

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anthony Dixon and Kathleen	:	
Dixon, his wife, Ellen Wetterau,	:	
Marlene E. Kadany and	:	
Norbert Kotzer,	:	
Appellants	:	
	:	
v.	:	No. 185 C.D. 2008
	:	
Zoning Hearing Board of	:	Argued: September 11, 2008
The Borough of West	:	
Hazleton and Daniel E. Zola	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: November 18, 2008

Anthony and Kathleen Dixon, Ellen Wetterau, Marletta E. Kadany and Norbett Kotzer (Objectors) appeal from the order of the Court of Common Pleas of Luzerne County (trial court) denying their appeal from the decision of the West Hazelton Borough Zoning Hearing Board (Board), which granted Daniel E. Zola's request for a variance for use of a residential structure as a professional office with certain improvements and the installation of an outdoor sign. We reverse.

On May 1, 2006, Zola purchased property located at 129 Susquehanna Boulevard, West Hazelton, Pennsylvania. The property is located in the R-1 Residential District.¹ The property is a narrow corner lot located at the intersection of State Route 93, which is Susquehanna Boulevard, and Irving Street.² The property is improved with a residence and a one stall garage.

Zola purchased the property for the purpose of using the property as a law office with one secretarial employee. Although the property had been previously used as a residence, Zola never intended to live on the property. The proposed hours of operation of the law office are 9:00 a.m. to 5:00 p.m. daily and by appointment. Zola proposes to provide six off-street parking spaces as per the current Ordinance. Zola was granted a permit by the Zoning Officer to make interior renovations for use of the residence on the property as a professional office.

¹ Under Section 115-9A of the West Hazelton Zoning Ordinance (Ordinance), as relevant here, the only uses permitted in the R-1 Residential district are: "(1) Single-family dwellings and two-family dwellings, not including row houses"; "(6) Home occupations, as defined in §115-3B"; and "(7) Professional office maintained in a residence, as defined in § 115-3B." Reproduced Record (R.R.) at 434A. Section 115-3B of the Ordinance defines a "home occupation" as "[a]n occupation which is permitted under the terms of this Ordinance to be conducted as an accessory use to a residential dwelling unit." *Id.* at 426A. Section 115-25 governs "accessory uses." *Id.* at 460A-69A. Section 115-25B(1) establishes a home occupation as a permitted use if, *inter alia*, the occupation is "only by one or more permanent residents of the dwelling" and is "clearly incidental and secondary to the use of the dwelling unit for residential purposes." *Id.* at 460A-61A. Among the occupations that can qualify as a home occupation under Section 115-25B are "professional offices." *Id.* at 461A. Although Section 115-9A(7) of the Ordinance indicates that Section 115-3B also contains a definition of a "professional office maintained in a residence," no such definition is found in Section 115-3B. *Id.* at 434A.

² The record shows that State Route 93 and Susquehanna Boulevard is the same road. Reproduced Record (R.R.) at 387a. We will refer to Susquehanna Boulevard throughout the remainder of this opinion as that is the street address of the property in question.

The side of Susquehanna Boulevard on which Zola's property is located is predominantly residential. All the lots across Irving Street and for the next three blocks are used as residences. The lots behind the property also are used as residences. Proceeding from the property away from Irving Street toward 22nd Street, the next four lots are houses used as residences. However, an insurance agency is located at the corner of 22nd Street and Susquehanna Boulevard. Across 22nd Street, but also on Susquehanna Boulevard, are a Pizza Hut and a bagel shop. Except for one corner of the rear yard of the property, which is not square, its physical boundaries are similar to other residential properties in the immediate vicinity. On the opposite side of Susquehanna Boulevard, the area is zoned B-1 Local Business or Residential district, which permits a mix of businesses and residences. There are large commercial businesses on that side of Susquehanna Boulevard directly across from the property, including a Lowes and a Weis Supermarket.

On July 6, 2006, Zola filed an application with the Board seeking a variance to use the property for his professional office with interior improvements and installation of outdoor signage for the professional use. Zola stated in the application that he believed the application should be granted because "the use is permitted in an R1 Residential District". R.R. at 394a.

Public hearings on Zola's application were advertised but the advertisements only contained notice that the issue before the Board was a zoning use variance and did not refer to the issue of whether the use was permitted as of right in an R-1 Residential District. At the public hearings on the application,³ Zola testified that he would not be living in the house and that he initially would

³ Hearings before the Board were held on August 26, 2006 and September 20, 2006.

employ one secretary and eventually might have a few other employees. Objectors, all of whom reside on Irving Street adjacent or close to the property, testified as to the residential nature of the neighborhood and the impact that the proposed use would have on them and the neighborhood, including reducing the value of their properties. Experts for both sides also testified as to those matters. Zola and his expert, real estate agent Kenneth Temborski, testified that the property could be used solely as a residence, but it would not be practical because the area had become predominantly commercial.

The Board found that Zola satisfied the requirements for a variance and granted a variance for "use of a residential dwelling as a professional office" on the property. In light of the grant of the variance, the Board declined to address Zola's legal contention that the Ordinance permitted a residential dwelling in the R-1 Residential District to be used solely as a professional office as a matter of right. The Board noted further the legal notice for the hearings before the Board only referred to a zoning use variance and not to the issue of whether the use was permitted as of right. Objectors appealed the Board's decision.

Upon review, without taking any additional testimony, the trial court first determined that the Board did not abuse its discretion in granting the use variance based on the evidence presented. The trial court also determined, based on its interpretation of the provisions of the Ordinance, that a professional office by right in a structure once used as a residence was permitted in an R-1 Residential District.⁴ Accordingly, the trial court denied Objectors' appeal from the Board's decision. This appeal followed.⁵

⁴ The trial court reasoned that since, under Sections 115-9A(6) and 115-25B(1) of the Ordinance, a professional office is considered a home occupation permitted as of right in the R-1

(Continued....)

Objectors raise the following issues for this Court's review:

1. Whether the trial court and/or Board committed an error of law and/or abuse of discretion in determining that Zola met his burden of proving the required factors for the grant of a variance.
2. Whether the trial court and/or Board capriciously disregarded relevant and competent evidence offered by Objectors in opposition to the requested variance.
3. Whether the trial court committed an error of law and/or abuse of discretion in finding that Objectors failed to produce any expert evidence with respect to adverse impacts on the neighborhood when such expert testimony was in fact presented.
4. Whether the trial court and/or Board committed an error of law and/or abuse of discretion in relying upon hearsay evidence in granting the variance when such evidence was properly objected to and not corroborated by competent evidence.
5. Whether the trial court abused its discretion and committed an error of law by determining that Zola's

Residential District when conducted by one or more residents of the dwelling, Section 115-9A(7), which permits a professional office maintained in a residence as of right in the R-1 Residential district, cannot also require residency. Otherwise, there would be no need for both sections. The trial court pointed out that, pursuant to the rules of statutory construction and the requirement of Section 603.1 of the Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10603.1, added by the Act of December 21, 1988, P.L. 1329, where doubt exists as to the intended meaning of a restriction in a zoning ordinance, the language must be interpreted in favor of the property owner; therefore, the trial court found that using the property solely for a professional office was permitted as of right by Section 115-9A(7).

⁵On June 16, 2008, Zola filed a Motion to Quash this appeal on the ground that Section 115-9A(7) of the Ordinance had been amended on June 10, 2008 to define a "professional office maintained in a residence" as not requiring the professional operating the office to reside within the building. By order and opinion filed July 23, 2008, this Court denied the motion on the ground that the amendment was not retroactive. We pointed out that "this Court must decide the merits based upon the Ordinance in effect at the time of the proceedings."

proposed use of the property as a professional office was a permitted use when the Board's decision did not address this issue.

Initially, we note that in an appeal from the grant or denial of a zoning variance where, as here, the trial court has not taken any additional evidence, this Court's scope of review is limited to a determination of whether the zoning hearing board committed an error of law or abused its discretion. Hill District Project Area Committee, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 638 A.2d 278 (Pa. Cmwlth.), petition for allowance of appeal denied, 538 Pa. 629, 646 A.2d 1182 (1994). An abuse of discretion will only be found where the zoning board's findings are not supported by substantial evidence. Id. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Teazers, Inc. v. Zoning Board of Adjustment of the City of Philadelphia, 682 A.2d 856 (Pa. Cmwlth. 1996).

Objectors first argue that Zola failed to prove that he was entitled to a variance. Objectors contend that the evidence does not support the Board's findings that the property met the applicable criteria, as set forth in the Municipalities Planning Code (MPC), in order for a variance to be granted. Objectors contend further that his matter is controlled by our Supreme Court's decision in Wilson v. Plumstead Township Zoning Hearing Board, 594 Pa. 416, 936 A.2d 1061 (2007); therefore, the Board's decision granting the variance should be reversed.

An applicant seeking a variance bears a heavy burden of proof. Polonsky v. Zoning Hearing Board of Mount Lebanon, 590 A.2d 1388 (Pa. Cmwlth. 1991). In order to qualify for a variance, an applicant must establish that (1) an unnecessary hardship stemming from unique physical characteristics or

conditions will result if the variance is denied; (2) because of such physical circumstances or condition, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and a variance is necessary to enable the reasonable use of the property; (3) the hardship has not been created by the applicant; (4) granting the variance will not alter the essential character of the neighborhood nor be detrimental to the public welfare; and (5) the variance sought is the minimum variance that will afford relief. Section 910.2 of the MPC, 53 P.S. §10910.2;⁶ Ruddy v. Lower Southampton Township Zoning Hearing Board, 669 A.2d 1051 (Pa. Cmwlth. 1995), petition for allowance of appeal denied, 546 Pa. 651, 683 A.2d 887 (1996).

The reasons for granting a variance must be substantial, serious, and compelling. Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983). Variances should be granted sparingly and only under exceptional circumstances. O'Neill v. Zoning Board of Adjustment, 434 Pa. 331, 254 A.2d 12 (1969). A variance should not be granted simply because such a grant would permit the owner to obtain a greater profit from the use of the property. A.R.E. Lehigh Valley Partners v. Zoning Hearing Board of Upper Macungie Township, 590 A.2d 842 (Pa. Cmwlth. 1991). Mere economic hardship is insufficient to justify a variance. Hill District Project Area Committee, Inc.

In Wilson, the property owner sought a variance to use a residence located on his property solely as a professional office for his accounting business without living in the residence. The zoning hearing board, finding that the property could reasonably be used as a residence with a home occupation, denied the application. On appeal, the trial court took additional evidence, which showed

⁶ Added by the Act of December 21, 1988, P.L. 1329.

that there were dissimilar property uses on both sides of owner's property, including an adjacent residence that was used as a plumbing contractor office, a residence five parcels away that was used as the headquarters of a concrete contractor followed by a tavern, auto body shop, car dealer and a large shopping center, and on the other side of owner's property a residence that was also used as a plumbing contracting business, a church, and a tree farm and nursery. A farm, a church, a residence used as a landscaping business, and a residence with the office of an excavation company were across from owner's property. The trial court found that due to these dissimilar and disharmonious uses, mandating that the property be used for residential purposes was impractical and an unnecessary hardship unique to the property, entitling owner to a variance.

This Court reversed, determining that the property owner failed to show that he could not make reasonable use of the property as a residence. The Supreme Court affirmed this Court, albeit on different reasoning. The Supreme Court noted that the trial court failed to take into account that a number of the properties that the trial court cited as the basis for its ruling were in a district that was zoned commercial. It held that owner's request for a variance had to be denied because:

Following the trial court's decision would result in an absurd holding that nowhere in Pennsylvania could there be mixed use of zoning districts which include residential use on busy, and perhaps noisy, streets. [Owner] has not shown that an unnecessary hardship will result if he is not granted a variance. The surrounding properties comply with the Zoning Ordinance. There has been no showing that there is a hardship "unique or peculiar to the property as distinguished from a hardship arising from the impact of zoning regulations on an entire district."

Wilson, 594 Pa. at 429, 936 A.2d at 1068 (citations omitted).

Although the Board and trial court in this matter did not have the benefit of our Supreme Court's decision in Wilson, we conclude that the Board and the trial court committed the same error as the trial court in Wilson. The Board found in this matter, based on the testimony of Zola's expert, Kenneth Temboksi, that the highest use of the property would in fact be commercial in that the same would no longer be suitable for residential purposes due to the immediate commercial district which had grown across the street from the premises. In addition, the Board determined that the fact that the lot upon which the property is located abuts the commercial district across Susquehanna Boulevard also made the property unique. In response to the evidence that the prior owners had in fact lived in the residence located on the property, the Board found that the circumstances had changed and the Board believed that the premises could no longer be reasonably used as a residence based upon the change of circumstances in the neighborhood. The Board found further that the hardship was not created by Zola but by the zoning change across Susquehanna Boulevard. Thus, the Board makes clear in its findings and conclusions that its grant of the variance was based on the heavy commercial uses across Susquehanna Boulevard.⁷

The trial court upheld the Board's grant of the variance based first upon its conclusion that there were unique physical circumstances or conditions peculiar to the property. In support of this conclusion, the trial court determined that the property was located in a predominately non-residential neighborhood with commercial uses directly across from the property on the opposite side of

⁷ The Board makes this point even clearer in its brief to this Court in opposition to this appeal.

Susquehanna Boulevard and on the same side of Susquehanna Boulevard as the property, there was a mix of residential and business uses with non-residential uses. The trial court concluded that these circumstances prohibited the property from being conducive to residential living.

Next, the trial court concluded that the physical conditions made it impossible to reasonably use the property in strict conformity with the Ordinance. The trial court reasoned as follows:

In the case at hand, Kenneth Temborski concluded that residential use of the property is not impossible, but not practical or plausible given the location of the property and its surroundings. Mr. Temborski stated that through selling the property his investigation revealed that the sellers were selling the property because it could not be used as zoned, and was not conducive to residential living based upon its current location.

Although the property is zoned for residential use, it is located on a major state highway surrounded by commercial uses that are dissimilar and disharmonious with residential use. As such, it is not practical or reasonable to use the property for residential purposes. Therefore, the second part of the variance test has been met based upon substantial evidence, and the zoning Board was correct in concluding such.

The law, as applied to the facts of the case, indicates that the second part of the variance standard has been met out of necessity for reasonable use of the property with similar nearby uses.

Trial Court Opinion at 7-8.

As stated previously, the Supreme Court indicated in Wilson that, even on a busy and noisy street, it is improper to grant a variance to convert a residence into a business because of commercial uses in the area when the commercial uses comply with the zoning ordinance. Herein, Susquehanna Boulevard is the dividing line between the R-1 Residential District and B-1

Business and Residential District. The commercial uses across Susquehanna Boulevard are in a different district zoned for both commercial and residential uses and thus are permitted uses in that district. Therefore, the surrounding properties comply with the Ordinance. While the residential use of the property may seem impractical due to the close proximity of the commercial uses, as in Wilson, this fact does not satisfy Zola's burden of proving that there is a hardship "unique or peculiar to the property as distinguished from a hardship arising from the impact of zoning regulations on an entire district." Wilson, 594 Pa. at 429, 936 A.2d at 1068. As such, Zola has not shown that an unnecessary hardship will result if he is not granted a variance.

In short, based on Wilson, Zola failed to prove that there were circumstances or conditions peculiar to his property or that he could not make reasonable use of the property as a residence. As Zola has failed to prove all the criteria required for the grant of a variance, the trial court erred in affirming the Board's decision.

In addition, we further hold that the trial court abused its discretion by addressing the issue of whether Zola's proposed use of a residence for a professional office in the R-1 Residential District is a use permitted by right without Board approval pursuant to the Ordinance. First, as pointed out by the Board, the legal notice for the hearings before the Board only referred to a zoning use variance and not to the issue of whether the use was permitted as of right.⁸ Thus, the Board recognized that the only issue properly before it for consideration was whether Zola was entitled to a variance. Second, the Board specifically declined to address the issue of whether the use was permitted by right; therefore,

⁸ See Section 908 of the MPC, 53 P.S. §10908.

the Board did not make any findings or conclusions of law with respect to this issue. Finally, Objectors did not raise this issue on appeal to the trial court.

Accordingly, the trial court's order is reversed.⁹

JAMES R. KELLEY, Senior Judge

⁹ Based on our resolution of this matter, we need not address the remaining issues raised by Objectors in this appeal.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anthony Dixon and Kathleen	:	
Dixon, his wife, Ellen Wetterau,	:	
Marlene E. Kadany and	:	
Norbert Kotzer,	:	
	:	
Appellants	:	
	:	
v.	:	No. 185 C.D. 2008
	:	
Zoning Hearing Board of	:	
The Borough of West	:	
Hazleton and Daniel E. Zola	:	

ORDER

AND NOW, this 18th day of November, 2008, the order of the Court of Common Pleas of Luzerne County in the above-captioned matter is reversed in accordance with the foregoing opinion.

JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anthony Dixon and Kathleen :
Dixon, his wife, Ellen Wetterau, :
Marlene E. Kadany and :
Norbert Kotzer, :
Appellants :
v. : No. 185 C.D. 2008
: Argued: September 11, 2008
Zoning Hearing Board of :
The Borough of West :
Hazleton and Daniel E. Zola :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE SMITH-RIBNER

FILED: November 18, 2008

I respectfully dissent. The order of the Court of Common Pleas of Luzerne County should be affirmed because it correctly upheld the decision of the Zoning Hearing Board of West Hazleton to grant Daniel E. Zola (Zola) a variance to use his residential structure as a professional law office. The Board made the necessary credibility determinations and resolved conflicts in the testimony, and its findings are supported by the record. *See Nettleton v. Zoning Board of Adjustment of City of Pittsburgh*, 574 Pa. 45, 828 A.2d 1033 (2003) (restating principle that zoning board is the sole judge of credibility). It voted to grant Zola a variance, subject to conditions with respect to parking and screening, and upon appeal by Appellants the trial court conducted a hearing and affirmed the Board's order after finding that it did not commit an error of law or an abuse of its discretion.

The subject property is located at 129 Susquehanna Boulevard, West Hazleton, in the R-1 zoning district, which permits, among other things, a home occupation and a professional office maintained in a residence as defined in Section 115-3B of the Zoning Ordinance. Zola's credited testimony shows that at the time of his purchase of the property he believed it to be zoned for professional offices permitted as of right without Board approval. The trial court found Zola's testimony to be fortified by the fact that Pennsylvania licensed real estate selling agent, Kenneth Temborski, testified that the prior owner used the property for an E-Bay business, that the property was located in a mixed business area, that he listed the property as being zoned for mixed business uses and that the purchase price was based upon a commercial value. After his purchase, Zola was granted a permit by the Zoning Officer to make interior renovations to use the residence on the property as a professional office.

After reviewing variance standards set forth in Section 910.2 of the Pennsylvania Municipalities Code, 53 P.S. §10.910.2, *see also Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 462 A.2d 637 (1983), the trial court determined that Zola met all of the standards and that he was entitled to the variance to use his property as a professional office. The trial court concluded that the property is located in a predominantly non-residential neighborhood and its physical characteristics do not coincide with the other properties within the zoning district, thereby rendering it nonconducive to residential living. The property is surrounded by commercial uses, which is a condition sufficient to meet variance criteria that physical conditions make it impossible to reasonably use the property in strict conformity with the Zoning Ordinance.

The real estate agent testified that the sellers could not use the property as zoned and that it was not conducive to residential living because of its

location on a major state highway surrounded by commercial uses dissimilar and out of harmony with residential use. Moreover, as determined, Zola did not create the necessary hardship that exists by virtue of the property's characteristics; his proposed use is harmonious with the neighborhood and will produce no adverse impacts upon it; and the variance represents the least modification possible to afford Zola relief under the Zoning Ordinance. According to the trial court, he seeks a use similar to that of a home occupation.

I agree that the case law provides as the majority indicated with regard to the variance standards. I disagree with the majority, however, that *Wilson v. Plumstead Township Zoning Hearing Board*, 594 Pa. 416, 936 A.2d 1061 (2007), clearly requires a reversal of the trial court's order in this case. The Supreme Court in *Wilson* affirmed this Court's order to uphold denial of a variance to the applicant for his failure to show unnecessary hardship or otherwise to meet the variance standards where the applicant's property could be used for residential living despite the surrounding dissimilar and commercial property uses and those on U.S. Route 611. On the other hand, the Supreme Court recognized that some circumstances might exist even where a landowner purchases property knowing of its zoning restrictions but nonetheless may be entitled to a variance because the hardship is not considered to be self inflicted.

The landowner in *Wilson* purchased the residential property knowing the zoning restrictions applicable thereto. He applied for a building permit based upon his representation that the property would be used as a residence with a home occupation, or a use permitted in the R-2 zoning district. An enforcement notice was issued, however, after zoning officials discovered that the property was being used not as a residence but solely as an accounting office. In the present case, Zola purchased the property believing that the Zoning Ordinance permitted his proposed

use; the property was advertized and listed by the real estate agent as being located in a mixed business area; and the agent credibly testified that the purchase price was based upon a commercial value. Significantly, after his purchase, Zola was granted a permit by the Zoning Officer to make interior renovations to use the residence as a professional office. He did not misrepresent his intentions. For all of these reasons and more, this case is distinguishable from *Wilson*, and Zola should be allowed a variance to use his property as proposed. I also note that the Borough Council amended the Zoning Ordinance on June 10, 2008 to define a "professional office" maintained in a residence and to clarify that the professional, Zola in this case, is not required to reside in the property.

DORIS A. SMITH-RIBNER, Judge