

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| CN Development Company, | : | |
| Appellant | : | |
| | : | |
| v. | : | |
| | : | |
| The Zoning Hearing Board of | : | |
| Summit Township, County of | : | |
| Erie, Pennsylvania, Henry J. | : | |
| Zawistoski and Sandra R. | : | No. 876 C.D. 2010 |
| Zawistoski, his wife | : | Argued: November 9, 2010 |

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: February 24, 2011

CN Development Company (CN Development) appeals the order of the Court of Common Pleas of Erie County (trial court) which denied its land use appeal.

Henry and Sandra Zawistoski (Zawistoskis) have a 9.4 acre parcel of land in Summit Township. The front 250 feet of depth is zoned R-2, where residential use was permitted, while the remainder of the parcel is zoned I-1, industrial.

In 1989, the Zawistoskis obtained a building permit to construct and use a 6,200 square foot warehouse as a commercial woodworking shop on that portion of the property located in the industrial zoning district.

In 1994, the Zawistoskis spoke with the former Summit Township Zoning Officer, Elmo Kelly (Kelly), now deceased, about constructing a residence inside the warehouse. Kelly informed the Zawistoskis that they did not need a further permit from Summit Township to complete the construction. Based on Kelly's representation, the Zawistoskis constructed a 2,000 square foot residence on a second floor within the warehouse which consisted of three bedrooms, two and one-half baths and a kitchen, dining room and living room.

Since 1995, the Zawistoskis openly resided in the residence. That the Zawistoskis resided at this location was well-known for many years by residents of Summit Township, and Summit Township officials, including Nancy Agostine (Agostine), the current Zoning Officer, and current and former Township Supervisors.

In 2000, CN Development purchased the property next door to the Zawistoskis. At some point thereafter, a disagreement arose between the parties which resulted in lawsuits being filed for negligence/nuisance and defamation. This litigation resulted in a small verdict for the Zawistoskis.

On March 25, 2008, CN Development sent a letter to Agostine on March 25, 2008, and requested that she issue a Notice of Violation to the Zawistoskis pursuant to Section 706.1 of the Summit Township Zoning Ordinance

and order them to cease and desist within 30 days their "illegal" residential use of a portion of their warehouse because a residential use was not a permitted use in the Industrial-1 zoning district. CN Development also requested, in the event the Zawistoskis failed to comply with the Notice of Violation, that "an enforcement

action be commenced with the District Magistrate ... seeking a per diem judgment of not more than \$500.” Letter from CN Development to Nancy Agostine, March 25, 2008, at 1; Reproduced Record (R.R) at 35a.

Agostine investigated the issue and concluded that “**the Summit Township Supervisors and Elmo Kelly, on their behalf, approved the change in use of the premises for a joint use of industrial and residential.** That action occurred in 1995.” Letter from Nancy Agostine to CN Development, September 17, 2008, at 2; R.R.) at 65a (Emphasis added). Agostine declined to issue the Notice of Violation.

CN Development appealed Agostine’s decision to the Summit Township Zoning Hearing Board (ZHB) which held a hearing. After the hearing, the ZHB denied the appeal.

CN Development appealed to the trial court which heard additional testimony. The trial court concluded that the ZHB did not err when it declined to issue the Notice of Violation. The evidence demonstrated that Kelly approved the construction of the residence in the I-1 zoning district without a permit.

The trial court then observed that even absent the credited evidence that the residential construction was approved, the Zawistoskis would have been entitled to a variance by estoppel because: (1) the Zawistoskis reasonably relied on the statements of then-Zoning Officer Kelly that no permit was required; (2) over fourteen years had passed during which Township officials were aware of a zoning violation but took no action; (3) the Zawistoskis incurred a substantial expenditure when they constructed their home in reliance on Kelly’s representations; and (4)

denial of a variance at this point would likely result in substantial hardship to the Zawistoskis because they would no longer be entitled to reside in their home.¹

On appeal,² CN Development contends the trial court erred when it denied its land use appeal because the Zawistoskis failed to establish by clear, precise and unequivocal evidence that they were entitled to a variance by estoppel.

First, a review of the trial court's order makes it clear that its discussion regarding a variance by estoppel was not a crucial basis on which the trial court decided this controversy. Whether the Zawistoskis were entitled to a variance by estoppel was not before the trial court **because a variance was not requested**. The variance by estoppel issue was raised by the trial court in an "even if" context. The trial court reasoned that "even if" a Notice of Violation was issued, the Zawistoskis would have been entitled to a variance by estoppel. This discussion was not essential to the disposition of the case. It was dicta.

The land use appeal filed by CN Development was from the ZHB's decision upholding correspondence from the Township Zoning Officer that denied CN Development's request for a Notice of Violation directed to the Zawistoskis. The specific issue before the trial court was whether the ZHB erred when it

¹ In its order, the trial court directed the ZHB to take appropriate action to bring the Zawistoskis into compliance with Summit Township ordinances.

² Where, as here, the trial court took additional evidence, this Court must determine whether the trial court committed an error of law or abuse of discretion. DeGray v. Zoning Hearing Board of Upper Saucon Township, 599 A.2d 286 (Pa. Cmwlth. 1991). The trial court abuses its discretion if its findings are not supported by substantial evidence, that is, such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. McGonigle v. Lower Heidelberg Township Zoning Hearing Board, 858 A.2d 663 (Pa. Cmwlth. 2004).

declined to issue a Notice of Violation to the Zawistoskis. The basis of the trial court's order was its denial of CN Development's request to overturn the ZHB's decision. The trial court found in favor of the Zawistoskis because Kelly authorized construction of the residence without requiring an additional permit.

Despite the language of the trial court's Order and the discussion in the Opinion, CN Development's appeal focuses on the trial court's discussion of whether the Zawistoskis would qualify for a variance by estoppel. It is clear that this discussion of the trial court was not the basis for its decision. As such, CN Development has offered no basis on which to overturn the trial court's decision. Therefore, this Court must affirm the trial court.

Even giving CN Development the benefit of the doubt, and assuming that it properly challenged the basis for the trial court's decision, this Court would affirm.

An action to enforce a zoning ordinance involves a showing on behalf of the municipality or the private plaintiff that the use or structure involved in the proceeding violates the zoning ordinance or that the owner failed to obtain a required permit or permission. Pennsylvania Zoning Law and Practice, Robert S. Ryan, §9.1.10. Here, CN Development asked Agostine to issue a Notice of Violation under Section 706 of the Zoning Ordinance because the Zawistoskis failed to obtain the required permit.

706 VIOLATIONS

Failure to comply with any provision of this Ordinance or to secure a Zoning Permit, or Zoning Hearing Board permit, **when required**, prior to the erection, construction, extension, alteration, or addition

to a structure shall be a violation of this Ordinance. Failure to secure a Summit Township Occupancy/Use Permit prior to occupying a building, structure or lot shall also be a violation of this Ordinance. (Emphasis added).

Summit Township Zoning Ordinance, §706.

Section 706 of the Zoning Ordinance provides that the failure to obtain a zoning permit “when required” shall be a violation of the ordinance. The ZHB and trial court found that no violation existed because, based on the representations of Kelly, in his official capacity, a permit was not required.

While the trial court did not discuss the reason for its holding in terms of “equitable estoppel,” this Court believes this doctrine applies.³ The doctrine of equitable estoppel has been applied to zoning cases such as this one where (1) a material fact is intentionally or negligently misrepresented by a zoning official; (2) the zoning official making the representation knew or had reason to know that the landowner would rely justifiably on the misrepresentation; and (3) the landowner was induced to act to his detriment because of his reliance on the

³ There are three closely related equitable doctrines: (1) vested rights; (2) variance by estoppel; and (3) equitable estoppel, which operate to bar a municipality from enforcing its land use regulations. Equitable estoppel is not to be mistaken for a variance by estoppel because, as pointed out above, variance by estoppel is applicable only where a variance is requested. Likewise, the equitable doctrine of “vested rights,” often seen in zoning cases, is not applicable because the “vested rights” doctrine applies whenever a permit is issued and the landowner acts on reliance on that permit. See Ferguson Township v. Zoning Hearing Board of Ferguson Township, 527 A.2d 174 (Pa. Cmwlth. 1987). For a discussion of the three equitable doctrines see Vaughn v. Zoning Hearing Bd. of Twp. of Shaler, 947 A.2d 218, 224-225 (Pa. Cmwlth.), appeal denied, 599 Pa. 713, 962 A.2d 1199 (2008).

misrepresentation. Cicchiello v. Bloomsburg Zoning Hearing Board, 617 A.2d 835 (Pa. Cmwlth. 1992).

In essence, this was the analysis performed by the trial court. Kelly made the representation in his official capacity. The representation was not a mere suggestion but rather it was a positive statement of fact that Kelly knew or should have known would be relied upon. Finally, the Zawistoskis reasonably relied on that representation to their detriment. Therefore, the Township was equitably estopped from finding a violation of the zoning ordinance and issuing a Notice of Violation.

The trial court is affirmed.

BERNARD L. McGINLEY, Judge

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ORDER

AND NOW, this 24th day of February, 2011, the Order of the Court of Common Pleas of Erie County in the above-captioned case is hereby affirmed.

BERNARD L. MCGINLEY, Judge