

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lorraine Kennedy, :
Appellant :
v. : No. 863 C.D. 2009
Zoning Hearing Board of : Argued: November 10, 2009
Middletown Township :

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: January 8, 2010

Lorraine Kennedy appeals from an order of the Court of Common Pleas of Bucks County (Trial Court) denying Kennedy's appeal from an order of the Zoning Hearing Board of Middletown Township (ZHB), and affirming the ZHB's grant of a dimensional variance sought by J. Hugh Harr (collectively with his wife and daughter, Harr). We vacate and remand.

Harr is the owner and occupant of a townhome and real property (the Property) located within Middletown Township (Township) in an MR zoning

district under the Township's Zoning Ordinance (Ordinance).¹ As part of a senior college project, Harr constructed a fence measuring sixteen feet by sixteen feet by one-point-nine feet high, to enclose an organic vegetable garden located in the front yard of the Property which was to be bordered by native shrubs and flowers. The fence, and an accompanying attached arbor, was built to protect the garden from pests; the garden itself was located in the front yard of the property as that was the sole location with optimum sunlight.

As a result of a complaint from neighboring landowner Kennedy following Harr's commencement of construction on the fence and arbor, a Township Zoning Officer issued a cease and desist order. Thereafter, Harr halted construction of the arbor, which was unfinished, although the garden and fence had already been substantially completed.

Harr subsequently applied for a dimensional variance from the applicable Ordinance provision that required a minimum thirty-foot setback for a structure such as that at issue *sub judice*, and two hearings were held before the ZHB. In between the two hearings, the ZHB also conducted a site visit to Harr's property to form a first-hand opinion of the fence. At the two hearings, Harr, Kennedy, and various neighbors testified as to the fence and arbor, and as to the garden itself. Neighboring landowners testified both in support of, and in opposition to, the variance grant requested, with that testimony centering almost exclusively on the appearance of the structure.

¹ The Ordinance is contained within the Original Record to this matter.

By Decision and Order with a mailing date of July 14, 2008, the ZHB granted Harr's variance to permit the construction of the fence and arbor with a one and one-half foot setback. The ZHB concluded that the variance requested represented the least modification of the applicable regulations, that there would be no negative impact on the surrounding properties and uses by its grant, and that the "garden structure" had a positive aesthetic and environmental value. The ZHB's grant of the variance was unanimous.

Kennedy thereafter appealed to the Trial Court, which heard the matter without receiving additional evidence. Following its review of the record and the parties' arguments, the Trial Court concluded that it was bound by the ZHB's credibility determinations and interpretation of the evidence, and that the ZHB's findings demonstrated that Harr's request met the variance criteria of Section 910.2 of the Pennsylvania Municipalities Planning Code (MPC), 53 P.S. §10910.2.² Concluding that the ZHB did not abuse its discretion or commit an

² Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10910.2, added by the Act of December 21, 1988, P.L. 1329. Section 910.2 of the MPC reads:

Zoning hearing board's functions; variances

(a) The board shall hear requests for variances where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant. The board may by rule prescribe the form of application and may require preliminary application to the zoning officer. The board may grant a variance, provided that all of the following findings are made where relevant in a given case:

- (1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional

(Continued....)

error of law, the Trial Court denied Kennedy's appeal, and affirmed the ZHB's Decision and Order, by Order dated April 3, 2009. Kennedy now appeals to this Court.

In reviewing a land use appeal where the trial court took no additional evidence, this Court's review is limited to determining whether the ZHB committed

topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.

(2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

(3) That such unnecessary hardship has not been created by the appellant.

(4) 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.

(5) 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.

(b) In granting any variance, the board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this act and the zoning ordinance.

an error of law, or abused its discretion. Township of Northampton v. Zoning Hearing Board of Northampton Township, 969 A.2d 24 (Pa. Cmwlth. 2009).

Kennedy presents one issue for review: whether the ZHB committed an error of law, or abused its discretion, in granting the dimensional variance from the required thirty-foot Ordinance³ setback requirement to allow construction of the fence with a one and one-half foot setback.

Acknowledging the lesser standard applicable to a dimensional variance grant,⁴ as opposed to a use variance, Kennedy argues that substantial evidence of record does not exist supporting the variance grant on all five of the factors required by Section 910.2 of the MPC. Additionally, Kennedy argues that

³ There is no dispute in this matter that the Ordinance requires a thirty-foot setback for a front yard fence such as that at issue.

⁴ In Hertzberg v. Zoning Board of Adjustment of City of Pittsburgh, 554 Pa. 249, 257, 263-64, 721 A.2d 43, 47, 50 (1998), our Supreme Court held:

When seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations. Thus, **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.**

* * *

[I]n determining whether unnecessary hardship has been established, courts should examine whether the variance sought is use or dimensional. To justify the grant of a dimensional variance, courts may consider multiple factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.

(Emphasis added).

the ZHB relied on improper criteria under the clear mandate of Section 910.2. Kennedy cites to the ZHB's reliance upon two stated factors, namely, the garden's need for optimal sunlight in its location within Harr's front yard, and the positive environmental impact of the "garden structure."

In its Decision, the ZHB made the following relevant findings of fact in regards to the five factors required by Section 910.2 of the MPC:

6. Victoria Harr further credibly testified that: she planted the organic garden as part of a college senior project to develop a curriculum for teaching middle school science, and to have a positive environmental impact on the site; the fence is to be bordered by native shrubs and flowers; the fence is needed to protect the garden; and, this location at the front of the property was chosen as the only part of the property with optimum sunlight.

17. The neighbors' testimony did not credibly contradict the applicant and his family with regard to the need to place the garden structure in the front of the property due to optimal sunlight, the need for the fence itself, nor did it contradict the statements with regard to the positive environmental impact of the garden structure.

ZHB Decision at 2-3. Additionally, the ZHB concluded, in relevant part:

1. The Zoning Hearing Board concluded that the variance requested represented the least modification of the applicable regulations.

2. The [ZHB] further concluded that there would be no negative impact upon the grant of the requested relief on surrounding properties or uses, as the [ZHB] conducted a site visit and formed a positive opinion of the aesthetic and environmental value of the garden structure.

ZHB Decision at 3.

We first note that there is no dispute in this case regarding the location of the garden itself, which apparently is permitted within a front yard under the Ordinance. Reproduced Record (R.R.) at 47a, 50a, 55a. The sole subject of these proceedings, and of Harr's variance request, was the fence and attached arbor surrounding the garden. The ZHB expressly noted this distinction during the proceeding before it, and expressly noted that the garden itself was permitted under the Ordinance. However, the ZHB's inconsistent and imprecise employment of the terms "fence" and "garden structure," as well as the orientation of nearly all of its findings around the garden itself, obfuscates the findings and the conclusions drawn therefrom. Given that lack of precision and tangential focus upon the garden, effective appellate review of the ZHB's Decision is not possible.

Independently dispositive, the ZHB has failed to address all five of the factors required by Section 910.2 of the MPC as a prerequisite to a grant of a variance. Section 910.2 plainly states, prior to listing the five factors, that "[the ZHB] may grant a variance, **provided that all of the following findings are made** where relevant in a given case." 53 P.S. §10910.2 (emphasis added). In the entirety of its opinion, the ZHB clearly has not made findings in regards to a minimum of two of those factors, and possibly as many as four of those factors, given the imprecise language and seemingly interchangeable terms for the garden and its surrounding fence and arbor. As such, again, effective appellate review of this matter is precluded. We note that nothing in the record to this matter indicates that any of Section 910.2's five factors would not be relevant in this case, under Section 910.2's plain language.

Accordingly, we vacate the Trial Court's Decision, and remand this matter to the Trial Court with instructions for further remand to the ZHB for the sole and limited purpose of producing a decision that comports with the requirements of Section 910.2 of the MPC, and which enables effective appellate review thereof.

JAMES R. KELLEY, Senior Judge

