

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David R. Lease, :  
Appellant :  
v. : No. 1613 C.D. 2009  
Hamilton Township Zoning Hearing : Submitted: January 15, 2010  
Board and Board of Supervisors of :  
Hamilton Township :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McCULLOUGH

FILED: March 2, 2010

David R. Lease (Lease) appeals from the June 18, 2009, order of the Court of Common Pleas of Adams County (trial court), affirming the decision of the Hamilton Township Zoning Hearing Board (Board) denying Lease's appeal and sustaining two zoning violations. We now affirm.

Lease is the owner of property located at 150 and 160 Gun Club Road in Hamilton Township, Adams County, Pennsylvania. By letter dated July 16, 2008, Ronald Balutis (Balutis), zoning and building code enforcement officer for Hamilton Township, issued Lease notice of two zoning violations with respect to his properties. The first violation related to construction of a garage without a zoning permit at 160 Gun Club Road, and the second violation related to installation of a new heating system without a zoning permit at 150 and 160 Gun

Club Road. Lease appealed to the Board, which conducted a hearing on September 25, 2008.

At this hearing, Balutis testified that he personally observed the properties on July 14, 2008, following complaints by Keith Traini, who resides at 140 Gun Club Road. Balutis said he noted the significant expansion of a garage housing an outside wood burner and an open trench with new, insulated piping running from this burner to a house on the property. (R.R. at 32.)<sup>1</sup> Balutis identified the piping as flexible pex piping, commonly used for exterior wood burning heating. (R.R. at 109.) Balutis noted that the piping was red and blue, which presumably would indicate a hot feed and a cold return. Id. Balutis approximated the length of the trench at eighty to one hundred feet, running from the burner to the buildings on the property. (R.R. at 110.) Balutis then identified two aerial photographs of the properties, one from December of 2003 and another from January of 2007, which showed an addition to the garage that housed the burner. (R.R. at 35.)

Traini also testified at the hearing. Traini indicated that he contacted Balutis after he saw “a trench installing heat pumps from the outdoor wood burner to the house next to me in 150 [Gun Club Road].” (R.R. at 30.) Traini stated that he personally has observed the garage which houses the burner and that the change in size noted by Balutis was accurate. (R.R. at 49-50.) Traini later testified that the garage housing the burner was originally “5 x 6 and now it is 20 x 30” or at least “24 x 24.” (R.R. at 102, 107.)

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<sup>1</sup> We note that Lease’s reproduced record fails to include the lower case “a” following the page number as required by Pa. R.A.P. 2173.

During his testimony, Lease denied that he expanded the garage that houses the burner or installed a new heating system on his properties. As to the garage, Lease stated that he merely repaired the roof, added siding and replaced one or two windows. (R.R. at 54, 65.) With respect to the trench and piping, Lease indicated that he dug the trench by hand in order to repair a water line to a well pump, and he specifically denied the presence of any new piping in the trench. (R.R. at 52, 68.) Lease noted that the wood burner supplies heat for the building at 160 Gun Club Road, but not the building at 150 Gun Club Road, which utilizes electric baseboard heat. (R.R. at 51-52.)

Barbara Zamboni, who resides at 170 Gun Club Road, testified on Lease's behalf. Zamboni referred to the garage housing the wood burner as an "outbuilding," and she denied that it was ever expanded since she moved next door in 2001.<sup>2</sup> (R.R. at 79-80.) On cross-examination, Zamboni acknowledged that Lease owns the property at 170 Gun Club Road and that she is one of Lease's tenants.

Jeffrey McClintock, a state-certified residential code inspector, also testified on Lease's behalf. McClintock inspected the garage housing the wood burner in August of 2008. He described the same as "an old building" probably standing for "20 years plus." (R.R. at 89.) McClintock denied seeing any new pipe or disturbed ground at this time or during a previous site visit in July of 2008. (R.R. at 95-96.) McClintock estimated the size of the garage to be "24 feet deep...and maybe 30 wide." (R.R. at 96.)

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<sup>2</sup> Zamboni acknowledged that Lease performed roof and chimney repairs and also sided this "outbuilding." (R.R. at 80.)

At the conclusion of the hearing, the Board voted unanimously to deny Lease's appeal and sustain the zoning violations. (R.R. at 125.) The Board rendered a terse opinion dated November 4, 2008, with the following findings of fact and conclusions of law:

Findings of Fact

1. Construction of a structure had taken place without a zoning permit at 160 Gun Club Road, as stated in the letter of July 16, 2008.
2. There had been the installation of a new heating system at 150 and 160 Gun Club Road, as stated in the letter of July 16, 2008.

Conclusions of Law

1. The Hamilton Township Zoning Hearing Board has jurisdiction.
2. The party is properly before the Hamilton Township Zoning Hearing Board.
3. The applicant has failed to sustain his burden of proof.
4. The Township has sustained its burden of proof.

(Board op. at 2.)

Lease then filed a notice of appeal with the trial court. The trial court, without taking additional evidence, affirmed the Board's order. The trial court concluded that the testimony of Balutis and Traini, as well as the aerial photographs, constituted sufficient evidence to support the Board's finding that Lease has undertaken construction of a garage and installation of a heating system without obtaining an appropriate permit. While noting that Lease placed great emphasis on his own testimony and that of Zamboni and McClintock, the trial court observed that the Board, the sole arbiter of credibility, rejected the same, and

instead credited the testimony of Balutis and Traini, which was supported by the aerial photographs. (Trial court op. at 2.) Lease then filed a notice of appeal.<sup>3</sup>

On appeal,<sup>4</sup> Lease argues that the trial court erred in affirming the Board's decision, as the Board abused its discretion in concluding that he had violated the Township's ordinance with respect to expansion of the garage housing the wood burner and installation of a new heating system. More specifically, Lease argues that the Board's decision was "against the weight of the evidence that was presented at the hearing..."<sup>5</sup> (Lease's Brief at 12.) Lease also alleges that the Board capriciously disregarded the evidence that he presented at the hearing. However, Lease's argument in this regard represents nothing more than his dissatisfaction with the Board's determinations of credibility and evidentiary weight. It is well-settled that a zoning hearing board is the sole judge of the credibility of witnesses and the weight to be afforded their testimony. Taliaferro v. Darby Township Zoning Hearing Board, 873 A.2d 807 (Pa. Cmwlth.), appeal denied, 585 Pa. 692, 887 A.2d 1243 (2005).

Having reviewed the record, we conclude that the testimony of Balutis and Traini as to their personal observations of the expansion of the garage and the

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<sup>3</sup> Lease originally filed his appeal with the Superior Court. However, by order dated August 19, 2009, the matter was transferred to this Court.

<sup>4</sup> As the trial court did not take additional evidence, our review is limited to determining whether the zoning hearing board committed an abuse of discretion or an error of law. Good v. Zoning Hearing Board of Heidelberg Township, 967 A.2d 421 (Pa. Cmwlth.), appeal denied, 601 Pa. 704, 973 A.2d 1008 (2009). An abuse of discretion occurs where substantial evidence does not support the zoning hearing board's findings. In re McGlynn, 974 A.2d 525 (Pa. Cmwlth. 2009).

<sup>5</sup> Lease does not challenge the sufficiency of the Board's findings.

trench, as well as the two aerial photographs of Lease's properties admitted without objection, constitute substantial evidence that supports the Board's decision.<sup>6</sup>

Accordingly, the order of the trial court is affirmed.

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PATRICIA A. McCULLOUGH, Judge

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<sup>6</sup> We note that, on January 19, 2010, the Board of Supervisors of Hamilton Township (Supervisors) filed a motion for counsel fees pursuant to Pa. R.A.P. 2744. This Rule provides that an appellate court "may award" such fees "if it determines that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious." The imposition of counsel fees is solely within the discretion of the court. Larry Pitt & Associates v. Long, 716 A.2d 695 (Pa. Cmwlth. 1998). In determining the propriety of such an award, the court is "ever guided by the principle that an appeal is not frivolous simply because it lacks merit. Rather, it must be found that the appeal has no basis in law or fact." Menna v. St. Agnes Medical Center, 690 A.2d 299, 304 (Pa. Super. 1997). Such a high standard is imposed "in order to avoid discouraging litigants from bringing appeals for fear of being wrongfully sanctioned." Id.

The Supervisors allege that Lease's present appeal is frivolous and was brought only for the purpose of delay. However, Lease's appeal to this Court did challenge the sufficiency of the evidence relied on by the Board. While Lease's argument was not meritorious, we cannot say that the same was frivolous. Accordingly, we deny the motion for counsel fees.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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|-----------------------------------|---|--------------------|
| David R. Lease,                   | : |                    |
| Appellant                         | : |                    |
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|                                   | : |                    |
| Hamilton Township Zoning Hearing  | : |                    |
| Board and Board of Supervisors of | : |                    |
| Hamilton Township                 | : |                    |

**ORDER**

AND NOW, this 2nd day of March, 2010, the order of the Court of Common Pleas of Adams County is hereby affirmed.

The motion of the Board of Supervisors of Hamilton Township for counsel fees pursuant to Pa. R.A.P. 2744 is hereby denied.

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PATRICIA A. McCULLOUGH, Judge