

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Suzanna Z. Vaughn, :
Appellant :
v. : No. 822 C.D. 2010
: Submitted: December 6, 2010
Towamensing Township Zoning :
Hearing Board, John A. Parr, Patrick :
Gremling, Scott Heffelfinger, and :
Towamensing Township :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: December 30, 2010

Suzanna Z. Vaughn appeals from the order of the Court of Common Pleas of Carbon County, which affirmed the decision of the Towamensing Township Zoning Hearing Board (Board) to grant a conditional variance of a road paving requirement to John A. Parr, Patrick Gremling and Scott Heffelfinger (Landowners), owners of a private campground in Towamensing Township (Township).¹ We reverse.

¹ Landowners declined to file a brief in this matter.

The Landowners acquired the campground property from Vaughn in 2003. The property had been used as a commercial campground prior to the acquisition, and continued to be used as a commercial campground afterwards. Vaughn was and still is the owner of property surrounding the campground, and the subdivision of her land for the sale left the campground property without public access. To address this, Vaughn also conveyed to the Landowners an easement allowing the use of a 40-foot wide strip across her property to reach the campgrounds. A gravel road runs over this strip.

In 2008, the Landowners decided they wanted to expand their campsite. They submitted a development plan to the Towamensing Township Board of Supervisors (Supervisors), that included a proposed partial exemption from the requirement that their access road be paved.

Two distinct provisions apply to the paving requirement. Section 406.C (C14)(a) of the Township Zoning Ordinance states that “[a]ll access roads leading from public streets or alleys to the camping area shall comply with the requirements contained in the Towamensing Township Subdivision and Land Development Ordinance (SALDO) for a Street in a residential subdivision. . . .” In turn, section 504.02(b) of the SALDO requires that “[a]ll mobile home parks and campsites shall have paved access roads to and from any such sites and in no instance shall such sites be in conflict with any other ordinance of the Township.”

The Landowners first sought a partial waiver of the SALDO requirement from the Supervisors, pursuant to Section 512.1 of the Municipal Planning Code (MPC).² In November 2008, the Board granted a partial waiver of

² Act of July 31, 1968, P.L. 805, *as amended*. Section 512.1 was added by the Act of December 21, 1988, P.L. 1329. This section allows for waiver if “literal enforcement will exact (Footnote continued on next page...)”

the paving requirement, determining that the Landowners would only be required to pave the first 500 feet of their access road. The first 500 feet of the access road does not cross Vaughn's property.

After receiving the waiver of the SALDO requirement, Landowners went to the Board to request a variance from Section 406.C (C14)(a) of the Township Zoning Ordinance for all except the first 500 feet of the road. The Board granted the variance, conditioned on Vaughn's approval that the portion of the road across her property remain unpaved. From that determination, Vaughn took an appeal. Common pleas affirmed, and an appeal to this court followed.

Before this court, Vaughn argues that the variance was improperly granted and that the variance impermissibly expands the scope of the easement.

Vaughn's second argument is not properly before us. The enforcement of private rights are not properly raised as the subject of a zoning appeal. *Gulla v. North Strabane Twp.*, 676 A.2d 709 (Pa. Cmwlth. 1996). If an easement is violated, the remedy is an enforcement action, not zoning proceedings. *Id.* For this reason, we confine our analysis to the question of whether the variance was properly granted under the Township Zoning Ordinance.

The party seeking a variance must establish:

- (1) an unnecessary hardship will result if the variance is denied, due to the unique physical circumstances or conditions of the property;
- (2) because of such physical

(continued...)

undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not be contrary to the public interest and that the purpose and intent of the ordinance is observed." 53 P.S. § 10512.1. This standard is more lenient than the one required by a Zoning Board for a variance. See Ryan, Pa. Zoning Law and Practice, § 11.2.7 (Supp. 2009); compare *Morris v. S. Coventry Twp. Bd. of Supervisors*, 836 A.2d 1015 (Pa. Cmwlth. 2003) with *Taliaferro v. Darby Twp. Zoning Hearing Bd.*, 873 A.2d 807 (Pa. Cmwlth. 2005).

circumstances or conditions the property cannot be developed in strict conformity with the provisions of the zoning ordinance and a variance is necessary to enable the reasonable use of the property; (3) the hardship is not self-inflicted; (4) granting the variance will not alter the essential character of the neighborhood nor be detrimental to the public welfare; and (5) the variance sought is the minimum variance that will afford relief.

Taliaferro v. Darby Twp. Zoning Hearing Bd., 873 A.2d 807, 811-12 (Pa. Cmwlth. 2005). Among her arguments, Vaughn asserts that the Landowners have failed to establish the second element listed above. Finding merit in this contention, there is no need to address the remaining elements.

To meet this test:

[T]he applicant must demonstrate that due to the physical characteristics, the property cannot be used for any permitted purpose or could only conform to such purpose at a prohibited expense, or that the property has either no value or only a distress value for any permitted purpose.

Patullo v. Zoning Hearing Bd. of Twp. of Middletown, 701 A.2d 295, 300 (Pa. Cmwlth. 1997). “A property owner does not have a right to utilize his land for his highest and best financial gain. Showing that a lot can be used in a more profitable fashion is insufficient; there must be no permitted use to which the land can feasibly be put.” *Twp. of E. Caln v. Zoning Hearing Bd. of E. Caln Twp.* 915 A.2d 1249, 1254-55 (Pa. Cmwlth. 2007) (citations omitted).

The Landowners argued before the Zoning Board that they suffered hardship because the access road was flanked with wetlands which would be disturbed by paving. However, this argument clearly does not meet the threshold, as it does not demonstrate that all permitted uses are precluded absent the variance. In fact, it is a matter of record that the Landowners have used the land as a

campgrounds for the past seven years without the expansion which caused the variance request. Because it is indisputable that it is feasible to use the land for a permitted purpose without the variance, the Zoning Board clearly erred in finding unnecessary hardship. For this reason, we reverse.³

BONNIE BRIGANCE LEADBETTER,
President Judge

³ We do note, however, that reversal in this case would seem to have little practical effect. The paving requirement in the Township Zoning Ordinance merely refers to the requirements of the SALDO, and because the requirement of the SALDO has been waived, the Zoning Ordinance requires nothing more than compliance with the applicable SALDO provision, as waived. *See Morris v. S. Coventry Twp. Bd. of Supervisors*, 836 A.2d 1015 (Pa. Cmwlth. 2003). Because the SALDO has already been waived for all except the first 500 feet of the road, there is no requirement that the Landowners pave beyond that section of road, so a variance is unnecessary. We note that the propriety of the SALDO waiver was not at issue in this case, nor could it properly have been. Moreover, as noted above, the SALDO waiver is subject to less stringent requirements than apply to a variance. A challenge to that waiver could properly be raised after the approval of Landowner's entire development plan, which apparently has not yet occurred.

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ORDER

AND NOW, this 30th day of December 2010, the order of the Court of Common Pleas of Carbon County in the above-captioned matter is hereby REVERSED.

BONNIE BRIGANCE LEADBETTER,
President Judge