IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph M. Polverini, Appellant	:	
v.	:	
Downingtown Borough Zoning Hearing Board and Downingtown Borough and Sandra L. Byron, et al.	:	No. 1013 C. D. 2007
Cesare Fersinni and Joseph M. Polverini, Appellants	:	
v.	:	
Downingtown Borough Zoning Hearing Board and Downingtown Borough	:	No. 1014 C.D. 2007
Joseph M. Polverini, Appellant	:	
v.	:	
Downingtown Borough Zoning Hearing Board and Sandra L. Byron	:	No. 1091 C.D. 2007 Submitted: November 9, 2007

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: January 30, 2008

Joseph M. Polverini (Polverini) and Cesare Fersini (Fersini) (collectively, the Appellants) appeal from the order of the Court of Common Pleas of Chester County (common pleas court) that rejected Appellants' mandamus

action and affirmed the Downingtown Zoning Hearing Board's (Board) denial of Appellants' application for a special exception and/or variances. Further, Appellants appeal the common pleas court's partial denial of Appellants' appeal of the Board's Enforcement action.

The root of this case is Polverini's attempt to construct a commercial-use thirty (30) foot by sixty (60) foot 'pole barn' on residentially zoned land that he rents via oral lease from his grandfather, Fersini. The procedural history is rather complex, and consists of a deemed approval mandamus appeal and statutory appeal, initiated by Appellants, and an enforcement action initiated by the Borough of Downingtown (Borough).

DEEMED APPROVAL APPEAL AND MANDAMUS COMPLAINT

The Board has done a concise job of reciting the facts:

> 1. Cesare Fersini has owned the subject premises and an adjacent lot since March 1962.
>
> 2. The subject premises is a triangular shaped lot, consisting of 12,688.23 square feet of land, which has frontage on Garfield Avenue, comes to a point in Chestnut Street, and has a northern border which runs with Parke Run, a small stream or creek.
>
> 3. The property is located in the R-3 Zoning District.
>
> 4. The property concurrent has four (4) small structures commonly referred to as sheds. There are no permanent buildings. The property is improved with a fence.
>
> 5. The property is currently used by the Applicant to store construction equipment and materials used in his general contracting business.

6. The construction business is operated from the adjacent property, known as 211 Chestnut Street.

7. The Applicant [Polverini] started the construction business in 1987 and claims he used the premises to store equipment and materials continuously since 1987.

8. Several long time residents of Garfield Avenue testified that in the late 1960's there was a garden on the subject premises, that a metal box (shed) showed up in the 1970's, but that the construction business activity on the premises was not apparent until 1989 or early 1990's.

9. Parke Run Stream has flooded, over flowed its banks, on a number of occasions in the recent past.

10. With the exception of the subject premises, Garfield Avenue is completely residential, improved with single-family homes. There is one commercial property on Chestnut Street in the vicinity of the premises, currently a hair solon [sic].

11. The Applicant proposes to construct a thirty (30) foot by sixty (60) foot pole barn.

12. The Applicant stated that if permitted to construct the proposed structure, all his construction equipment and materials would be stored inside the structure.

13. The proposed structure would encroach approximately eight and one half (8.5) feet into the front yard setback of twenty-five (25) feet required by § 287 (A)(5) [of the Downingtown Borough Zoning Ordinance].

14. The proposed structure would also encroach into the rear yard setback required by § 287-28 (A)(7) for a portion of the northwest corner of the proposed structure.

15. The majority of the proposed structure would be located in the floodplain.

> 16. The applicant [sic] introduced no evidence that the parcel could not be used as a residential building lot.
>
> 17. The applicant [sic] proposes to access the proposed structure by backing a truck and trailer into the premises from a residential street.
>
> 18. The applicant [sic] introduced no evidence of any hardship.
>
> 19. The size of the proposed building was determined by applicant's [sic] desire to park his truck with an attached equipment trailer in a building without the necessity of disconnecting the trailer from the truck.

Decision of the Zoning Hearing Board of Borough of Downingtown, In Re Joseph M. Polverini, No. 2004-11, April 19, 2005 (Board Decision, April 19, 2005) Findings of Fact (F.F.) Nos. 1-19.

In 1989, a new Zoning Ordinance and Map were enacted by the Borough, which indicated that Appellants' property was zoned R-3 Residential. Notes of Testimony, Zoning Hearing Board Hearing, March 15, 2005 (March 15 Hearing) at 166; Reproduced Record (R.R.) at 234a. In 1997, a neighbor inquired of the propriety of the use of the lot for the contracting business of then-Zoning Officer of Downingtown Borough, Brian Gallagher (Gallagher). Gallagher's reply memo, addressed to Tony Gambale, then-Director of Administration and Finance for the Borough, was forwarded on to the neighbor as well as Polverini, and stated that:

> vi.2 The Property is an existing non-conforming property. The business can continue to operate at that site from now into eternity, provided that it does not expand more than twenty-five percent (25%) of the area currently occupied by buildings and if it should change

> ownership, the same type of occupancy would have to carry on. The Property is located within an R-3 Residential District.
> . . . .
> vi.4 The operations have been in place before the enactment of Zoning Regulations that prohibit or regulate such operations. (emphasis added).

Memorandum From Brian Gallagher to Tony Gambale dated August 7, 1997 (1997 memo) at 2-3; R.R. at 141a-142a. This memo was also provided to the Borough Council President, Peter Duca. No parties challenged the conclusions of this memo.

In 2002, Polverini contacted the Borough's then-Zoning Officer, Robert Lynn (Lynn), about the possibility of constructing the pole barn. Zoning Officer Lynn replied that the maximum amount of allowable expansion would be 25% and that a flood plain study would be required since the property bordered Parke Run. No further progress occurred until 2004, when Polverini contacted Zoning Officer Thomas Yuhas (Yuhas) to discuss the expansion. Notes of Testimony, October 11, 2005, (N.T. 10/11/05) at 96; Reproduced Record (R.R.) at 387a. Yuhas seemed to accede at this time that Polverini's use of the property was lawfully nonconforming, and testified that at this time he was aware of Gallagher's 1997 memo to that end.

After preparing the flood study, Polverini applied to the Board which held hearing on the application on March 15, 2005. The application relevantly requested:

> 1. Section 287-128 (Non Conformities Within Flood Plain District) refers to 287-12 (h). [Polverini] requests a special exception and/or variance pursuant to Section

> 287-123 (h) to remove the sheds from the flood way area and construct the new pole barn storage building within the flood fringe area of the lot.
>
> 2. Variance from the minimum front-yard requirement of 25 ft. (Section 287-28A(5)) in order to provide a 15 ft. front-yard setback for the new pole barn storage building.
>
> 3. A variance from the minimum rear-yard setback requirement of 35 ft. (Section 287-28A(7)) so that the left rear corner of the building can be located at a distance of 25 ft. from the rear property line.
>
> 4. Any additional relief deemed necessary by the Zoning Hearing Board. (emphasis added)

Application to the Zoning Hearing Board, December 10, 2004, at 2; R.R. at 104a.

The Board took testimony from various parties, including neighbors, and questioned Polverini extensively. Ultimately, the Board retired to off-the-record executive session, in the hearing room, in view of the attendees. At the resumption of official activities, the Board announced that it had voted to deny the application. The Board neither voted on the record, nor addressed the special exception issue.

The Board's Solicitor confirmed by letter dated March 16, 2005, that the Board "denied the application for a variance to construct a 30x60 pole barn on the property located at 410 Garfield Avenue." Denial of Application letter, March 17, 2005; R.R. at 439a. On April 19, 2005, the Board signed the written decision and order, and on April 22, 2005, the Board's Solicitor sent the order to the parties. The Board made the following relevant conclusions:

> 2. The Property is located in an R-3 Zoning District.

> 3. The proposed commercial pole barn is not a permitted use in the R-3 Zoning District.
>
> 4. Variances from §§ 287-128, 287-12 (h), 287-28 (A)(5) and (A)(7) would be required to permit the applicant to construct the proposed structure on the lot.
>
> 5. Granting the applicant the requested variance would have an adverse impact on the health, safety, and welfare of the general public.
>
> 6. The property has no unique physical characteristics which would warrant the requested variances.
>
> 7. The ordinance does not impose a hardship on the property.
>
> 8. The variances sought are not de minimus.

Board Decision, April 19, 2005, Conclusions of Law (C.L.) Nos. 2-8.[1]

On May 5, 2005, Polverini notified the Board's Solicitor that a deemed approval was appropriate because the Board failed to vote on the record at the hearing with respect to two variances, in violation of the Sunshine Act, and that the Board had failed to address his request for special exception. On May 17, 2005, Polverini timely appealed the Board's decision denying his variance application. Joseph M. Polverini v. Downingtown Borough Zoning Hearing Board, C.C.C.C.P. No. 05-03932 (Zoning Appeal). On May 17, 2005, after receipt of Polverini's statement that he was entitled to deemed approval, the Board held

[1] Polverini argued, and the common pleas court agreed, that F.F. No. 18, and C.L. Nos. 4, 6, and 7 were erroneous. This Court agrees with the finding by the common pleas court, as discussed infra. However, this has no impact on the disposition of the case at hand.

another public meeting and voted on the record to deny the disputed special exception application.

On May 27, 2005, Appellant brought a separate Complaint in Mandamus in common pleas court against the Board for deemed approval regarding two variances and a special exception. Joseph M. Polverini v. Downingtown Borough Zoning Hearing Board, C.C.C.C.P. No. 05-04242 (mandamus action). The residents of Garfield Avenue joined as Intervenors in the mandamus action.

On May 11, 2007, the common pleas court denied many of Appellants' claims, and remanded to the Board the Zoning Appeal for the Board to advertise and hold a public hearing in compliance with the Sunshine Act and render a decision on the merits of Polverini's application.

ENFORCEMENT APPEAL

Following the initial application hearing, on April 25, 2005, Yuhas, after hearing complaints aired by neighbors, issued a Notice of Violation to Appellants:

> [t]he storage of vehicles and equipment and items related to your business constitutes a violation of the Zoning Ordinance of the Borough of Downingtown. . . . The commercial use of the residentially zoned property does not predate applicable zoning restrictions. . . . The Property is located in the R-3 Zoning District. In this District, running a contracting business is not a permitted use and therefore not allowed. (Section 287-27 of the Downingtown Code) . . . since contracting businesses are not a permitted use in the R-3 Zoning District, and the

> Zoning Ordinance also regulates fencing, you are in violation of Sections 287-27(a) and (b) and Section 287-76 of the Downingtown Borough Zoning Ordinance.

Notice of Violation Letter, April 25, 2005, at 1; R.R. at 425a. Appellants appealed this enforcement notice to the Board.

The appeal was heard on October 11, 2005, and denied by decision and order of the Board dated January 17, 2006. The Board concluded:

> 3. 401 Garfield Avenue is currently located in a R-3 [residential] Zoning District.
>
> 4. Under the Zoning Ordinance in effect in 1987, the property was located in a R-4 [residential] zoning District.
>
> 5. The storage of construction vehicles, equipment and construction materials is not permitted in the R-3 Zoning District under the current Zoning Ordinance.
>
> 6. The storage of construction vehicles, equipment and construction materials is not permitted in the R-4 Zoning District under the current [sic] Zoning Ordinance effect [sic] in 1987.
>
> 7. Neither Cesare Fersini nor Joseph Polverini obtained a permit or variance to conduct a construction business at 401 Garfield Avenue.
>
> 8. The Borough has the burden of proving the use was unlawful.
>
> 9. The Borough sustained its burden of proving the use violated the current and previous Zoning Ordinance.

Decision of the Zoning Hearing Board, January 23, 2006, C.L Nos. 3-9. Appellants appealed this decision to the court of common pleas, and alleged that much of the information relied upon in the enforcement was inadmissible hearsay

or improperly authenticated. Cesare Fersini and Joseph M. Polverini v. Downingtown Borough Zoning Hearing Board, C.C.C.C.P. No. 06-01423 (Enforcement Appeal). The Residents of Garfield Avenue joined as Intervenors. On April 27, 2007, the common pleas court denied the appeal, but reversed the Board's denial of that portion of the enforcement notice that required Appellants to remove the fence and sheds or relocate them on the property.

STATUTORY APPEAL

Granting of Variance Based Upon Hardship Caused by the Property

Appellants raise many issues before this Court.[2] Appellants contend[3] that the nature of the property imposed a hardship upon them as owners because it is triangularly-shaped and entirely within the flood fringe of the stream. Appellants' argument boils down to whether the lot is suited to building a residence. Appellants have never tried to use the lot for anything other than the use they now seek, i.e., a commercial use for storage and staging of equipment for Polverini's contracting business.

"One applying for a variance must demonstrate that the zoning regulations complained of uniquely burden his property; and mere economic hardship resulting from the necessity for complying with the regulations shared in

[2] This Court addresses Appellants' arguments out of order. Importantly, if the Board committed no error, Appellants' arguments must fail.

[3] When the court of common pleas does not conduct a hearing or receive additional evidence not before the zoning board, the standard of appellate review is limited to whether there was manifest abuse of discretion or error of law. Larsen v. Zoning Board of Adjustment of the City of Pittsburgh, 543 Pa. 415, 672 A.2d 286 (1996). An abuse of discretion will only be found where the zoning board's findings are not supported by substantial evidence. Id.

common with all other landowners is not unnecessary hardship." Kar Kingdom, Inc. v. Zoning Hearing Board of Middletown Township, 489 A.2d 972 (Pa.Cmwlth. 1985) (citing Appeal of Buckingham Developers, Inc., 433 A.2d 931, 933 (Pa.Cmwlth. 1981)). Under the Pennsylvania Municipalities Planning Code (MPC),[4] the standard requires that the hardship be imposed by the unique physical circumstances or conditions of the property, not the circumstances or conditions created by the provisions of the zoning ordinance in the relevant neighborhood. MPC § 910.2(a)(1), 53 P.S. § 10910.2(a)(1). Further, there must be no possibility that the property may be developed in strict compliance with the provisions of the zoning ordinance. MPC § 910.2(a)(2), 53 P.S. § 10910.2(a)(2).

In this controversy, the hardship was created by Appellants' use of the land, not the land itself. Polverini claims that the triangular shape of the land is the natural physical condition that imposed the hardship. Oddly, the shape of the land never posed a hardship for the duration of Fersini's ownership of the lot. Indeed, no problem arose until Polverini sought to construct a pole barn. Further, the common pleas court determined that if the lot were to be used as zoned, residential, the Board could not have rejected Appellants' application to build a *residence* in accordance with the zoning ordinance, and the Board would have been compelled to grant the requested variances, in accordance with 53 P.S. Section 10910.2(a)(2). Polverini's claimed hardship is an inability to use the property commercially. This is not a significant hardship and accordingly, the common pleas court opinion is affirmed.

[4] Act of July 31, 1968 P.L. 744 as amended, 53 P.S. §§ 10101-11202.

Enforcement Appeal

A. Validity of the Enforcement Notice

Appellants challenge the enforcement notice, authored by Yuhas, as defective on its face because it failed to name Polverini. An enforcement notice may be issued by a municipality pursuant to Section 616.1 of the MPC, 53 P.S. Section 10616.1.[5] Appellants challenged the enforcement notice here because it was addressed to Fersini, in care of Polverini. While there is no specific requirement in Section 616.1 of the MPC, 53 P.S. § 10616.1, that the enforcement notice be *addressed* to both owner and tenant of the lot, Appellants claim that the enforcement notice did not provide the requisite notice against *whom* the action

---

[5] Section 10616.1 provides:

> (b) The enforcement notice shall be sent to the owner of record of the parcel on which the violation has occurred, to any person who has filed a written request to receive enforcement notices regarding that parcel, and to any other person requested in writing by the owner of record.
>
> (c) An enforcement notice shall state at least the following:
>
> (1) The name of the owner of record and any other person against whom the municipality intends to take action.
>
> (2) The location of the property in violation.
>
> (3) The specific violation with a description of the requirements which have not been met, citing in each instance the applicable provisions of the ordinance.
>
> (4) The date before which the steps for compliance must be commenced and the date before which the steps must be completed.
>
> (5) That the recipient of the notice has the right to appeal to the zoning hearing board within a prescribed period of time in accordance with procedures set forth in the ordinance.
>
> (6) That failure to comply with the notice within the time specified, unless extended by appeal to the zoning hearing board, constitutes a violation, with possible sanctions clearly described.

was pursued. Polverini claims he was not aware, from the letter and the address, whether he was a defendant in the action.

The letter was addressed to "Mr. Cesare Fersini, C/o Mr. Joseph Polverini." Enforcement Notice at 1; R.R. at 425a. The salutation line of the letter indicates that it is directed to both Appellants: "Dear Mr. Fersini and Mr. Polverini." Based on the salutation line of the letter, the enforcement notice clearly stated against whom the municipality intended to take action, in compliance with Section 616.1 of the MPC. Appellants overreach in an effort to establish a due process claim, relying on a strict compliance standard. Polverini not only appeared before the hearing board, but appealed the matter in the letter. He may not now argue that notice was faulty. Accordingly, the common pleas court properly dismissed this argument.

Appellants further contend that the prescriptions of Section 616.1 of the MPC must be met with strict compliance lest the enforcement notice be void. Township of Maiden Creek v. Stutzman, 642 A.2d 600 (Pa. Cmwlth. 1994); Conewago Township v. Ladd, 15 Pa. D&C 4th 138 (York County 1992). Appellants misinterpret case law. Maiden Creek held that a township's reference to the ordinance, required in an enforcement notice by 616.1(c)(3) of the MPC, must be to a specific section, rather than a vague reference to the township's zoning ordinance. Maiden Creek did not espouse a strict compliance standard. Neither did Conewago Township, which dismissed a letter purporting to be an enforcement notice because the notice "merely informed defendant that the special exception was due to expire on October 30, 1989, (three months hence), that an

extension would not be granted, and that defendant should obtain a tax certification prior to removal of the mobile homes." 15 Pa. D&C 4th at 141. However, the trial court there did go on to "conclude that all six factors required by 53 P.S. §10616.1(c) must appear in one written notice." Id.

The common pleas court here did find deficient the portion of the enforcement notice relating to removal and or relocation of the four sheds and the fence. This Court, upon review of the notice, affirms.

B. Admissibility of the Transcript of the Prior Hearing, the 1963 Zoning Ordinance, and the 1963/1969 Zoning Map

Appellants contend that the transcript from the initial application hearing was improperly admitted into evidence during the enforcement proceeding because the enforcement proceeding was of an entirely different nature with a different burden of proof. Further, Appellants contend that the 1963 Zoning Ordinance and 1963/1969 Zoning Map were inadmissible during the enforcement proceeding because they were not incorporated in the Notice of Violation, and they were irrelevant to the enforcement before the Board on the enforcement appeal.

Appellants argue that, on a prosecution for alleged ordinance violations, the hearing on the appeal of the Notice of Violation required the burden of proof to be on the Borough. Hartner v. Zoning Hearing Board of Upper St. Clair Township, 840 A.2d 1069 (Pa. Cmwlth. 2004). This is undisputed by the Board. Yuhas was called first by the Borough and his testimony properly set out the bases of the action against Appellants, and they were aware of what was

necessary for a defense. The common pleas court, in concluding this matter, stated that:

> [g]iven the witnesses presented by both the Borough and Polverini at the enforcement appeal hearing, I can find no prejudice in the Board's admission of the transcripts. As discussed . . . the 1962 zoning ordinance and map were clearly relevant and material in providing the Borough's case by disproving the contractor's yard was not a legal nonconforming use. They were not improperly admitted by the Board to prove a present violation of the 1962 ordinance. The Board did not err in admitting them.

Common Pleas Court Opinion at 40. This Court agrees with the common pleas court. Because the prior hearing transcript and the zoning map and ordinances were properly admitted, the order of the common pleas court is affirmed.

C. Failure to Establish a Violation of the Ordinance at the Time the Commercial Use Began

Appellants argue that the burden of proof for establishing a violation was shifted because the Board did not shoulder its burden to prove the use of the property was unlawful.[6] Appellants argue that the Board's investigation ignored the twenty year period between 1969 and 1989. This contention is without merit.

---

[6] The protections given to lawful nonconforming uses are constitutional in nature. Nettleton v. Zoning Board of Adjustment, 574 Pa. 45, 50, 828 A.2d 1033, 1036 (2003); Northwestern Distributors, Inc. v. Zoning Hearing Board of Moon Township, 526 Pa. 186, 192-92, 584 A.2d 1372, 1375 (1991); Hanna v. Board of Adjustment, 408 Pa. 306, 312-13, 183 A.2d 539, 543 (1962). As the common pleas court noted, "a lawful nonconforming use endows a property owner with a vested right that cannot be abrogated or destroyed unless it is a nuisance, is abandoned or is extinguished by eminent domain. Smalley v. Zoning Hearing Board of Middletown Township, 834 A.2d 535 (Pa. 2003); Robertson v. Henry Clay Township Zoning Hearing Board, 911 A.2d 207 (Pa.Cmwlth. 2006); Keystone Outdoor Advertising v. Dep't of Transportation, 687 A.2d 47, 51 (Pa.Cmwlth 1996)."

Appellants essentially challenge the sufficiency of the evidence, and assert that it was the Board's burden to put into evidence the precise Zoning Ordinance and Map, as they existed in 1987, when the use as a contractor's yard began, and because the Board failed to do so, the enforcement cannot stand. The Board, however, found that Appellants' use was an unlawful commercial use of the property. For a nonconforming use to be protected, an applicant must prove that the use was once lawful. Cook v. Bensalem Township Zoning Board, 413 Pa. 175, 179, 196 A.2d 327, 330 (1964). Appellants never did so. Because this finding was supported by substantial evidence, this Court will not disturb the conclusion of the Board and the order of the common pleas court.

D. Lawful Noncomforming Use Based Upon the Current Zoning Ordinance

Appellants argue that their use of the property is lawfully nonconforming, and that the common pleas court erred when it found the use to be unlawful. Appellants argue that Yuhas's testimony confirmed that the use was nonconforming, as it predated the effective date of the Zoning Ordinance adopted in 1989, and met the definition of nonconforming use as set forth in that ordinance. Appellants argue that even if the activities on the property that pre-dated the 1989 Ordinance were unlawful under the earlier 1963 ordinance, the 1989 Ordinance served to turn any unlawful use into a lawful nonconforming use

"[T]he right to maintain a pre-existing non-conformity extends only to uses that were legal when they came into existence. The enactment of a new ordinance cannot have the effect of protecting a pre-existing illegality." Scalise v. Zoning Hearing Board of Borough of West Mifflin, 756 A.2d 163, 166

(Pa.Cmwlth. 2000). The law places upon the applicant the burden of proving lawful nonconformity by objective evidence of both its existence and its legality before the enactment of an ordinance at issue. Lantos v. Zoning Hearing Board of Haverford Township, 621 A.2d 1208 (Pa.Cmwlth. 1993); Jones v. Township of North Huntingdon Zoning Hearing Board, 467 A.2d 1206, 1207 (Pa.Cmwlth. 1983).

The common pleas court found, and this Court agrees, that Appellants did not establish that the use was ever lawful or founded upon the proper approval or permits. Because the burden was on the Appellants to establish the lawfulness of the use, and the Appellants failed to do so, this Court holds that the Board did not abuse its discretion, and that its findings were supported by substantial evidence. Therefore, the order of the common pleas court is affirmed.

E. Vested Right in Property

Based upon Intervernors' argument that Appellants' use was not lawful, Appellants contend that a vested right existed that estopped the Board from enforcement. The common pleas court addressed this argument:

> Variance by estoppel or vested rights may preclude a municipality from enforcing an otherwise applicable zoning restriction against a landowner where there has been a long period of municipal failure to enforce the ordinance when the municipality knew or should have known of the violation, combined with some form of active acquiescence in the illegal use, under circumstances where the landowner has acted in good faith, innocently relying upon the validity of the use, and has made substantial expenditures based upon that reliance, such that denial of relief imposes an unnecessary hardship upon him, with no resulting threat

to public health, safety or morals. Mucy v. Fallowfield Township, 609 A.2d 591 (Pa.Cmwlth. 1992); Appeal of Crawford, 531 A.2d 865 (Pa.Cmwlth. 1987); Springfield Township v. Kim, 792 A.2d 717, 721 (Pa.Cmwlth. 2002), petition for allowance of appeal denied, 825 A.2d 640 (Pa. 2003); Borough of Dormont v. Zoning Hearing Board of the Borough of Dormont, 850 A.2d 826 (Pa.Cmwlth. 2004). It is an unusual remedy granted only upon due proof by the proponent in extraordinary circumstances. In Re Krieder, 808 A.2d 340 (Pa.Cmwlth. 2002).

The contractor's yard evolved over some 18 years before zoning relief was sought; however, the evidence does not prove that the Borough, acting through its officials, actively acquiesced in a known illegality. . . . While the Borough's knowledge and past failure to take action to terminate Polverini's use of the property is a form of acquiescence, it was not acquiescence in a perceived illegality. Elected officials are transient officeholders, who necessarily rely upon administrative employees to perform the everyday functions of municipal government, especially zoning enforcement. Though it is not disputed that Polverini's use was clearly known to and recognized by Borough officials, that does not necessarily compel the conclusion that the Borough acquiesced in a perceived violation of its zoning regulations, where, as here, the initial erroneous opinion of its zoning officer facilitated the Borough's acquiescence. I acknowledge that the use continued without apparent Borough objection before [a neighbor's] inquiry. Conversely, Polverini did not secure any municipal permits or approvals authorizing the contractor's yard or its gradual expansion, leaving no administrative trail from which it could be determined by succeeding Borough administrative and elected officials how the use originated, in turn blurring the distinction between legality and illegality. This is an example of why the law places upon the applicant the onus of proving lawful nonconformity by objective evidence. Assuming *arguendo* that chargeable Borough acquiescence was present, neither [of the Appellants] made substantial expenditures on the Property in reliance

> upon erroneous municipal advice or lack of enforcement. Hitz v. Zoning Hearing Board of South Annville Township, 734 A.2d 60 (Pa.Cmwlth. 1999). . . . Indeed, the rationale supporting the concept is equitable in nature and is intended to protect from financial disadvantage a property owner who has made substantial expenditures on the property itself on the strength of municipal inaction. Mucy v. Fallowfield, supra. Nor has Polverini in his capacity as a tenant-at-will demonstrated that denial of his vested rights argument imposes an unnecessary hardship upon him in relocating to an area zoned for his use. Certainly, no such hardship attends Mr. Fersini, since there was no evidence whatsoever that he has expended any funds on his property in conjunction with the contractor's yard. Consideration must also be given to the adverse impact upon the neighbors in this residential neighborhood by construction of a 1,800 square feet commercial storage building.

Common Pleas Court Opinion at 21-24. This Court agrees.

Additionally, a board's failure to uniformly enforce zoning regulations does not preclude a subsequent enforcement. Ridley Township v. Pronesti, 431 Pa. 34, 244 A.2d 719 (1968); Kar Kingdom, Inc. v. Zoning Hearing Board of Middletown Township, 489 A.2d 972 (Pa.Cmwlth. 1985); Braccia v. Upper Moreland Zoning Hearing Board, 327 A.2d 886 (Pa.Cmwlth. 1974). This Court again agrees with the thoughtful analysis of the common pleas court.

F. Retaliation for First Amendment-Protected Expression

Appellants allege that the Board's enforcement action is in violation of the First Amendment because it is in retaliation for petitioning the Board for the variances and special exception. This contention is patently without merit. As the common pleas court ably noted, the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for speech by the

individual. Crawford-El v. Britton, 523 U.S. 574 (1998). However, Appellants failed to adduce the elements of retaliatory animus. Appellants' violation of the zoning ordinance prompted the enforcement notice. That the violation did not come to light until the zoning hearing will not be said to constitute retaliatory action by the Board. Indeed:

> causation [for the alleged retaliatory action] is understood to be but-for causation, without which the adverse action would not have been taken; . . . upon a prima facie showing of retaliatory harm, the burden shifts to the defendant . . . to demonstrate that even without the impetus to retaliate he would have taken the action complained of. . . . (citation omitted)

Hartman v. Moore, 547 U.S. 250, ___, 126 S.Ct. 1695, 1703-04 (2006). Because the Appellants have failed to establish a prima facie case and because Appellants further were unable to overcome the Board's existing rebuttal that established that a violation existed, this Court rejects Appellants' First Amendment claim. The common pleas court is affirmed.

G. Selective Nature of the Enforcement

Appellants argue that the enforcement was brought selectively and constituted discrimination by the Board. The common pleas court took up this argument and held that, contrary to Appellants' claim, the Board's action did not rise to the level of conscious discrimination. The common pleas court stated:

> [e]nforcement was clearly prompted by Polverini's efforts to build a large commercial building in the midst of a residential neighborhood, efforts that forced the hands of Fersini's neighbors to protect their properties by opposing it. As well, the facts first developed during Polverini's initial zoning hearings forced Yuhas to

> investigate further and to properly assume his governmental role in enforcing the zoning ordinance, the purpose of which is to protect and preserve the health, safety and general welfare of the Borough's residents. Under these facts, I cannot conclude he did so in an unconscionable manner or for a discriminatory purpose, or that the Borough deliberately selected the appellants for arbitrary or disparate treatment. Inadequate and inept enforcement does not rise to the level of arbitrary and selective state action, nor does misapplication of the law in an individual case. Township of Ridley v. Prosneti, 244 A.2d 719 (Pa. 1968); Anselma Station v. Pennoni Associates, 654 A.2d 608, 615 (Pa. Cmwlth. 1995); Korsunsky v. Housing Code Board of Appeals, City of Harrisburg, 660 A.2d 180 (Pa. Cmwlth. 1995).

Common Pleas Court Opinion at 46-47.

This Court agrees with the common pleas court observation that "feckless" administration of the zoning ordinance did not result in the type of discriminatory selective enforcement sufficient to overturn the enforcement. See Knipple v. Geistown Borough, 624 A.2d 766 (Pa. Cmwlth. 1993) In Knipple, this Court recognized that a zoning board committed conscious discrimination when it had denied a side-yard variance by written decision prepared in advance of application hearing, particularly when ten other commercial properties in the immediate vicinity of the property at issue had recently been granted building permits or variances. The board then encouraged a second separate application, for a rear-end addition instead, granted that permit, and then withdrew the permit after work had begun. The action of the Board in this case does not rise to the level of conscious action seen in Knipple. The common pleas court is affirmed.

DEEMED APPROVAL MANDAMUS COMPLAINT

A. Deemed Approval of Requested Variances

Appellants argue that they are entitled to deemed approval of the two variance requests. When the Board voted on the variances, they did so in executive session, off the record. After coming back on the record at the hearing, the Board then announced its decision to deny the variance applications. The cornerstone of Appellants' argument is that the Board did not *vote* on the record. This is a violation of the Sunshine Act, 65 Pa.C.S. Sections 701-16, according to Appellants.

"Since 1957, Pennsylvania has had an open meeting law which compels organizations created pursuant to statute and performing essential governmental functions to render their decisions at public meetings." Appeal of Emmanuel Baptist Church, 364 A.2d 536, 539 (Pa. Cmwlth. 1975). The Sunshine Act provides that actions of state organizations must be open to the public. "Official action" shall take place at a public meeting. 65 Pa.C.S. § 704. Official action encompasses a "vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order." 65 Pa.C.S. § 703.

While this requirement applies to a board's formal public vote on an application, a Sunshine Act violation does not result in a deemed decision when a board renders a written decision within the required forty-five day period, as the common pleas court noted. Emmanuel Baptist Church, 364 A.2d at 541-42; Kennedy v. Upper Milford Township Zoning Hearing Board, 575 Pa. 105, 834 A.2d 1104 (2003). This Court stated in Enck v. Anderson, 360 A.2d 802 (Pa. Cmwlth. 1976), that "mandamus will lie where it is alleged the Zoning Hearing

Board has made no decision within forty-five days after its last hearing; it is not authority for testing in mandamus the validity of a decision admittedly timely made, on the ground of an alleged violation of the Sunshine Law. . . ." Id. at 804. "The Sunshine Law declares that 'no formal action shall be valid unless such formal action is taken during a public meeting'; it does not declare that such action so taken is no action at all." Id. At question is whether the Board's failure to vote on the record was cured, by its announcement on the record, that the Board denied the variance applications, or by the written notice of its decision issued the next day.

Mandamus is available to punish a board's procrastination. Bucks County Housing Development Corp. v. Zoning Hearing Board of Plumstead Township, 406 A.2d 832 (Pa.Cmwlth. 1979). The General Assembly intended the purpose of mandamus relief in this context to be relief of a petitioner against an obstinate and contrarian zoning hearing board. However, "[w]here a board does make a decision [within forty-five days], even in violation of other procedural requirements, there is absent the vice of procrastination, against which the 45-day rule is directed." (emphasis added) Id. at 835.

Section 713 of the MPC, 53 P.S. § 10713 provides that even if a common pleas court determines that a violation of the Sunshine Act has occurred, it still retains discretion with respect to invalidating a board's action. The procedural improprieties that occurred in the denial of the variance applications were harmless, especially because the Board's executive session and vote took place in the meeting room, in front of Appellants. Appellants were aware of the

Board's decision with respect to the variance application, and the Board may not be said to have dragged its heels, and therefore deemed decision was not an appropriate remedy. Because the Board did not abuse its discretion, this Court affirms the common pleas court with respect to the variance requests.

B. Deemed Approval of Requested Special Exception

The Board declined to vote on the application for special exception to construct the pole barn at the zoning hearing. Appellant Polverini contends that because the Board further neglected to act on the application during the forty-five day period following the hearing, the application was deemed approved because the Board did not provide the required written notice of denial in a timely manner, as required by Section 908(9) of the MPC, 53 P.S. § 10908(9). This section provides that the Board must render a written decision within forty-five days.

The Board argues that it was unnecessary to decide the special exception application as Appellants' ability to act upon the special exception was dependent upon obtaining the variances. Appellant Polverini was unable to construct the pole barn in the absence of either the special exception or the variances. Because the variances were denied, a decision regarding the special exception was unnecessary.

Intervenors appropriately note that the Board found, as a Conclusion of Law No. 4: "[v]ariances . . . would be required to permit the applicant to construct the proposed structure on the lot." Board Decision, April 19, 2005, C.L. No. 4. By implication, this amounted to a rejection of the special exception

application, as Appellants' ability to construct the pole barn hinged on approval of both applications.

Further, it appears from a scrutiny of the record that there was not a distinct application for variances and for a special exception, but rather the one application, which asked for the above-mentioned relief. Thus, the Board's denial of the variance requests, and foregoing review of the special exception, was proper. In fact, the issue only arose after the decision was mailed to Appellants, and Appellants obviously sought a technical loophole to challenge the adverse decision. Though the Board could have nicely wrapped this in a more transparent way, this Court finds no error with the Board's original disposition of the alleged special exception application.

The common pleas court remanded the deemed approval mandamus complaint to the Board, apparently based on the summary conclusion that "Polverini's was a combined application for both variances and a special exception." Common Pleas Court Opinion at 30. However, the Board had already acted. The Board again voted on May 17, 2005, on the record and in compliance with the Sunshine Act and Section 908(9) of the MPC, to deny the application. Because there were no violations of the Sunshine Act, there was no necessity to remand to the Board. Additionally, any error by the Board was harmless, and another Board vote in compliance with the Sunshine Act is unnecessary. This Court refuses to accept Appellants' argument that deemed approval of the application was appropriate. The order of the common pleas court remanding the action at C.C.C.C.P. No. 05-03932 is reversed.

Accordingly, the order of the common pleas court remanding for a vote in compliance with the Sunshine Act is reversed. The order of the common pleas court is in all other matters affirmed.

_____

BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph M. Polverini, Appellant v. Downingtown Borough Zoning Hearing Board and Downingtown Borough and Sandra L. Byron, et al.	:	No. 1013 C. D. 2007
Cesare Fersinni and Joseph M. Polverini, Appellants v. Downingtown Borough Zoning Hearing Board and Downingtown Borough	:	No. 1014 C.D. 2007
Joseph M. Polverini, Appellant v. Downingtown Borough Zoning Hearing Board and Sandra L. Byron	:	No. 1091 C.D. 2007

O R D E R

AND NOW, this 30th day of January, 2008, the order of the Court of Common Pleas of Chester County is reversed with respect to the remand for a vote in compliance with the Sunshine Act, at No. 1013 C. D. 2007. The order of the common pleas court is in all other matters affirmed.

_____

BERNARD L. McGINLEY, Judge