

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| University of Scranton | : | |
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| v. | : | |
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| Zoning Hearing Board of the City of Scranton | : | |
| | : | |
| v. | : | No. 2024 C.D. 2008 |
| | : | Argued: September 14, 2009 |
| Thomas Hashem, | : | |
| | : | |
| Appellant | : | |

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: October 19, 2009

Thomas Hashem (Hashem) appeals from the September 19, 2008, order of the Court of Common Pleas of Lackawanna County (trial court), which reversed the decision of the Zoning Hearing Board (ZHB) of the City of Scranton to the extent the ZHB determined that a prior variance it granted to Hashem in 2006 included use of the basement in his commercial building, not merely the first floor of the structure, as a restaurant/bar. We affirm.

Hashem is the owner of contiguous parcels located at 1206 Mulberry Street and 326-328 North Webster Avenue (the property) in the city of Scranton. The property abuts the campus of the University of Scranton (university). Hashem previously filed several variance requests with respect to the property. In September

2003, the ZHB granted Hashem's zoning application for setback variances, which indicated that he wished to construct a commercial building with parking in front. Thereafter, in November 2004, the ZHB granted Hashem's use variance application, so that a one-story restaurant/bar could be placed on the property. Then, in March 2006, Hashem, through a planning and engineering consultant, filed an application with the ZHB seeking a variance for a commercial use spanning both C-N (Neighborhood Commercial) and R-2 (Medium Density Residential) zoning districts.¹ Hashem also requested variances from certain setback requirements. The plans that Hashem submitted in support of the 2006 use and setback variances showed a one-story commercial building, 3,900 square feet in size, with a basement of equal size to be used for "receiving."

Upon inspection of the property in April 2008, Zoning Enforcement Code Officer Michael J. Wallace learned that the basement of the commercial building was being used as a game room with a service bar, which Wallace considered over-building. Wallace also determined that the added use required parking spaces beyond the twelve on site. By letter dated April 15, 2008, Wallace cited Hashem for exceeding the previous ZHB decision, for over-building and for having inadequate parking for a restaurant or tavern in the applicable zoning district. The letter informed Hashem that if he did not file plans "for correct construction" within ten days, formal enforcement action would begin against him. On April 25, 2008, Hashem filed an application for a variance and a special exception, as well as

¹ The zoning officer apparently directed Hashem to reapply for the use variance because the 2004 variance was inactive for more than twelve months.

an appeal from the cease and desist order. Hashem stated in this application that his pizzeria, known as Goodfellas, hoped to occupy approximately 2,500 square feet of the basement for a commercial use.

At the May 14, 2008, ZHB hearing, at which Hashem and his counsel appeared, and the university, through counsel, objected, the ZHB agreed to frame the issue as whether the use of the basement for a bar/restaurant exceeded the ZHB's approval granted in 2006. By unanimous vote, the ZHB determined that Hashem's use of the additional square footage did not exceed its 2006 zoning approval.² The ZHB also granted Hashem's special exception request to reduce the number of required parking spaces.³

² The ZHB specifically found on this issue:

6. The Plans submitted for the 2006 Variance show a thirty-nine hundred (3,900) square foot building with a basement to be used for receiving/storage. Applicant now seeks to use the basement (about 2,500 square feet) for a restaurant/bar and sought an interpretation as to whether that use was included in the 2006 Variance or whether a Variance to expand such use to the basement was necessary.

7. By a vote of 5-0, the [ZHB] found the 2006 Variance grant did include the basement. Therefore, the only issue before the [ZHB] was for additional parking required by use of the twenty-five hundred (2,500) square feet.

(ZHB's Findings of Fact Nos. 6-7, op. at 2.)

³ The question of whether Hashem properly received a special exception for reduction of parking spaces required by the additional square footage is not at issue in this appeal.

The university appealed the ZHB's decision to the trial court, which took no additional evidence. By order dated September 19, 2008, the trial court directed: "The use of the Property, namely the contiguous parcels at 1206 Mulberry Street and 326-328 North Webster Avenue, shall be restricted to that of a one-story restaurant to occupy no more than 3900 square feet, in accordance with the use variance of 2006." (*University of Scranton v. Zoning Hearing Board of the City of Scranton v. Thomas Hashem*, Order dated September 19, 2008.) Hashem appealed to this court, and, on April 13, 2009, the trial court issued an opinion in support of its order.

On appeal here, Hashem queries whether the trial court committed an error of law by reversing the ZHB's decision that Hashem had not exceeded the use variance granted to him in 2006.⁴ In support of his position, Hashem contends that, in 2008, a unanimous ZHB concluded that the use variance granted to him in 2006 extended to the entire structure and not simply to the first floor. According to Hashem, this most recent determination should end the question of whether he is entitled to use 6,400 square feet, as opposed to 3,900 square feet (or the first floor of the structure), for restaurant/bar purposes, because the trial court took no additional evidence on the issue and incorrectly substituted its judgment for that of the ZHB.

In its opinion, the trial court thoroughly and correctly analyzed the issue of the scope of the use variance granted by the ZHB to Hashem in 2006.

⁴ Our scope of review in a zoning case, when the trial court takes no additional evidence, is limited to a determination of whether the ZHB committed an error of law or abused its discretion. *Whitpain Township Board of Supervisors v. Whitpain Township Zoning Hearing Board*, 550 A.2d 1355 (Pa. Cmwlth. 1988), *appeals denied*, 525 Pa. 639, 578 A.2d 932 (1990). The ZHB commits an abuse of discretion when its findings of fact are unsupported by substantial evidence. *Id.*

Accordingly, finding neither an error of law nor an abuse of discretion, we affirm the trial court's order and adopt the well-reasoned opinion of Senior Judge Harold A. Thomson entered in *University of Scranton v. Zoning Hearing Board of the City of Scranton v. Thomas Hashem* (No. 08 CV 3910, filed April 13, 2009).

ROCHELLE S. FRIEDMAN, Senior Judge

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 Appellant :

ORDER

AND NOW, this 19th day of October, 2009, the order of the Court of Common Pleas of Lackawanna County, dated September 19, 2008, is hereby affirmed. This Court adopts the analysis of Senior Judge Harold A. Thomson's opinion for purposes of appellate review and affirms the trial court's order on the basis of the opinion issued in *University of Scranton v. Zoning Hearing Board of the City of Scranton v. Thomas Hashem* (No. 08 CV 3910, filed April 13, 2009).

ROCHELLE S. FRIEDMAN, Senior Judge

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UNIVERSITY OF SCRANTON

: IN THE COURT OF COMMON PLEAS

Appellant

: OF LACKAWANNA COUNTY

: CIVIL DIVISION

v.
ZONING HEARING BOARD
OF THE CITY OF SCRANTON

v.

Appellee

THOMAS HASHEM

Intervenor

FILED FOR RECORD
2009 APR 13 A 10:13
MARY F RINALDI
LACKAWANNA COUNTY
NO. 08 CV 3910

OPINION

THOMSON, S.J.

On June 12, 2008, the University of Scranton filed a Notice of Appeal of the Zoning Hearing Board of the City of Scranton Decision dated May 14, 2008. Oral Argument was heard by this Court, and an order partially granting the Appeal was issued on September 19, 2008. Thomas Hashem filed a Notice of Appeal to the Commonwealth Court of Pennsylvania on October 16, 2008. This opinion is filed in compliance with Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure.

SCAN

I. BACKGROUND

The property at issue is owned by Thomas Hashem ("Intervenor"), and is located at 326-328 North Webster Avenue, Scranton, Pennsylvania. See Brief of Zoning Hearing Board of the City of Scranton in Opposition of Land Use Appeal, pg. 1. Three Variances have been issued with respect to the property. *Id.* In September 11, 2003, a Variance was granted for a commercial building, and on November 10, 2004, a Variance for a one story restaurant/bar was issued. *Id.* The University of Scranton owns property surrounding the property at issue, and was listed as an effected property owner on the application for the 2003 variance but not for the 2004 variance. See Brief of University of Scranton in Support of Land Use Appeal, pg. 4. The University of Scranton was not notified of the hearing for the 2004 variance, therefore was not present, and the variance was approved on November 15, 2004. *Id.* The 2004 variance expired due to inactivity, and Mr. Hashem reapplied for a variance on March 23, 2006. *Id.* The University of Scranton again was omitted as an effected party, and did not receive notice of the hearing. *Id.* at 5. Mr. Hashem submitted plans with his application depicting a one story commercial building called "Goodfellas Pizzeria" utilizing 3900 square feet, with a basement to be used for "Receiving." *Id.*

The Variance at issue in the present litigation was issued on April 12, 2006 for a restaurant/bar with several setback Variances. After April 12, 2006, a restaurant/bar was constructed on the premises, which included a basement bar. See Brief of Zoning Hearing Board of the City of Scranton in Opposition of Land Use Appeal, pg. 2. On March 26, 2008, a Stop Work Order was issued to Mr. Hashem for exceeding the 2006 Zoning Hearing Board's Variance. *Id.* Mr. Hashem appealed the Stop Work Order ,

and also sought a Special Exception and/or Variance to expand a nonconforming use, and a Special Exception for relief from parking requirements. Id.

On May 14, 2008, a hearing was conducted by the Zoning Board. Id. At the hearing, the Zoning Board's solicitor stated that the 2006 zoning approval "seems to be for a 3900 square foot commercial building." See Transcript of May 14, 2008 Scranton City Zoning Hearing, pg. 13. The solicitor went on to say that the approval was also based on the sketches submitted with the 2006 application, which indicated that the first floor of the building would be used for the commercial purposes, but not the basement. Id. at 14. The Board found that the 2006 Variance included the use of the basement for the purposes of a restaurant bar. See Brief of Zoning Hearing Board of the City of Scranton in Opposition of Land Use Appeal, pg. 2. The board further granted a Special Exception to permit a reduction of the required parking spaces for the facility. Id.

The University of Scranton appealed the decision of the Zoning Hearing Board. In an order dated September 19, 2008, this Court found that the use of property, namely the contiguous parcels at 1206 Mulberry Street and 326-328 North Webster Avenue, should be restricted to that of a one-story restaurant to occupy no more than 3900 square feet in accordance with the use variance of 2006. The Intervenor, Mr. Hashem appealed the decision of this Court on October 16, 2008.

II. DISCUSSION

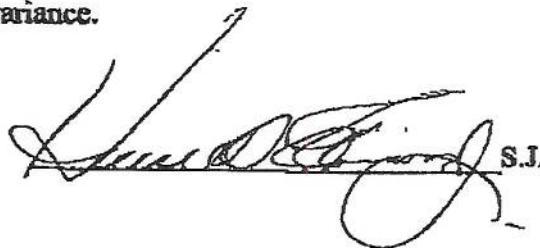
An applicant for a variance asks for permission to violate a zoning ordinance. Boeing Co. v. Zoning Hearing Bd. of Ridley Tp., 822 A.2d 153 (Pa.Cmwth.Ct.2003). An applicant must demonstrate the following to establish entitlement to a zoning variance:

- (1) an unnecessary hardship stemming from unique physical circumstances or conditions of the property will result if the variance is denied;
- (2) because of such physical circumstances or conditions, 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 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.

Township of Birmingham v. Chadds Ford Tavern, Inc., 572 A.2d 855 (1990). A variance should not be granted solely to maximize the profitability of the property. Ken-Med Associates v. Board of Township Supervisors of Kennedy Township, 900 A.2d 460,466 (2006). A variance will only be granted for substantial, serious, and compelling reasons. Valley View Civic Ass'n v. Zoning Board of Adjustment, 462 A.2d 637 (1983). A variance should not be granted solely to permit an owner to obtain a greater profit from the use of a property. A.R.E. Lehigh Valley Partners v. Zoning Hearing Board of Upper Merion Township, 590 A.2d 842 (Pa.Cmwith.Ct.1991)

In the present case, a variance for a 3900 square foot commercial building to be used for a restaurant bar was granted on April 12, 2006. The drawings submitted with the application depicted a 3900 square foot restaurant/bar with a basement receiving area. At some point prior to March 26, 2008, Mr. Hashem expanded the proposed 3900

square foot restaurant/bar into the basement for a total of 6400 square feet of commercial space without seeking a new variance. A Zoning Enforcement Officer for the City of Scranton issued a Stop Work Order on March 26, 2008 for exceeding the 2006 variance. In issuing the variance in 2006, the Zoning Hearing Board found that the 3900 square foot commercial building represented the minimum variance required for relief. However, at the hearing on May 14, 2008, the Zoning Hearing Board found that the 2006 variance included use of the basement for a restaurant/bar. If a 3900 square foot restaurant/bar constituted the minimum variance required for relief, a 6400 square foot restaurant/bar exceeds the minimum variance required for relief. This Court found that the Zoning Hearing Board committed an error of law by finding that the 2006 variance encompassed a 6400 square foot restaurant/bar, when the application clearly detailed a 3900 square foot facility and a 3900 square foot facility was approved. As a result of that finding, this Court issued an order restricting use of the property to the original 3900 square feet of the 2006 variance.



S.J.