

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mark Purcell and Karen Purcell,	:	
Husband and Wife,	:	
Appellants	:	
	:	
v.	:	No. 68 C.D. 2010
	:	SUBMITTED: April 30, 2010
Ross Township Zoning Hearing	:	
Board and Ross Township	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER**, President Judge
 HONORABLE P. KEVIN BROBSON, Judge
 HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: June 11, 2010

Mark and Karen Purcell, husband and wife, appeal from the order of the Court of Common Pleas of Allegheny County, which affirmed the decision of the Ross Township Zoning Hearing Board (ZHB) to deny the Purcells' application for a use variance and/or recognition of a preexisting nonconforming use to allow storage of vehicles and supplies for a landscaping business on their property.

The Purcells own property, a vacant lot, on Jacks Run Road in Ross Township, Allegheny County. This property is located in an R-2 zoning district. Before the ZHB, Mark Purcell testified that he bought the property in 1988 and that since that time he has been allowing his son, Mark Purcell, Jr., to use it for the storage of equipment and materials for his landscaping business. To this end,

several structures are maintained on the property for the storage of mowers and other equipment, as well as several trucks and piles of mulch and other material. It is undisputed that this use of the property qualifies as Commercial Outdoor Storage and Display, which is not permitted in the R-2 zoning district under Section 904 of the Ross Township Zoning Ordinance (Ordinance). In 2007, a Building Inspector notified the Purcells that this use of their property required ZHB approval. They then filed their application for a use variance and/or recognition of a preexisting nonconforming use. Their application was initially denied by the ZHB, but on appeal the common pleas court remanded for reconsideration *de novo* because a power outage had prevented the creation of a record of the ZHB's hearing. After two meetings and a site visit on remand, the ZHB again denied the Purcells' application. On appeal, common pleas affirmed, finding that substantial evidence supported the ZHB's decision. An appeal to this court followed.¹

In order to be entitled to a variance in Ross Township, an applicant must satisfy all of the following criteria:

A. 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 such conditions and not to the circumstances or conditions generally created by the provisions of this Chapter in the neighborhood or district in which the property is located.

B. That because of such physical circumstances or conditions there is no possibility that the property can be

¹ In cases such as this, where the trial court took no additional evidence, our review is limited to determining whether the ZHB committed an error of law or found facts which are not supported by the record. *See Smalley v. Zoning Hearing Bd. of Middletown Twp.*, 575 Pa. 85, 834 A.2d 535 (2003).

developed in strict conformity with the provision of this Chapter and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

C. That such unnecessary hardship has not been created by the applicant.

D. 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.

E. 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.

Section 604 of Ordinance. The ZHB concluded that the evidence did not establish that the lot had unique physical conditions that made it impossible be used in conformity with the Ordinance and did not establish that granting the variance would not alter the character or nature of the neighborhood or be detrimental to the public welfare.

The Purcells argue that the evidence presented at the hearing established that the property cannot be put to a permitted use because a dwelling cannot be constructed on it and that their use would not alter the character and nature of the neighborhood. At the hearing, Mark Purcell testified that a right-of-way cut across his land and that drilling samples established the ground was unsuitable for building a residence. Additionally, in their briefs to this court, the Purcells assert that it is impossible to build on the property because the ground is unstable. However, Mark Purcell also testified that there was a building on the property when he purchased it (which he tore down) and that if he could not obtain a variance for commercial use of the property, “then I’m going to use it for what I intended to use it for in the first place, and that is to build a low-income senior

citizen high rise building.” Reproduced Record at 99a. Moreover, the evidence indicated that the drilling samples came from only a limited area of the property, and that the right-of-way was self-imposed, as the Purcells had sold it to a third party. Essentially, the Purcells are simply arguing that their factual allegations should have been credited. However, determining the weight and credibility of the evidence is the province of the ZHB, and even uncontradicted testimony may be discredited. *Piper Group, Inc. v. Bedminster Twp. Bd. of Supervisors*, 992 A.2d 224 (Pa. Cmwlth. 2010). Having both heard the witnesses and viewed the property first-hand, the ZHB weighed the evidence and determined that the Purcells had not met their burden of establishing that physical conditions prevented the land from being developed in conformity with the Ordinance. We will not superimpose our judgment over that of the ZHB in this regard.

In addition, the ZHB found that the Purcells’ use of their property did alter the character or nature of the neighborhood. Mark Purcell testified that there were a number of other commercial properties in the area, but did not establish if any of them were in areas zoned residential. Mark Purcell, Jr. testified about the operation of his landscaping business, saying that the only activity on the property was his crews loading up their supplies in the morning and returning in the evening. This testimony was contradicted by several neighbors, who testified that work on the property took place at a variety of times during the day and night, and was often noisy and disturbing. Again, the assessment of this evidence was the province of the ZHB and the evidence on the record provided ample basis for the ZHB to conclude that the Purcells had failed to establish that the variance they sought would not alter the character or nature of the neighborhood or be detrimental to the public welfare.

Finally, we will not disturb the ZHB's refusal to recognize a preexisting nonconforming use. In order to establish a prior nonconforming use, "the landowner is required to provide objective evidence that the subject land was devoted to such use at the time the zoning ordinance was enacted." *Smalley*, 575 Pa. at 90, 834 A.2d at 538-39. This burden includes "the requirement of conclusive proof . . . of the precise extent, nature, time of creation and continuation of the alleged nonconforming use." *Jones v. Twp. of North Huntingdon Zoning Hearing Bd.*, 467 A.2d 1206, 1207 (Pa. Cmwlth. 1983). The relevant ordinance in this case was adopted in 1986. To establish a non-conforming use, therefore, the Purcells would have to prove that the lot was used for commercial storage prior to that year.

Before the ZHB, Mark Purcell testified that prior to his purchase of the lot in 1988, the property had been owned by Equitable Gas, who had a monitoring station on the premises. In addition, Purcell testified that Equitable Gas had lengths of pipe and other supplies on the property. The ZHB found that the property had been used prior to 1986 for commercial and gas monitoring purposes, but that Purcell had not established to the satisfaction of the ZHB that it was used for commercial storage at the time he purchased the property.

In this regard, it is not altogether clear whether the ZHB discredited Purcell's testimony concerning Equitable's storage of pipe and supplies or simply found that the testimony was so vague that it was inadequate to show more than an incidental storage of supplies as an accessory to the primary use of the property as a monitoring station. Either way, the ZHB did not err. Keeping a few supplies in connection with Equitable's use of the land as a monitoring station, even had it been shown that it was done continuously from before enactment of the ordinance until the Purcells purchased the property, simply provides no basis to find a pre-

existing non-conforming use for storage of vehicles, equipment, piles of mulch and landscaping materials for an off-premises business. Thus, whether the testimony concerning some storage by Equitable was credited or not, it was insufficient to meet the Purcell's burden of proof.

For all of the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

