling had previously been used as a single-family dwelling and was illegally converted into a two-family dwelling by the previous owner. The conversion was in violation of the Borough's zoning ordinance with respect to minimum lot size, minimum lot width, minimum side yard, and minimum parking requirements. Following an inspection by the Borough's building inspector in May of 1987, Skarvelis was notified that the use of the property as a two-family dwelling was in violation of the ordinance without the grant of necessary variances. Following a period of inaction in excess of seven years, in October of 1994, the Borough issued Skarvelis an enforcement notice requiring that he remove the second family unit by November 25, 1994.

Skarvelis sought and was denied most of the required variances by the local zoning hearing board. Skarvelis appealed to the local common pleas court asserting a right to a variance by estoppel. The common pleas court agreed with Skarvelis and reversed the zoning hearing board's decision, noting that Skarvelis acted in good faith and would suffer substantial hardship if he were not granted relief. The Borough appealed, and this Court reversed. We noted that the mere passage of time does not entitle a property owner to a variance by estoppel. Additionally, we indicated that, under this theory, the municipality must do more than passively stand by and that an affirmative act is required, such as the issuance of a permit. Finally, we concluded that the Borough did not take any action which would constitute active acquiescence and that Skarvelis, as a property owner, had a duty to ensure that the property was in compliance with local zoning requirements. Accordingly, we held that Skarvelis had not established entitlement to a variance by estoppel.

In Chateau Woods, Gateway Center had obtained the approval of Lower Paxton Township for a sewer capacity of forty-four equivalent dwelling units (EDUs)

related to a proposed development. John Boland, a shareholder in Chateau Woods, Inc. (CWI), subsequently acquired the forty-four EDUs from Gateway Center and, in turn, sold them to CWI. CWI thereafter applied to the township for building permits related to its own proposed development with a sewer capacity of forty-four EDUs. The township denied the permits because of a DEP prohibition restricting new connections to the sewer system to four per month. CWI filed a complaint in mandamus and request for injunctive relief alleging that it had a vested right in the building permits by virtue of the EDU transfer from Gateway to CWI. The trial court rejected CWI's allegation and this Court affirmed, noting that the vested rights doctrine only applied in situations where the applicant, in good faith, relied upon a permit issued in error and incurred significant non-recoverable costs. We indicated that CWI's allegation that it was entitled to the permits did not involve permits that were issued in error and there was no evidence suggesting that the township erroneously issued connection permits to Gateway Center.

In Cicchiello, Joan Cicchiello purchased a property in Bloomsburg in 1985. The property had been previously used as a restaurant or snack bar. At the time of purchase, however, the property was used as office space for Bloomsburg University. In 1986, the property's zoning classification was changed from Residential-Urban to University District. The lease with Bloomsburg University expired in April of 1989 and Cicchiello sought a permit from the Bloomsburg zoning hearing board to use the ground floor of the building for student housing and the basement for a take-out pizza service. At a hearing before the zoning hearing board, the board's chairman recommended that Cicchiello ask city council to rezone the property and then return for a variance to change the use. The zoning hearing board issued a decision concluding that a take-out pizza service was not a permitted use.

Cicchiello did not appeal but instead sought a rezoning of the property, which was granted.

Cicchiello thereafter filed an application for a variance with the zoning hearing board, but the same was denied. Cicchiello appealed, and the common pleas court reversed the zoning hearing board's decision, concluding that, based upon the earlier representations of the board's chairman, the board was equitably estopped from denying the variance. However, this Court reversed, noting that the board chairman only advised Cicchiello that she should first seek to rezone her property and then apply for a variance and never misrepresented to her that a variance would in fact be granted. Additionally, we indicated that the zoning hearing board did nothing to preclude Cicchiello from appealing the denial of her original permit request. Thus, we concluded that the board was not equitably estopped from denying the variance.

As these cases illustrate, the Court employs a similar analysis in considering assertions brought under all three theories. Importantly, we have opined that the different labels, i.e., vested rights, variance by estoppel, and equitable estoppel, impose an analytical rigidity that is not helpful as municipal action in these types of cases often embodies more than one category. Kreider. The present case offers such an example.

Herein, the Board concluded that Schweitzer had established a vested right to use the first and second floor of his property for office use. However, the Board could have easily reached a similar conclusion under the theory of variance by estoppel or equitable estoppel. As found by the Board, Schweitzer relied upon the advice of a BBI building inspector, who was aware of Schweitzer's proposed office use at the property, in obtaining his January 3, 2005, residential building permit.⁵

⁵ We recognize that this Court has previously held that vested rights cannot be gained by relying on the statements of mere ministerial officers, such as a zoning officer or his secretary. **(Footnote continued on next page...)**

Further, in his February 1, 2006, application for an occupancy/building permit, Schweitzer specifically noted his proposed use of the first and second floors as office space, with a dwelling unit on the third floor. The City's zoning administrator approved the permit that same day. Also on that day, Schweitzer obtained a "Voucher-Build" from BBI which identified work to be done at the structure relating to the use of the first and second floors as office space and the third floor as a dwelling unit. Schweitzer thereafter installed new wiring, windows, and bathrooms, including handicapped accessible bathrooms on the first and second floors which did not contain a shower or bath.

On June 28, 2006, following completion of renovations of the third floor dwelling unit, Schweitzer filed a temporary occupancy permit application regarding the third floor, noting that work remained relating to the commercial build out of the first and second floors. The City's zoning administrator approved the application and Schweitzer received a temporary occupancy certificate which noted this remaining commercial work. Additionally, the BBI building inspector observed the work completed throughout the renovation process and never raised an objection.

Based upon this evidence, the Board concluded that Schweitzer exercised due diligence in obtaining building permits; he did not engage in any fraud with respect to these permits; he reasonably relied on the advice of the BBI building inspector; he spent significant unrecoverable funds; and his use of the first and second floors for office space, in an area surrounded by industrial and commercial

(continued...)

Ferguson Township v. Zoning Hearing Board of Ferguson Township, 475 A.2d 910 (Pa. Cmwlth. 1984). However, as will be discussed above, this case involves more than a landowner's simple reliance on the advice of the BBI building inspector.

uses, was not injurious to the health, welfare, and safety of the neighborhood. We cannot conclude that the Board erred in reaching these conclusions.

Moreover, unlike the applicants in Kreider, the Board found that Schweitzer exhibited no bad faith or an intention to mislead. Additionally, unlike the Borough of Dormont in Skarvelis or the zoning hearing board in Cicchiello, in the present case, BBI, the building inspector, and the zoning administrator did not passively stand by, but instead took affirmative actions which lead Schweitzer to believe that his proposed use of the first and second floors of his property for office space was sanctioned under the law. Thus, Schweitzer satisfied the requirements under a theory of vested rights, a theory of variance by estoppel, or a theory of equitable estoppel, and the Board did not abuse its discretion or err as a matter of law in directing the Chief of BBI to issue an occupancy permit to Schweitzer.

Accordingly, the order of the trial court is affirmed.

PATRICIA A. McCULLOUGH, Judge

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Appellant	:	
	:	No. 2143 C.D. 2009
v.	:	
	:	
Zoning Board of Adjustment of the	:	
City of Pittsburgh and Thomas W.	:	
Schweitzer	:	

ORDER

AND NOW, this 6th day of January, 2011, the October 5, 2009, order of the Court of Common Pleas of Allegheny County is hereby affirmed.

PATRICIA A. McCULLOUGH, Judge