

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Appeal of Lower Providence :  
Township From the Decision of the :  
Lower Providence Township Zoning :  
Hearing Board Dated January 8, 2010 :  
: :  
Pawlings Road Associates, LLC :  
: :  
Appeal of: Lower Providence : No. 980 C.D. 2010  
Township : Argued: February 7, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE JOHNNY J. BUTLER, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE PELLEGRINI

FILED: March 3, 2011

Lower Providence Township (Township) has filed an appeal from that portion of the order of the Court of Common Pleas of Montgomery County (trial court) quashing its appeal from a decision of the Lower Providence Township Zoning Hearing Board (Board) granting the zoning application filed by Pawlings Road Associates (Applicant).<sup>1</sup> For the reasons that follow, we remand the matter to the trial court solely for the purpose of holding a hearing on the issue of the variances.

This appeal involves the Township's conduct regarding the property located at 1433 Pawlings Road in Lower Providence Township. The previous

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<sup>1</sup> The trial court issued one order dated April 27, 2010, at two different docket numbers: No. 2010-02677 (980 C.D. 2010) and No. 2010-02677 (981 C.D. 2010).

owner in the 1980s used the property as an auto repair shop. On the property were three buildings used in connection with that business as well as two apartments in a separate structure. The previous owner also stored vehicle parts and trash outdoors on the property. When that owner died in December 2005, the property was sold at a tax sale. The Tax Lien Officer marketed the property as an auto service garage and multi-unit apartment building.

In September 2008, Applicant purchased the property relying on representations made by the Township's zoning officer that the auto repair business and duplex were lawful non-conforming uses. Applicant had informed the Township's zoning officer that it intended to renovate the duplex and combine two of the three garage buildings on the property. Specifically, it intended to replace the first garage building with a new garage of the same size and to demolish the existing two garage buildings and replace them with one garage building that would be 23% larger than the combined area of the two demolished buildings. The Township's zoning officer sent a letter to Applicant's bank stating that the current use of an auto repair garage with a residence on the property was a non-conforming use with three non-conforming structures and those uses had been determined not to be abandoned.

Applicant renovated the property and removed old cars, tires, trash and other debris from the property. It then built the first replacement garage and did work to the residential duplex which the Township permitted and inspected. Applicant began demolishing the second garage building and was then served with an enforcement notice by the Township on May 14, 2009. It listed three

violations: 1) storage of landscape and contracting equipment and products in violation of permitted uses for the subject property; 2) earthmoving activities conducted and storage of landscape and contracting equipment without securing land development approval in violation of Township codes; and 3) earthmoving activities conducted without a zoning permit in violation of permitted uses for the subject property.

On June 16, 2009, Applicant filed an application with the Board to continue using the property as an auto repair business and a residential duplex. Applicant requested: 1) that the enforcement notice dated May 14, 2009, be overturned and that it be permitted to continue the non-conforming use and demolition/construction of the two proposed buildings; 2) an interpretation that existing uses were non-conforming and that the continuation of such uses along with the proposed expansion of the two buildings containing the non-conforming uses were permitted pursuant to the zoning ordinance; and 3) variances from certain sections of the zoning ordinance to permit the continuation of the non-conforming uses and proposed expansion of the existing buildings (vested right and/or variance by estoppel). Nine public hearings took place before the Board at which Harold and Angeline Baird (Bairds), adjacent property owners to Applicant's property, also appeared with counsel to contest Applicant's application. While the hearings were underway, the Township and Applicant settled the matter.

The Board granted the requested relief finding that Applicant had a pre-existing non-conforming use for the duplex which had not been abandoned and

a pre-existing non-conforming use for the auto repair business which had also not been abandoned. The Board also found that the Township had *withdrawn* the enforcement notice pursuant to an agreement with the Applicant that the Applicant, among other things, confine the use of the property to an auto repair garage as well as a residential duplex. The Board further found that the proposed renovation of the auto repair garage buildings was necessary to comply with current building codes and ADA accessibility regulations; to accommodate modern and larger tools; and to house increased technology and equipment including alignment machines, computer diagnostic equipment and today's larger vehicles. The Board also explained that the proposed auto repair garage use would not change just because larger trucks would be serviced as argued by the Bairds because the zoning ordinance did not differentiate between types of vehicles in defining the auto repair garage use. Therefore, the use proposed by Applicant was not a change of use but simply the continuation of the existing use. The Board also granted variances and variances by estoppel for both uses and for the expansion of the buildings to house the auto repair business.<sup>2</sup> It found that because the footprint of

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<sup>2</sup> Applicant had requested equitable relief under the theory of vested rights under three classifications: variance by estoppel, vested rights and equitable estoppel. The Board found that Applicant had also met the test for vested rights because it had proceeded with due diligence; it began renovating the property pursuant to permits and inspections done by the Township; it expended substantial unrecoverable funds; no appeals had been taken from the issuance of the permits and the appeal periods had expired; and there was an absence of injury to the public interest. *Petrosky v. Zoning Hearing Board of Upper Chichester Township*, 485 Pa. 501, 402 A.2d 1385 (1979). The Board also found that the factors of equitable estoppel had been met: the Township intentionally or negligently misrepresented a material fact; knew or had reason to know that the other party would rely justifiably on the misrepresentation; and induced the other party to act to its detriment because of its reliance on the misrepresentation. *Cicchiolo v. Bloomsburg Zoning Hearing Board*, 617 A.2d 835 (Pa. Cmwlth. 1992). The Board found that prior to Applicant's purchase of the property, the Township issued a resale use and occupancy permit and an opinion letter dated August 19, 2008, indicating that the proposed auto repair **(Footnote continued on next page...)**

the one building created by the demolition of the two garage buildings would be less than 25%, it would be permitted by right.

The Township filed an appeal with the trial court from the Board's decision arguing, *inter alia*, that there was no pre-existing non-conforming use of the residential house on the property as a duplex and Applicant did not meet its burden to establish such use; the auto repair shop use had been abandoned and terminated; Applicant did not meet its burden of proving that it is entitled to use the property for an auto repair garage based on a theory of vested right or equitable estoppel; the pre-existing auto repair garage use had previously been expanded to the maximum extent permitted by the zoning ordinance and Applicant was not entitled to any further expansion; and the Board exceeded its authority by allowing Applicant to enlarge, relocate and construct new buildings on the property and otherwise engage in the redevelopment of the property without complying with the requirements of the land development and subdivision ordinances of the Township. Applicant filed a motion to quash the Township's appeal.<sup>3</sup> The Board separately filed a motion joining in Applicant's motion to quash.

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**(continued...)**

garage use was permitted and that expansion was permitted per the zoning ordinance; prior to expending any time or money on the renovations, Applicant again requested and the Township issued a second opinion letter dated October 2, 2008, confirming the uses and stating that the buildings could be expanded up to 25% under the provisions of the zoning ordinance. Applicant relied upon those representations.

<sup>3</sup> In a separate appeal at No. 981 C.D. 2010, the Bairds filed an appeal with the trial court from the Board's decision. The Township filed a notice of intervention in that case which the trial court denied.

The trial court issued an order stating that:

The Motions to Quash are **GRANTED IN PART** and **DENIED IN PART**. Insofar as the Township wishes to avail itself of the right to intervene it may do so, but is precluded from opposing the relief granted and/or the Decision of the Zoning Hearing Board. The Township may intervene and support the relief granted and/or the Decision of the Zoning Hearing Board. **The township's separate appeal of the decision of the Zoning Hearing Board is QUASHED.**

(Trial court's April 27, 2010 order.) (Emphasis added in part.) The trial court stated not only had the Township ignored concepts of judicial economy by filing a separate action at the companion case *In Re: Appeal of Harold Baird and Angeline Baird From the Decision of the Lower Providence Zoning Hearing Board Dated January 8, 2010*, (No. 981 C.D. 2010, filed March , 2011), that was factually identical to this case, but the Township could not now appeal from its own agreement resolving the underlying appeal from its own enforcement notice. The trial court explained that the doctrine of equitable estoppel applied because the Township had intentionally or negligently misrepresented to Applicant that the property was suitable for an auto repair garage and residential duplex use by issuing the resale use and occupancy permit along with opinion letters, Applicant relied on the Township's representations, and Applicant acted to its detriment. "Nothing, however, prevents the Township from intervening in an appeal by a party opposed to the resolution of the enforcement notice. The Baird Appeal constitutes such an action and as noted in Part I above, the Township is an intervenor in the Baird Appeal." (Trial Court's September 17, 2010 opinion at 3.) Because the Township was already a party in the earlier filed Bairds' appeal

(companion case), the trial court concluded that the Township's appeal was duplicative and a waste of judicial resources. This appeal by the Township followed.

The Township first contends that the trial court erred by granting the motions to quash its appeal because it was not clear from the agreement that an appeal was precluded by the Township. Specifically, it argues that the trial court did not explain in any detail the basis or rationale for its interpretation of the agreement that the non-conforming auto repair garage use could be expanded and the nature of the use changed through the grant of the variances. The real issue involves what the agreement between the Township and Applicant encompass.

The July 28, 2009 letter/agreement on which the Township alleges the motion to quash was based, provides the follows:

Dear David: (Onorato, Esquire – Township Solicitor)

This letter will serve to confirm our agreement that the enforcement notice dated May 14, 2008 with respect to the above referenced property is withdrawn by the Township. On behalf of my client, Pawlings Road Land Associates, LLC, we agree to the following:

1. Immediately upon our receipt of the appropriate relief by the Zoning Hearing Board, we will cause to be completed an engineered plan showing what we propose to fully comply with the grading and storm water regulations of the Township (notwithstanding the Decision of the Board we fully realize our responsibility to file an engineered plan and we agree to comply with that obligation.) Our plan will be completed and the necessary work will be accomplished in conformance with the direction of the Township Engineer.

**2. Use of the subject property will be confined to an auto repair garage use as well as a residential duplex use.**

In light of the Township's agreement to withdraw the enforcement notice, my client has agreed to the above referenced conditions and agrees as well to their imposition as conditions in the matter currently before the Lower Providence Township Zoning Hearing Board.

I respectfully request that you sign the letter evidencing your concurrence in the place indicated below as I intend to submit this letter as an Exhibit in this evening's Zoning Hearing Board matter.

(Emphasis added.) This agreement was sent and signed by the Applicant's representative and signed by the Township solicitor. However, nowhere in this agreement are variances discussed and approved regarding the expansion of the auto repair garage use.<sup>4</sup>

While testimony may have been elicited before the Board regarding the need for the expansion of the auto repair garage use and the Board made findings to that effect,<sup>5</sup> those reasons were not part of the agreement between the

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<sup>4</sup> The Township Solicitor sent out two opinion letters – one to Applicant's bank and the other to Applicant upon which Applicant relied, seemingly indicating that the Township approved of Applicant's uses and that those uses were a continuation of the previous uses. While those letters may have an impact on whether Applicant can make out its claim of equitable estoppel, *see n. 2*, they do not warrant quashing of the appeal.

<sup>5</sup> The Board made the following findings regarding the need for expansion of the auto repair garage:

40. The proposed renovation of the auto repair garage buildings is necessary to meet today's standards. The additional space in the

**(Footnote continued on next page...)**



parties. Because the agreement does not include any discussion or settlement on the issuance of variances, the Township was not precluded from appealing that issue to the trial court.

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**(continued...)**

proposed auto repair garage is necessary for the business to comply with current building codes and ADA accessibility regulations, to accommodate modern and larger tools, and increased technology and equipment including alignment machines and computer diagnostic equipment and to accommodate today's larger vehicles. It also will permit repair work previously done outside to be done inside the garage. [N.T. 9/10/09, pp. 134-35, 137, 140-44; N.T. 9/29/09, pp. 162-71, 181-83.]

41. Protestant Baird's witness Phil Young, a real estate broker who had marketed the Property, testified that the doors of the garage building in question were too small to accommodate anything larger than a pickup truck. He also testified that due to the low height of the ceiling the whole building would have to be raised to service larger vehicles and that the auto repair garage use would be better served by replacing the garage with a new building. [N.T. 9/30/09, pp. 164-65.]

42. The current auto repair garage use currently repairs and/or inspects, and the proposed renovated auto repair garage would repair and/or inspect, passenger cars and light trucks, trucks over 17,500 pounds and motorcycles and trailers. The proposed auto repair garage use would have 7 bays (there are four bays in existing garage one and there would be three bays in proposed garage two including one 60 feet long bay) and have five to six part-time or full-time employees. The overhead doors in proposed garage two would face Pawlings Road. There will be no driveway access onto Catherine Street or Lincoln Street as part of the proposed redevelopment of the Property. [N.T. 9/30/09, pp. 47-57, 62-63, 65-66.]

As for the other issues that were settled by the agreement, i.e., the continuation of the non-conforming uses, the Township argues that it does not have the authority to settle matters that are within the exclusive jurisdiction of the Board. *Becker v. Zoning Hearing Board of the Borough of Sewickley*, 874 A.2d 1270 (Pa. Cmwlth. 2005). All of the cases approved in *Becker* involved court supervised or approved settlements. The agreement in this case is not part of a court supervised or approved settlement and does not have the protections afforded under the case law to court approved settlements.

While the Township is correct that it does not have the authority to settle zoning matters which are within the exclusive jurisdiction of the Board, it does have the right to oppose or not to oppose the relief that an applicant is requesting. Here, not only did the Township **not** oppose the Applicant's request, it signed the agreement stating that it agreed that the Applicant would only use the property for an auto repair garage use as well as a residential duplex use. Additionally, the Township solicitor made a point of stating at one of the hearings:

“...number two, the township is concerned about uses occurring on the site that were contrary to the permitted uses. We have agreement here. Again, we ask that it be made part of the record and part of the conditions rendered by the Board, that the applicant will seek no other use, other than the automobile repair garage and the residential duplex at the front of the site...”

(Original Record at 304a-305a.) The Township agreed to the uses sought by the Applicant as evidenced by the Township solicitor's signature on the agreement and by his comment which was made part of the hearing record. The Township cannot

now change its agreement to the use to the opposite position of opposing the use because it is judicially estopped from doing so. *See Morris v. South Coventry Township Board of Supervisors*, 898 A.2d 1213, 1218 (Pa. Cmwlth. 2006) (“The purpose of judicial estoppel is to uphold the integrity of the courts by preventing litigants from playing “fast and loose” with the judicial system by changing positions to suit their needs.”)<sup>6</sup>

Accordingly, the matter is remanded to the trial court solely for the purposes of holding a hearing on the issue of the variances.

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DAN PELLEGRINI, JUDGE

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<sup>6</sup> The Township also argues that the agreement lacks consideration because the promises by the Applicant constitute promises to perform pre-existing obligations. It also argues that the agreement is not enforceable because of a material breach of the agreement by the Applicant as it has not ceased to use the property for storage of equipment. Because this agreement was based on the Board’s determination that the Applicant had approval to use the property for the requested uses and must cease performing certain actions per the Board’s request in the zoning arena, this was not a “contract” based on or requiring consideration. If Applicant has failed to comply with the Board’s request that Applicant perform pre-existing obligations, that is for the Board to challenge.

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**ORDER**

AND NOW, this 3<sup>rd</sup> day of March, 2011, the above matter is remanded to the Court of Common Pleas of Montgomery County, solely for the purposes of holding a hearing to determine the issue of the variances in accordance with this decision.

Jurisdiction relinquished.

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DAN PELLEGRINI, JUDGE