IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tioga United, Inc.	:	
	:	
v.	:	No. 243 C.D. 2010
	:	Submitted: August 27, 2010
Zoning Board of Adjustment and City of Philadelphia and New Life Affordable Housing, L.P.	:	
	:	
Appeal of: New Life Affordable Housing, L.P.	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** January 5, 2011

Appellant New Life Affordable Housing, L.P. (New Life) appeals from an order of the Court of Common Pleas of Philadelphia County (trial court), which reversed a decision of the Philadelphia Zoning Board of Adjustment (ZBA). The ZBA's decision granted New Life a use variance, permitting New Life to construct seven (7) attached single-family homes on a tract of land (the Property)

in the Tioga section (Tioga) of the City of Philadelphia (City).[1] We affirm the trial court.

BACKGROUND

The facts as reflected in the ZBA's findings of fact and, where undisputed, in the record are summarized below.

1. New Life's Acquisition of the Property

In or around early 2006, New Life participated in meetings with City Councilperson Donna Reed Miller and her staff to discuss New Life's interest in acquiring vacant land in Tioga from the City for the purpose of developing the land for use as attached residential dwellings (row homes). The Property (as well as several other tracts in Tioga that New Life was interested in acquiring) was owned by the City and was vacant and considered blighted. (F.F. 17.) New Life submitted an application to the City's Vacant Property Review Committee (VPRC) in order to acquire the Property. (F.F. 16.) On March 14, 2006, the VPRC voted to recommend to the Philadelphia Redevelopment Authority (RDA) that the RDA convey the Property to New Life for the purpose of developing affordable housing. (F.F. 18.) According to an affidavit from New Life, the VPRC "approved [New

[1] The Property is situated on a City block bounded by 19th and 20th Streets and Venango and Pacific Streets. The Property cuts between Venango and Pacific and is bounded on the sides by row homes on one side and a warehouse on the other. In other words, when looking at the Property from Venango Street, one would be able to look across the vacant Property and see Pacific Street at the other end. While looking at the Property from this perspective, one would see row homes on one side and a warehouse on the other.

Life's] request to build [on the Property] seven single family homes dedicated to affordable housing." (R.R. at 197a; Affidavit, ¶ 3.) In March 2006, Councilperson Miller introduced a bill to City Council providing for the transfer of the Property to the RDA. (F.F. 20.) The RDA made no specific finding regarding the scope of the conveyances contemplated between the VPRC and New Life.

By letter dated April 4, 2006, the Philadelphia Planning Commission (the Planning Commission) wrote to Mark Deitcher, Vice President of "Fairmont Ventures," in response to a request to review the "New Life Affordable Housing 1" proposal for compliance with community plans. The Planning Commission's letter indicated that New Life's proposal encompassed the construction of thirty-three "new homes" in the Tioga section, including the seven attached dwellings New Life proposed for development on the Property.[2] (R.R. at 49a.) The Planning Commission's letter, however, made no mention of the fact that seven of the thirty-three anticipated dwellings would be attached dwellings.

This letter pointed out that the Planning Commission was preparing a community plan for Tioga that was then an "internal draft," and that New Life's Proposal was "entirely consistent with the draft recommendations of our [Community Plan]." (*Id*.) The letter also pointed out that "Tioga is a Redevelopment Area" and that "residential use is proposed for most of the areas

[2] Other documents, including the deeds of conveyance, also indicate that New Life's proposal included the construction of numerous other residential dwellings in the Tioga section.

affected by the New Life housing" proposal. (*Id*.) The Planning Commission concluded in the letter that "the New Life proposal is in substantial conformity with [the Redevelopment Area Plan.]" (*Id*.) Thus, although this letter indicates that New Life's overall proposed use of the Property, which it intended to acquire for residential purposes, conformed to the *draft* Community Plan and Redevelopment Area Plan, the letter does not tacitly or otherwise approve New Life's proposed development of the Property in any more detail than to acknowledge the intended residential use.

New Life planned to finance the development of the Property and the other tracts it planned to acquire in Tioga, in part, by applying to the Pennsylvania Housing Finance Agency (PHFA) for tax credits. On April 6, 2006, the VPRC sent a letter to the PHFA indicating that the RDA would settle with New Life on the Property. (F.F. 22.) On April 7, 2006, New Life submitted a tax credit application to the PHFA. (F.F. 21.)

2. The City's Amendment to the Zoning Ordinance

Stepping back in time to September 2005, the record indicates that City Councilperson Miller and the Planning Commission engaged in discussions with Tioga community representatives, including Tioga United, Inc., a civic association, regarding possible changes to the zoning map, including a change that would prevent the development of land in Tioga for row homes. (R.R. at 152a.)

Councilperson Miller introduced Bill No. 060088 (the Bill) to City Council on February 9, 2006. The Bill changed the designation of the area in which the Property is located from 9-A to C-2. Attached dwellings are not permitted uses in C-2 districts unless the dwellings contain a commercial use. During the adoption process in April 2006, a representative of the Planning Commission, William Kramer, testified before City Council regarding the collaborative genesis of the zoning change. Mr. Kramer, however, never informed City Council regarding New Life's plans for the Property. Ultimately, City Council passed the Bill on May 4, 2006, and the Mayor of the City of Philadelphia signed the Bill on May 18, 2006.

3. Post-Zoning Amendment Events

On September 14, 2006, the PHFA sent a letter to New Life, stating that PHFA had issued a conditional reservation of 2006 Federal low income housing tax credits for New Life's proposed development. (F.F. 25.) On December 14, 2006, the City transferred the Property to the RDA, which then transferred the Property to New Life. (F.F. 26.) The deed includes a provision that the owner, New Life, develop the Property in accordance with the comprehensive City plan. (N.T. May, 21, 2008 at 31.) Further, Section 14-404(6)(a) of the City Code provides that recipients of such land must develop and use the land in accordance with the Comprehensive Land Use Plan of the City of Philadelphia. At

the time of transfer to New Life, the new zoning districts had been in existence for approximately six months.

4. New Life's Application for a Variance

In March 2008, New Life submitted an application for a zoning/use permit for development of the Property. The application indicated that New Life sought to subdivide the Property into seven single lots and to construct seven three-story, single-family dwellings, with a single easement for all owners to have access to parking in the rear of the dwellings. Three row homes would front Pacific Street, while four row homes would front Venango Street. The plan proposed to have driveway access via Venango Street to the rear of the row homes with parking slabs for each home between the rears of the homes on Venango and Pacific Streets.

On March 16, 2008, the City's Department of Licenses and Inspections, which acts as the zoning permit office for the City, refused to grant the permit, noting three grounds for denial, including the Zoning Ordinance's preclusion of attached residential dwellings in C-2 districts. On March 27, 2008, New Life appealed that refusal to the ZBA.

The ZBA held hearings on the appeal on April 30, 2008 and May 21, 2008. New Life submitted a letter to the ZBA, dated April 28, 2008, asserting that in order to maintain its PHFA tax credits, it is required to proceed with its initial

plans. (R.R. at 29a.) Consequently, if the ZBA did not grant approval for its proposed development of the Property, New Life would not be entitled to tax credits from PHFA. In its memorandum to the ZBA, New Life asserted that it had satisfied the criteria necessary for the grant of a variance, and that the change in zoning had created the hardship that entitled New Life to a variance. New Life also asserted that it had established a vested right to a variance.

In a letter memorandum to the ZBA dated May 20, 2008, Tioga United suggested that the ZBA should reject New Life's argument that it had established a vested right to a variance. The protestants asserted that New Life had not demonstrated that it had an equitable interest in the Property before the change in zoning, and also that New Life had not established an entitlement to a variance on a vested rights theory.

The ZBA determined that (1) New Life began the planning process before the change in the ordinance;[3] (2) the Property is unique because it is vacant and blighted, located in the middle of a block, and located next to other property that received variance approval to permit the use of that property as a charitable institution and convent; (3) the Property could not feasibly be used for commercial use because of its size, shape, and location; (4) the use of one driveway for seven dwellings would not generate an appreciable amount of traffic; (5) other row

[3] The ZBA, however, also determined that New Life did not obtain an equitable interest in the Property at any time before the December transfer.

homes nearby would generate a greater amount of traffic; (6) the proposed dwellings would not significantly increase the neighborhood's density; and (7) the proposed development will not overcrowd the area or affect light and air to adjacent properties. (*Id*. at 322a-23a.)

The ZBA determined that the proposed development comported with the requirements of the previous zoning district designation and that the City's failure to recognize the impending change in district identification, while at the same time approving the transfer of the Property to New Life, resulted in a vested right in favor of New Life's proposed development. Alternatively, the ZBA concluded that New Life had satisfied the criteria for the grant of a variance.[4]

Tioga United appealed the ZBA's decision to the trial court. The trial court rejected the ZBA's conclusion that New Life established a vested right in a variance and also reasoned that New Life had not established that the variance New Life sought was the minimal variance necessary to grant relief. New Life appealed the trial court's order to this Court.

[4] The ZBA based this conclusion in part upon its finding that the Property was blighted. Relying upon *Hertzberg v. Zoning Board of Adjustment*, 554 Pa. 249, 721 A.2d 43 (1998), a case involving an application for a *dimensional* variance for a blighted property, rather than a *use* variance (the latter of which is at issue in this case), the ZBA concluded that New Life was entitled to a relaxation of the traditional variance criteria. The Supreme Court in *Hertzberg* emphasized that "the grant of a dimensional variance is of lesser moment than the grant of a use variance, since the latter involves a proposal to use the property in a manner that is wholly outside the zoning regulation." *Id.*, 554 Pa. at 257, 721 A.2d at 47. *Hertzberg* extended the relaxation of traditional variance criteria to dimensional variances, not use variances, and, thus, is inapplicable to the case at hand.

On appeal,[5] New Life raised the following issues for review: (1) whether the trial court erred in concluding that New Life failed to establish the hardship element of its variance claim; and (2) whether the trial court substituted its judgment for that of the ZBA by improperly rejecting the ZBA's credibility determinations.

An applicant for a use variance must establish that: (1) the property has unique physical characteristics creating an unnecessary hardship; (2) the physical characteristics of the property prevent development under the terms of the zoning ordinance such that no reasonable use of the property is possible; (3) the applicant has not created the unnecessary hardship; (4) the variance, if granted, represents the minimum departure from the terms of the zoning ordinance necessary to permit reasonable use of the property; and (5) the variance, if granted, will not alter the essential character of the neighborhood. Section 910.2(a)(1) of the Municipalities Planning Code (MPC).[6]

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[5] This Court's standard of review of a trial court decision reversing an order of the ZBA when the trial court takes no additional evidence is limited to considering whether the ZBA erred as a matter of law or abused its discretion. *1700 Columbus Assoc. v. City of Philadelphia, Zoning Bd. of Adjustment*, 976 A.2d 1257, 1260 (Pa. Cmwlth. 2009), *appeal den.*, ___ Pa. ___, 990 A.2d 731 (2010).

[6] Act of July 31, 1968, P.L. 805, *as amended*, added by Section 89 of the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10910.2(a)(1). Although the MPC does not apply to the City of Philadelphia, *Society Created to Reduce Urban Blight v. Zoning Board of Adjustment of Philadelphia*, 729 A.2d 117 (Pa. Cmwlth. 1999), Section 14-1802 of the Philadelphia Zoning Code requires an applicant for a variance in the City to satisfy the requirements of Section 910.2

As New Life acknowledges, in order to establish the unnecessary hardship element in an application for a use variance, an applicant must demonstrate that the physical aspects of the tract of land prevent the owner from developing the property in compliance with the applicable zoning ordinance or that the property can only be developed in accordance with the ordinance at a prohibitive cost. *Allegheny West Civic Council v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 547 Pa. 163, 167-68, 689 A.2d 225, 227 (1997).

New Life argues that the relevant provision of the City Code, Section 14-303(2)(a), affects such a hardship. That section of the ordinance allows any use "permitted in any residential districts except attached buildings used solely for dwelling purposes." Although New Life is correct in interpreting this provision to mean that an attached dwelling is permitted as long as the dwelling includes a commercial component, New Life ignores the most significant aspect of this provision: the uses permitted include any other residential dwelling as long as it is not an attached dwelling. Thus, New Life's argument does not refute the proposition that it could develop the Property for residential purposes as long as the dwellings are not attached. Because such a use is permitted, New Life had the burden to establish some reason why it could not develop the Property in accordance with the ordinance. New Life never offered such evidence, and,

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of the MPC. *Carman v. Zoning Bd. of Adjustment of Philadelphia*, 638 A.2d 365 (Pa. Cmwlth. 1994).

accordingly, we conclude that New Life failed to satisfy its burden to prove that it could not develop the Property in accordance with the zoning ordinance.

Further, New Life's reliance upon the purported understanding of City Council and other City agencies and officials regarding New Life's intended use of the Property is misplaced in the context of a pure variance request. The sole consideration is whether the Property itself has some fundamental physical characteristic that prevents development in accordance with the zoning ordinance. New Life has failed to demonstrate such a hardship. Accordingly, we conclude that the trial court did not err in concluding that the ZBA incorrectly determined that New Life was entitled to a use variance.

We also conclude that New Life has failed to establish its entitlement to a variance under a theory of vested rights.[7] New Life, relying upon our Supreme Court's decision in *Petrosky v. Zoning Hearing Board of Upper Chichester Township*, 485 Pa. 501, 402 A.2d 1385 (1979), asserts that its contact and

[7] As this Court explained in *In re Appeal of Kreider*, 808 A.2d 340, 343 (Pa. Cmwlth. 2002), there are three equitable remedies known in zoning and land use law that may preclude a municipality from enforcing a land use ordinance:

> Our courts have generally labeled the theory under which a municipality is estopped: . . . a "vested right" where the municipality has taken some affirmative action such as the issuance of a permit; a "variance by estoppel" where there has been municipal inaction amounting to active acquiescence in an illegal use . . .; or "equitable estoppel" where the municipality intentionally or negligently misrepresented its position with reason to know that the landowner would rely upon the misrepresentation.

communications with Councilperson Miller, the VPRC, and the Planning Commission support its right to a variance under a vested rights theory.

In *Chateau Woods, Inc. v. Lower Paxton Township*, 772 A.2d 122 (Pa. Cmwlth. 2001), this Court observed that the doctrine of vested rights only applies where an applicant relies in good faith on a permit a municipality issues in error and only where "the applicant incurs significant non-recoverable costs." *Chateau Woods*, 772 A.2d at 126 (citing *Hitz v. Zoning Hearing Bd. of South Annville Twp.*, 734 A.2d 60, 66 (Pa. Cmwlth. 1999).) In this case, New Life never received a permit allowing it to construct the attached row homes it seeks to erect. Further, the record contains no evidence regarding significant unrecoverable costs; New Life obtained all of the properties for one dollar. Consequently, we do not believe that the vested rights theory applies in this case.

Nevertheless, as we noted in *Kreider*, "[t]o a large extent the different labels [attached to the three equitable theories of vested rights, variance by estoppel, and equitable estoppel] impose an analytical rigidity that is not helpful [because m]unicipal action that may underpin estoppel often embodies more than one category." *Kreider*, 808 A.2d at 343. In this case, New Life suggests that actions on the part of the City's agencies led New Life to believe that it could develop its Property as proposed in its initial 2008 zoning application. This argument appears more aptly to describe the theory of equitable estoppel.

In *Cicchiello v. Bloomsburg Zoning Hearing Board*, 617 A.2d 835 (Pa. Cmwlth. 1993), this Court observed that in order to apply the doctrine of equitable estoppel in a land use matter, a litigant needs to establish that the party sought to be estopped (1) intentionally or negligently misrepresented some material fact, (2) knew or had reason to know that the other party would justifiably rely on the misrepresentation, and (3) induced the litigant party to act to his detriment because of his justifiable reliance on the misrepresentation. *Cicchiello*, 617 A.2d at 838.

In applying the criteria for equitable estoppel, we conclude that New Life has failed to satisfy its burden. The record in this case is simply insufficient to establish that the City or its agencies misrepresented a material fact. The primary factual finding of the ZBA that New Life pegs it case upon is Finding of Fact No. 23, in which the ZBA refers to a letter written by the acting director of the Planning Commission's Community Planning Division, which indicates that the housing development in New Life's proposal is consistent with the recommendations in the Planning Commission's *draft* plan for Tioga. (R.R. at 49a.) In our view, the fact that the Tioga plan was in a *draft* phase placed New Life on notice that the City had not finalized its plans for Tioga and that, therefore, there was a possibility that New Life's ultimate proposal might not satisfy the final community plan. New Life, having notice that community planning was in flux at

the time, should have ensured that its right to build as it intended had not changed before it accepted the transfer of the Property.

Second, although New Life's affidavit indicates that VPRC was aware that it intended to build seven dwellings on the Property, the record does not clearly reflect the specifics of the plan New Life proposed during the course of its communications with the City. Further, Section 16-404(6)(a) of the City Code provides that developers must comply with the City's Comprehensive Land Use Plan. The City adopted the changes to the zoning designation for the Property long before New Life gained title. New Life had a duty under this provision to develop in conformity with the City's Comprehensive Plan. New Life's failure to apprise itself of the changes divests it of any claim of reasonable reliance on the City's previous conduct.

It would be unreasonable to assume that, during the course of the decision-making process regarding the transfer of the Property to New Life, approvals by a City Councilperson, the VPRC, or the City Planning Commission for the development of Property for a residential use also authorized the development of the Property in contravention of the City's zoning ordinance. We believe that, under the vague circumstances presented in this case, it was not reasonable for New Life to assume that those City entities approving the transfer had a sufficient grasp of specific zoning regulations, or are empowered to grant

preliminary approval for the specific use, when their role was limited to considering the request for transfer for the general use of the Property for residential development. In summary, we cannot conclude that New Life carried the heavy burden to establish justifiable reliance upon the City's approval for transfer.

Also, to establish a right to develop under an equitable estoppel theory, New Life had to demonstrate that the City induced New Life to act to its detriment based upon justifiable reliance on the alleged misrepresentation. New Life has not offered argument or record evidence that would support a conclusion that it relied to its detriment on an alleged misrepresentation. The only specific matter New Life points to as a detriment is that it may not be able to obtain tax credits for the property under its initial application to the PHFA if it has to alter its development proposal for the Property. There is nothing in the record to indicate any other detrimental consequences if New Life has to revise its plans for the Property. Therefore, we conclude that New Life failed to establish this necessary criterion in support of its equitable estoppel theory.

Finally, we also reject New Life's claims that the trial court exceeded its standard of review. New Life argues that the trial court substituted its judgment for the ZBA's. New Life offers the non-specific assertion that the trial court concluded that the ZBA's factual findings are not supported by substantial

evidence, but does not indicate which findings the trial court determined were not supported by substantial evidence. New Life seems to suggest that the trial court concluded that New Life had not established the hardship element of its case. The trial court, in fact, noted that there was substantial evidence to support such a conclusion. (R.R. at 378a.) We, however, reached a different conclusion for the reasons set forth above. We do not agree with New Life's argument that the trial court usurped the ZBA's fact finding authority.

New Life also contends that the trial court erred in concluding that the variance it sought was not the minimum necessary to afford relief. Citing *East Torresdale Civic Association v. Zoning Board of Adjustment of the City of Philadelphia*, 536 Pa. 322, 639 A.2d 446 (1994), New Life contends that the trial court erroneously substituted its judgment for that of the ZBA. We need not address this issue, however, because we have concluded above that New Life did not demonstrate that its inability to improve the Property in the manner in which it proposed in its zoning application rises to the level of unique hardship necessary for the grant of a variance. Consequently, any error with regard to this element is harmless. Accordingly, we affirm the order of the trial court reversing the ZBA's decision.

P. KEVIN BROBSON, Judge

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O R D E R

AND NOW, this 5th day of January, 2011, the order of the Court of Common Pleas of Philadelphia County is AFFIRMED.

P. KEVIN BROBSON, Judge