IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert H. Black and Joan Kosove, Appellants	:	
v.	:	No. 1732 C.D. 2007
	:	Argued: June 9, 2008
The Zoning Hearing Board of The Township of Cheltenham	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER FILED: July 16, 2008

Robert H. Black and Joan Kosove (Appellants/Neighbors) appeal from an order of the Court of Common Pleas of Montgomery County that affirmed the decision of the Zoning Hearing Board of the Township of Cheltenham (Board) granting special exceptions and variances from the Cheltenham Township Zoning Ordinance (Ordinance), sought by H. Laurence Reinhard, III, and Greenwood Realty Partners, LLC, (Applicants) to develop a single residence and an access driveway on a lot identified as CTRERP Block 156, Unit 023 (Property). The Board also granted variances sought by Roger and Tracy Davis to disturb the steep slopes on a corner portion of 1101 Greenwood Avenue (Greenwood Lot) (Unit 024) to allow for the access driveway.[1]

[1]The application, amended from development of two residences to a single residence, requested the following relief for the Property: a special exception and a variance from the rules and regulations of the R-3 Residence District, Article V, Section 295-22; special exceptions from the Steep Slope Conservation District (SSCD), Article XXII, Sections 295-168(B) and 295-168(C); and variances from the SSCD, Sections 295-169(A)(1) - (A)(3) and 295-169(B). For the Greenwood Lot, the Davises sought variances from the SSCD, Sections 295-169(A)(2) - (A)(3) and 295-169(B). For the text of the provisions, *see infra* n2. The grant of relief was subject to

(Footnote continued on next page…)

The statement of questions presented is whether the trial court erred in determining that the Board neither committed an abuse of discretion nor an error of law where Appellants alleged facts showing 1) the grant of a special exception and/or variance pertaining to inadequate frontage from the street line; 2) a disregard of testimony and stipulations supporting the fact that the Property and the Greenwood Lot were physically merged by James F. and Mildred R. Besecker in 1957 and remained so until 2004; 3) a disregard for the fact that any hardship faced by Applicants was self-inflicted; and 4) a disregard for the testimony of neighbors and experts, which highlights the adverse effects that development on the Property would have on the health, safety, morals and general welfare of the community.

The Property, approximately 1.78 acres, is a vacant wooded lot with 30 feet of street frontage on Greenwood Avenue and "flagpole" width of 30 feet that extends 210 feet into the lot depth; it is located in the R-3 Residence District and in the SSCD. Other such "flag" lots exist in the immediate area. The Greenwood Lot is an adjacent lot improved with a single-family residence. In 2004 the Estate of Mildred R. Besecker conveyed both lots under a single deed to Reinhard who then conveyed the Greenwood Lot to Roger and Tracy Davis but retained a driveway easement for access to the Property; development of a driveway would require disturbances of steep slopes in both lots. Applicants and the Davises sought zoning relief for the proposed development.

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two conditions, one of which is that a temporary sound barrier be maintained during construction activities between the development site and the neighboring residence of Appellant Black to mitigate the impact of construction noise for Appellant Black's son, Shawn Black, who undergoes daily therapy for autism.

On the issue of lawful subdivision of the lots, the Board noted the Township's actions regarding the separate real estate registrations, the separate tax parcel numbers, the separate tax bills and the tax map showing the two parcels, with the Property's obviously substandard frontage. It concluded as follows:

> Such evidence entitles Applicants to invoke a presumption of regularity in favor of the Township officials. The Board must presume that Township officials accepted the registration and provided the information necessary to create tax parcels on some official act or failure to act that made the substandard lot lawful.

Board Decision, p. 13. Alternatively, it concluded that Applicants are entitled to a variance by estoppel:

> Here, Cheltenham Township did not merely fail to enforce the minimum street frontage requirement but, instead, regularly issued tax bills and accepted payment on two tax bills for two lots. Even though the nonconformance was obvious, the Township maintained a tax map illustrating the two independent parcels. The Township was certainly aware that potential purchasers would … rely upon the map and the tax bills.… If the Township were now to prevent development of the Property … Applicants would suffer financial hardship in an instance … where no unforeseen detriment will result to the community.

Id. Lastly, the Board stated that Section 295-26 of the Ordinance empowers it to grant special exceptions to allow lots with substandard widths. Noting that the Property's nonconformity is limited to its width, the Board concluded that the grant of special exceptions is required here where development will not result in any extraordinary adverse impact upon the community.

Regarding Appellants' argument of merger, the Board observed that the two lots had different characteristics and concluded:

> Although some owner at one time built a utility shed and may have run electric power to the shed, this scant evidence is not such as to invoke the notion of merger. Notwithstanding the remembrances of Mr. Besecker's neighbor, the Board cannot determine that the Beseckers ever unequivocally intended to merge the parcels….

Board Decision, p. 14.

The Board heard expert testimony as to whether the driveway leading to Greenwood Avenue would cause traffic hazards. Applicants presented expert testimony from John W. Leapson, a civil engineer, and John R. Caruolo, P.E., a traffic engineer; Appellants presented expert testimony from John H. Comiskey, Jr., P.E., a traffic engineer, and Joseph Augustine, an architect. Although the experts disagreed on whether proper sight distances existed, the Board stated:

> Absent from the record, however, was any evidence that the street frontage requirement or the steep slope limitations had anything to do with sight distances or safety considerations on the placement of driveways. The only evidence is that driveways are permitted along this stretch of Greenwood Avenue. With no record that this driveway is uniquely hazardous or that the placement of this driveway should not have been anticipated by the Board of Commissioners, this Board must conclude that the proposed placement does not create a condition that was not anticipated by the Commissioners and considered acceptable in this zoning district. Accordingly, protestants [sic] driveway hazard argument must fail.

Id. at 15. The Board noted that it has historically granted relief from limitations on development in steep slopes in less compelling circumstances and that no unusual adverse effects resulted from the proposed use.[2] The trial court affirmed.

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[2]The applicable ordinance provisions are as follows: Article V, Section 295-22 (Lot area and lot width): "A lot area of not less than [20,000 square feet] and a lot width of not less than one hundred (100) feet … shall be provided for every principal building hereafter erected, altered or used in this district"; Section 295-26 (Nonconforming lots): "[the Board] may grant special

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The Court's review when a trial court takes no additional evidence in a land use appeal is limited to determining whether the zoning board committed an error of law or abused its discretion. *Dudlik v. Upper Moreland Township Zoning*

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exceptions in the case of lots which are nonconforming as to area and width regulations"; and Section 295-30 (Building area): "The building area shall not exceed fifteen per centum (15%) of the lot area for buildings over one (1) story in height or twenty-five per centum (25%) of the lot area for one-story buildings." Under Article XXII, the following sections apply: Section 295-168 (Permitted uses): "The following uses shall be permitted by special exception … B. Sanitary or storm sewers and impoundment basins with the approval of the Township Engineer and the Pennsylvania Departments of Environmental Protection and Energy. C. Underground utility transmission lines"; Section 295-169 (Prohibited uses), providing:

> The following shall be prohibited within the boundaries of the Steep Slope Conservation District: (1) Freestanding structures, buildings and retaining walls, unless no alternative location is feasible…. (2) Roads, access driveways and parking facilities, unless no alternative alignment or location is available.... (3) The filling or removal of topsoil except when related to an activity approved by special exception….

Also, Article XXVII (criteria for granting special exceptions and variances), Section 295-209 provides as follows:

> A. An applicant for a special exception shall have the burden of establishing both: (1) That his application falls within the provision of this chapter which accords to the applicant the right to seek a special exception; and (2) That allowance of the special exception will not be contrary to the public interest….
>
> ….
>
> C. In determining whether the allowance of a special exception … is contrary to the public interest, the Board shall consider whether the application, if granted, will: (1) Adversely affect the public health, safety and welfare due to changes in traffic conditions, drainage, air quality, noise levels, and natural features of the land, neighborhood property values and neighborhood aesthetic characteristics. (2) Be in accordance with the Cheltenham Comprehensive Plan.

Hearing Board, 840 A.2d 1048 (Pa. Cmwlth. 2004). After examining the record, the Court is of the opinion that the trial court correctly disposed of the issues. The Ordinance allows development of the Property by special exception where there is no showing of detrimental effect on the community. Assuming *arguendo* that the concept of merger applies, the Court agrees that the evidence was insufficient to meet Appellants' burden to prove a merger of the lots. Under *Tinicum Township v. Jones*, 723 A.2d 1068 (Pa. Cmwlth. 1998), the party asserting a physical merger has the burden of proof. Because the Board committed no error of law or abuse of discretion, the Court affirms the trial court on the basis of the opinion issued by the Honorable Thomas M. Del Ricci of the Court of Common Pleas of Montgomery County in *Robert H. Black, Esquire, and Joan Kosove v. The Zoning Hearing Board of The Township of Cheltenham*, (No. 05-22660, filed December 11, 2007).

DORIS A. SMITH-RIBNER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert H. Black and Joan Kosove, Appellants	:	
v.	:	No. 1732 C.D. 2007
The Zoning Hearing Board of The Township of Cheltenham	:	

O R D E R

AND NOW, this 16th day of July, 2008, the Court affirms the order of the Court of Common Pleas of Montgomery County on the basis of the opinion authored by the Honorable Thomas M. Del Ricci of the Court of Common Pleas of Montgomery County in *Robert H. Black, Esquire, and Joan Kosove v. The Zoning Hearing Board of The Township of Cheltenham*, (No. 05-22660, filed December 11, 2007).

DORIS A. SMITH-RIBNER, Judge

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY,
PENNSYLVANIA
CIVIL DIVISION

ROBERT H. BLACK, ESQUIRE, and JOAN KOSOVE	:	**Commonwealth Court No.: 1732 CD 2007**
Appellants	:	**LAND USE APPEAL**
v.	:	
THE ZONING HEARING BOARD OF THE TOWNSHIP OF CHELTENHAM	:	
Appellees	:	
BOARD OF COMMISSIONERS OF CHELTENHAM TOWNSHIP, GREENWOOD REALTY PARTNERS, LLC, and H. LAURENCE REINHARD, III	:	
Intervenors	:	**Lower Court Dkt. No.: 05-22660**

DEL RICCI, J. **DECEMBER 11, 2007**

OPINION

FACTS AND PROCEDURAL HISTORY

Laurence Reinhard, III and Greeenwood Realty Partners, LLC, Intervenors herein, filed an Application with the Zoning Hearing Board of Cheltenham Township ("ZHB") seeking zoning relief for a vacant wooded lot identified as CTRERP Block 156, Unit 023 ("the Property"). An Application was also filed by Roger and Tracy Davis seeking three variances to allow for an access driveway on 1101 Greenwood Avenue ("the Greenwood Lot") to service the Property. The Property is an undeveloped "flag" lot with thirty feet of frontage on Greenwood

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Avenue.[1] Development of the driveway for the Property would require disturbances of steep slopes and part of the Greenwood Property.[2] The Intervenors have an easement over that portion of the Greenwood Lot.[3]

According to the record, the Greenwood Lot was conveyed by the Wagners to the Beseckers in 1949.[4] Then, in 1957, the Wagners conveyed the Property to the Beseckers.[5] In 2004 the Besecker Estate conveyed the Property and the Greenwood Lot to Intervenor Lawrence Reinhard, who later that same year conveyed the Greenwood Lot to Mr. and Mrs. Davis, retaining the driveway easement.[6] Later, the Intervenors sought to build two houses on the Property, however, they later amended the Application to seek only one house.[7] It is this amended Application that is at issue in the within appeal.

After hearings, the ZHB granted special exceptions and variances to allow the Property to be developed for a single family home.[8] Thereafter, the Appellants filed an appeal of the ZHB's decision to the Montgomery County Court of Common Pleas.[9] After reviewing the briefs filed by the parties, hearing argument, and upon reviewing the record, the Court affirmed the decision of the ZHB.[10] The Appellants appealed this Court's decision to the Commonwealth Court of Pennsylvania and subsequently filed a Concise Statement raising several claims of error, as discussed below.[11]

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[1] Decision of the ZHB ("ZHB Decision") at pp. 3, 4 and 6, found at Return of the Record, docketed 5/16/07 ("RR") at 42.
[2] ZHB Decision at p. 6.
[3] ZHB Decision at p. 6.
[4] ZHB Decision at p. 8.
[5] ZHB Decision at p. 8.
[6] ZHB Decision at p. 8.
[7] ZHB Decision at p. 6.
[8] ZHB Decision at pp. 16-18.
[9] Notice of Appeal to the Montgomery County Court of Common Pleas, docketed 9/13/05.
[10] Order docketed 8/22/07.
[11] Concise Statement docketed 9/24/07.

STANDARD OF REVIEW

The Court did not take additional evidence in the present appeal. Therefore, the scope of review is limited to whether the ZHB committed an error of law or abused its discretion. Smith v. Zoning Hearing Board of Huntingdon Borough, 734 A.2d 55, 57 n.2 (Pa.Cmwlth. 1999), *app. den.*, 747 A.2d 904 (Pa. 1999); *citing*, Hill District Project Area Committee, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 638 A.2d 278 (Pa.Cmwlth. 1994), app. den., 46 A.2d 1182 (Pa. 1994). A board abuses its discretion if its findings are not supported by substantial evidence. Patullo v. Zoning Hearing Board of the Township of Middletown, 701 A.2d 295, 298 n.1 (Pa.Cmwlth. 1997); *citing*, Teazers, Inc. v. Zoning Board of Adjustment of City of Philadelphia, 682 A.2d 856 (Pa.Cmwlth. 1996). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Cardamone v. Whitpain Township Zoning Hearing Board, 771 A.2d 103 (Pa.Cmwlth. 2001).

In addition to the limited scope of review, the ZHB's decision is entitled to deference. A zoning hearing board has the authority to interpret and apply the zoning ordinance. Further, "[i]t is well settled that a zoning hearing board's interpretation of its own zoning ordinance is entitled to great weight and deference from a reviewing court." Smith v. Zoning Hearing Board of Huntingdon Borough, 734 A.2d 55, 57 (Pa.Cmwlth. 1999), *app. den.*, 734 A.2d 904 (Pa. 1999)(*citations omitted*). This judicial deference is based upon the knowledge and expertise possessed by a zoning hearing board to interpret its own ordinance. *Id.* Also, "construction of a statute by those charged with its execution and application is entitled to great weight and should not be disregarded or overturned except for cogent reasons." Willits Woods Associates v. Zoning Board of Adjustment of the City of Philadelphia, 587 A.2d 827, 829 (Pa.Cmwlth. 1991), *quoting*, Longo Liquor License Case, 132 A.2d 899, 901 (Pa.Super. 1957). Finally, the Court,

having taken no additional evidence herein, is in effect sitting as an appellate court. It is well settled that on review, an appellate court may not substitute its interpretation of the evidence for that of the Board. Vanguard Cellular System, Inc. v. Zoning Hearing Board of Smithfield Township, 568 A.2d 703 (Pa.Cmwlth. 1989), *app. den.*, 590 A.2d 760 (Pa. 1990).

DISCUSSION

A. The Property Is A Lawful Non-Conforming Lot

Appellants contend that Intervenors were not entitled to zoning relief because there was no valid subdivision of the properties and therefore the Property was not a legal, non-conforming lot.[12] The record reflects, however, that the Township accepted a real estate registration of the Wagner's conveyance of the Greenwood Lot to the Beseckers in 1949. The Township also accepted a real estate registration of the Wagner's conveyance of the Property to the Beseckers in 1957. Further, the applicable zoning ordinances adopted in 1941 required a minimum lot width of 100 feet as measured at the street.[13] This 100 foot minimum width requirement remained in force in 1949, when the Greenwood Property was conveyed. The Property, however, was a flag lot with only 30 feet when measured at the street. Township records revealed no evidence of subdivision or zoning relief relative to these properties.[14] The record indicates, however, that at the time of the first known transfer, that being the 1949 conveyance of the Greenwood Lot, permission to subdivide was only required for three or more lots. Further, no Township official was able to testify that the absence of record of a subdivision established whether the Property was lawfully subdivided.[15]

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[12] Concise Statement at ¶¶ 2(A) and 2(B).
[13] Notes of Testimony, 4/20/05 ("N.T.-4/20/05") at pp. 64-65.
[14] N.T.-4/20/05 at pp. 67.
[15] ZHB Decision at p. 12.

From at least since the 1949 conveyance of the Greenwood Lot, the Property and the Greenwood Lot were issued separate tax parcel numbers and payments were received separately on each of these parcels. This procedure continued after the 1957 conveyance of the Property the Beseckers. The Township also maintained, as public records, tax maps indicating two separate properties. The tax maps clearly showed the Property with street frontage of only thirty feet.[16] With the exception street frontage, the Property conforms to the dimensional requirements under Cheltenham's Zoning Ordinance ("the Ordinance").[17] The ZHB found the evidence was sufficient to create a presumption of regularity in favor of Township officials, explaining that it "must presume that Township officials accepted the registration and provided the information necessary to create tax parcels on some official act or failure to act that made the substandard lot lawful."[18]

B. Variance By Estoppel Appropriate Remedy

The Applicants would also be entitled to a variance by estoppel. As the ZHB explained, the Township "did not merely fail to enforce the minimum street frontage requirement but, instead, regularly issued two tax bills and accepted payment on two tax bills for two lots. Even though the nonconformance was obvious, the Township maintained a tax map illustrating the two independent parcels. The Township was certainly aware that potential purchasers would refer to the tax map and rely upon the map and the tax bills in completing a real estate conveyance."[19] A variance by estoppel is appropriate when a use does not conform to the zoning ordinance and the owner of the property establishes:

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[16] Notes of Testimony, ZHB ("N.T.-12/13/04") at 46 - 48.
[17] N.T-12/13/04 at 46.
[18] ZHB Decision at p. 13.
[19] ZHB Decision at p. 13.

> (1) a long period of municipal failure to enforce the law, when the municipality knew or should have known of the violation, in conjunction with some form of active acquiescence in the illegal; (2) the landowner acted in good faith and relied innocently upon the validity of the use throughout the proceeding; (3) the landowner has made substantial expenditures in reliance upon his belief that his use was permitted; and (4) denial of the variance would impose an unnecessary hardship on the applicant.

Borough of Dormant v. Sparvero, 850 A.2d 826, 828 (Pa.Cmwlth. 2004)(*citation omitted*). Here, there has been a long period of failure to enforce, that being more that fifty years. The Township knew of the violation during that period because the requirement was 100 feet at the street for a buildable lot, yet Township tax maps showed the Property with only 30 feet. Certainly there was also active acquiescence as the Township continued to identify the parcels separately and issue separate tax bills. The Intervenors innocently relied in part on these public records in purchasing the properties. They also paid market price, planning to build on the Property. Without zoning relief, no home can be built. Further, the hardship is unique to the Property, and application of the 100 foot requirement renders the property essentially valueless.

In Hasage v. Philadelphia Zoning Board of Adjustment, 202 A.2d 61 (Pa. 1964), a property owner sought approval to convert a dwelling located in a district zoned single family to a four-family dwelling. Despite the denial of the request in 1951, the owner converted the building into a five-family dwelling. Those owners then sold the building in 1956, and the new owners continued to operate the building as a five-family dwelling until the city became aware of the violation during a routine inspection in 1962. The Pennsylvania Supreme Court concluded that the new owners were duty bound to check the applicable ordinances and search records before purchasing the building. Also, the economic loss did not warrant granting the variance, as the building could still be used as a single-family dwelling in conformity with the ordinance. Hasage, 202 A.2d at 64. Unlike the house in Hasage, the Property here cannot be utilized in conformity with the Ordinance, without the relief requested.

C. The Property And The Greenwood Lot Did Not Merge

The Appellants claim the properties merged, thereby preventing separate development of the Property from the Greenwood Lot.[20] The term "merger" in zoning law is used to describe the effect of a zoning ordinance on the adjoining lots held in common ownership. Tinicum Township v. Jones, 723 A.2d 1068, 1071 (Pa.Cmwlth. 1998)(*citation omitted*). Where the applicable zoning ordinance contains no language regarding single and separate ownership, such as the Ordinance herein, then the doctrine of merger does not automatically apply and the burden of proof is on the party asserting that a merger occurred.

Mere common ownership of adjoining lots does not automatically establish physical merger of adjoining lots for purposes of zoning. Tinicum Township, 723 A.2d at 1072. Where a landowner uses or treats both lots in such a manner so as to integrate both lots into one tract, then the lots do merge for purposes of zoning. Township of Middletown v. Middletown Township Zoning Hearing Board, 548 A.2d 1297 (Pa.Cmwlth. 1988).

Appellants contend that the owners prior to the Intervenors integrated both lots into one tract by riding a tractor on the Property, maintaining the trees on the Property, and having a shed on the Property. In Tinicum Township, however, the properties identified as Lot 1 and Lot 2 were found not to have merged, despite fencing the front of Lot 2 and a portion of Lot 1. Tinicum Township, 723 A.2d at 1072. The front twenty to thirty foot portion of Lot 2 was mowed monthly and a swing set was placed there. *Id.* The landowners grandson played throughout both lots on a weekly basis. *Id.* The township also considered the lots as separate parcels for taxing purposes and separate real estate tax bills were issued for both Lot 1 and Lot 2, similar to the separate bills issued to the Lot and the Greenwood Property herein. The Tinicum Court explained that such findings "fall short of any definite physical features held to be

[20] Concise Statement ¶ 2(C).

sufficient to establish the owners' intent to integrate the adjoining lots into one residential lot." In Appeal of Gregor, 627 A.2d 308 (Pa.Cmwilth. 1993), two lots were owned by the Gregors. There was testimony that the second lot was used as a lawn area, however such evidence, according to the Gregor Court, fell "far short of any physical features manifesting the Gregors' intent to integrate the two lots into a single residential parcel." Gregor, 627 A.2d at 311.

In cases where a finding of merger was upheld, there was evidence to show affirmative action taken to change the separate and distinct character of the two lots. For example, in Alpine, Inc. v. Abington Township Zoning Hearing Board, 654 A.2d 186, 189 (Pa.Cmwlth. 1995), fencing two lots and maintaining them as one unit for over fifty years was sufficient to support finding of merger. Blacktopping adjoining lots is sufficient to support a finding of merger. Price v. Bensalem Township Zoning Hearing Board, 569 A.2d 1030 (Pa.Cmwlth. 1990). Removing a hedge separating the parcels, capping the sewer lateral to one of the parcels, and, stating that the two parcels would be treated as one property, will also result in a finding of merger. Lebeduik v. Bethlehem township Zoning Hearing Board, 596 A.2d 302 (Pa.Cmwlth. 1991).

D. The Hardship Was Not Self-Created

Appellants herein contend that the Intervenors hardship was created by them when they sold the Greenwood Lot in 2004 without obtaining required exceptions or variances at that time.[21] The concept of a "self-created" hardship arises in the context of variances, and it is important to bear in mind the place held by variances in zoning law. A zoning ordinance is a legislative act. By its very nature, it speaks in general terms, exercising legislative power rather than attempting to regulate each specific property in the particular municipality it covers. Variances are designed to address the problem of adjusting such general requirements of an

[21] Concise Statement at ¶ 2(D).

ordinance to fit the land that it regulates.[22] A variance is, in effect, an exercise of a form of legislative power that is directed at the particular property involved. In order to prevent the power to grant variances from expanding to a general legislative power, limits are placed upon the granting of variances, and the reasons supporting a grant of a variance must be substantial, serious and compelling. Valley View Civic Association v. Zoning Board of Adjustment, 462 A.2d 637 (Pa. 1983). The applicant seeking relief bears the burden of proving unnecessary hardship and absence of injury to the public interest. *Id.* Further, the hardship must be shown to be unique or peculiar to the property, as distinguished from a hardship arising from the impact of zoning regulations on an entire district. *Id.*

The Zoning Code of Cheltenham Township ("Zoning Code") codifies the law of variances and provides the following criteria for granting variances:

> B. An applicant for a variance shall have the burden of establishing both:
>
> (1) That a literal enforcement of the provisions of this chapter will result in unnecessary hardship, as that term is defined by law, including court decisions; and
> (2) That allowance of the variance will not be contrary to the public interest.

Zoning Code, § 295-209(B). Case law also provides, however, that such hardship cannot be self-inflicted or self-created. In Larsen v. Pittsburgh Zoning Board of Adjustment, 672 A.2d 286, 291 (Pa. 1996), property owners built an addition covering 75% of their property, and then later request a variance to build a deck. The request for a variance was denied because the claimed hardship—insufficient space for an outside deck—was created by the property owners previously constructed addition. As discussed in parts A and B above, any hardship in the present case was not self-created, as the Property and the Greenwood Lot were separate parcels long before the Intervenors purchased the two properties. Any hardship was created not upon the

[22] Ryan, 1 Pennsylvania Zoning Law and Practice § 6.1.1 (2005).

sale of the Greenwood Lot by the Intervenors, but because of zoning deficiencies that had existed for many years, and passed through several different owners.

E. The Evidence Presented Supported the ZHB's Findings Regarding The Driveway

The Appellants claim the ZHB erred when it determined a second driveway existed or may have been utilized for the Property.[23] Testimony indicated that a driveway to the Property existed for many years.[24] Further, the driveway could be accessed simply by clearing out shrubs and broken branches.[25]

F. The ZHB's Decision Granting Zoning Relief Supported By The Record

The Appellants' Concise Statement claimed the ZHB disregarded evidence as to safety issues concerning the driveway and the negative impact on a nearby child.[26] Essentially, the Appellants claim the ZHB disregarded testimony, including some expert testimony, regarding the threat to health, safety and welfare, created by the granting of the within zoning relief.

The Zoning Code permits construction on a lot that is non-conforming as to width by special exception.[27] The standard to apply when considering whether to grant or deny a request for special exception is the following:

> A An applicant for a special exception shall have the burden of establishing both:
> (1) That his application falls within the provision of this chapter which accords to the applicant the right to seek a special exception; and
> (2) That allowance of the special exception will not be contrary to the public interest.
>
> B. An applicant for a variance shall have the burden of establishing both:
> (3) That a literal enforcement of the provisions of this chapter will result in unnecessary hardship, as that term is defined by law, including court decisions; and

[23] Concise Statement at ¶ 2(E).
[24] N.T.-2/14/05 at pp. 22-23.
[25] M/T/-21405 AT 23.
[26] Concise Statement at ¶¶ 2(F-I).
[27] The Zoning Code provides that "the Zoning Hearing board may grant special exceptions in the case of lots which are nonconforming as to area and width regulations." Section 295-26.

(4) That allowance of the variance will not be contrary to the public interest.

C. In determining whether the allowance of a special exception or a variance is contrary to the public interest, the Board shall consider whether the application, if granted, will:

(1) Adversely affect the public health, safety and welfare due to changes in traffic conditions, drainage, air quality, noise levels, and natural features of the land, neighborhood property values and neighborhood aesthetic characteristics.

(2)—(4) ....

(5) Otherwise adversely affect the public health, safety, morals or welfare.

Zoning Code, § 295-209.

A special exception is not an exception to the zoning ordinance. In Re: Appeal of Brickstone Realty Corp., 789 A.2d 333, 340 (Pa.Cmwlth. 2001). Instead, it is a use which is expressly permitted, provided there is no showing of a detrimental effect on the community. Greaton Properties, Inc. v. Lower Merion Township, 96 A.2d 1038, 1045 (Pa.Cmwlth. 2002), *citing*, Lower Moreland Township Zoning Hearing Board, 590 A.2d 65 (Pa.Cmwlth. 1991). An applicant for a proposed use has the duty to present evidence and bears the burden of persuading the board that the proposed use satisfies the objective requirements of the applicable ordinance for the grant of a special exception. Greaton Properties. Further, once an applicant shows compliance with the specific requirements of the applicable ordinance, it is presumed that the use comports with the promotion of health, safety, and general welfare. Brickstone Realty; *see also*, Bray v. Zoning Board of Adjustment, 410 A.2d 909 (Pa.Cmwlth. 1980). Evidence presented in opposition to the use of the special exception "must show a high probability that the use will generate adverse impacts not normally generated by this type of use and that these impacts will pose a substantial threat to the health and safety of the community." In re Dippolito, 833 A.2d 336, 342 (Pa.Cmwlth. 2003), *app. den.*, 851 A.2d 143 (Pa. 2004)(*citation omitted).* Here, the ZHB found that Appellants did not meet this burden.

In particular, the Appellants refer to evidence regarding accidents and lack of adequate sight distance as to the proposed driveway. The function of a zoning hearing board is to weigh the evidence before it and it is the sole judge of the credibility of witnesses and the weight afforded their respective testimony. Taliaferro v. Darby Township Zoning Hearing Board, 873 A.2d 807, 811 (Pa.Cmwlth. 2005)(*citations omitted*). Further, a zoning hearing board "is free to reject even uncontradicted testimony it finds lacking in credibility, including testimony offered by an expert witness." *Id.* Here, the ZHB found that the record did not establish that "the street frontage requirement or the steep slope limitations had anything to do with sight distances or safety considerations on the placement of driveways."[28] Further, there was no record that the driveway would be "uniquely hazardous."[29]

Variances were also granted to allow for the driveway. Section 295-209 of the Zoning Code also applies to variance requests. Case law outlines the four factors that must be established in order to be entitled to a variance: (1) that an unnecessary hardship exists which is not created by the party seeking the variance and which is caused by unique physical circumstances of the property for which the variance is sought; (2) that a variance is needed to enable the party's reasonable use of the property; (3) that the variance will not alter the essential character of the district or neighborhood, or substantially or permanently impair the use or development of the adjacent property such that it is detrimental to the public's welfare and (4) that the variance will afford the least intrusive solution. Larsen, 672 A.2d at 289. As discussed above in Part D, the unnecessary hardship was not self-created. Further, such hardship exists because of the unique physical characteristics of the Property, including that it is flag-shaped

[28] ZHB Decision at p. 15.
[29] ZHB Decision at p. 15.

with Greenwood Avenue frontage of only thirty feet, and, measures approximately 1.78 acres.[30] Also, the Property is substantially wooded and has some areas designated as having steep slopes.[31] Without the grant of variances, the Property would be unusable, despite its size and desirable location in a residential area, because there is no street access. Such variances will not alter the essential character of the neighborhood. The neighborhood is part of the R3 Residence District, which allows for single-family detached dwellings and row houses or townhouses. Zoning Code, § 295-21. The neighborhood surrounding the Property includes single family residential homes and several flag lots, similar to the Appellants proposed construction for the Property. The variances will not substantially or permanently impair the use or development of the adjacent property, and, in fact, the ZHB subjected the relief granted to certain conditions, including the building of a temporary sound barrier between the construction on the Property and Appellant Black's residence.[32]

Additionally, the variances applicable to the driveway afford the least intrusive solution. Only disturbance of steep slopes will be at the mouth of the driveway.[33] The total square footage of steep slopes that will be disturbed constitutes less than 2% of the total are of the Property.[34] The twelve foot driveway proposed is wider, and therefore safer, than most residential driveways, which are usually only nine feet wide.[35] Further, the proposed location avoids large trees and improves the sight distance on Greenwood Avenue.[36]

Issues were raised regarding the health impact on Appellant Black's child. These concerns were addressed by moving the building envelope as far away from the Black property

[30] ZHB Decision at ¶¶ 8 and 9, p. 6.
[31] ZHB Decision at ¶ 14, p. 6.
[32] ZHB Decision at ¶ 1, p. 17.
[33] N.T.-12/13/04 at 54.
[34] N.T.-12/13/04 at p. 55.
[35] N.T.-12/13/04 at pp. 48-49.
[36] N.T.-12/13/04 at pp. 48-50.

as possible without violating setback requirements. Also, as a Condition to the zoning relief approved, a temporary sound barrier is to be erected and maintained between the construction and the Black residence.[37]

CONCLUSION

The ZHB's decision, and its interpretation of its own Zoning Code, is entitled to great weight and deference. Further, the decision is supported by the record. The ZHB has committed no error of law, and therefore, the Court's dismissal of the appeal from the ZHB's decision should be affirmed.

WHEREFORE, the Court respectfully requests that this Court's Order be **AFFIRMED**.

BY THE COURT:

THOMAS M. DEL RICCI, J.

Copies sent December 11, 2007 to:
Robert H. Black, Esquire
Neil Sklaroff, Esquire, Esquire
Peter S. Friedman, Esquire/Michael J. Savona, Esquire
Joseph Bagley, Esquire
Montgomery County Law Reporter (via email)
Legal Communications (via email)
Arthur Zanan, Esquire—Law Library (via email)

[37] ZHB Decision at p. 17.

Commonwealth of Pennsylvania
County of Montgomery } **SS:**

Commonwealth Court of Pennsylvania
No. 2005-22660 CP Civil Action Law
Montgomery

I, William E. Donnelly. Prothonotary of the Court of Common Pleas, in and for the County of Montgomery, In the State aforesaid, Do Certify, that the above and aforegoing is a true and correct copy of the full, entire and whole Record in the hereinbefore stated case, wherein

ROBERT BLACK ET AL Plaintiff
VS
CHELTENHAM TWP ZONING HEARING BD
Defendant

to NO. 1732 CD 2007

As the same remains filed and of Record in said Court.

In testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Norristown, this 11 Day of December In the year of 2007.

William E. Donnelly
Prothonotary

By

Sheri Guenst
Appeals Clerk