

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Doug Varner, d/b/a Mindsight, LLC,	:	
Appellant	:	
	:	
v.	:	No. 2179 C.D. 2007
	:	SUBMITTED: April 11, 2008
The Zoning Hearing Board of the	:	
Borough of Indiana	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: October 20, 2008**

Doug Varner, d/b/a Mindsight, LLC, appeals from the order of the Court of Common Pleas of Indiana County (common pleas), which affirmed the decision of the Zoning Hearing Board of the Borough of Indiana (ZHB). The ZHB denied Varner’s application for variance by equitable estoppel from the applicable use and sign regulations in order to place two electronic message billboards on the side of a building in the Borough. Varner contends that he presented sufficient evidence to support his entitlement to a variance.

Varner’s business, Mindsight, LLC, advertises area businesses and provides community service messages on electronic billboards (signs). In the beginning of March, 2006, after identifying a building at the corner of Seventh and

Philadelphia Streets (the 700 Shop) in the Borough, located in the C-1 Retail Business and Commercial District, as a suitable and advantageous location for mounting two 4-feet by 8-feet electronic signs and acquiring from the building's owner the right to use two exterior walls, Varner met with Otto Peterson, an official in the Borough's Zoning Office, and Dave Kirk, the Director of the Zoning Office, to receive a zoning permit. Although Peterson was not aware at that time that Varner needed a zoning permit to hang the signs, he nevertheless told Varner to obtain a building permit from the Indiana County Office of Planning and Development (OPD) and then to return to the Zoning Office with specific plans for the signs so the Zoning Office could assure that Varner complied with the proper ordinances. Although Peterson specifically told Varner that he needed to provide the Zoning Office with specifications, neither Peterson nor Kirk was ever shown any specifications nor the photographs Varner later shared with OPD. Following this meeting, Varner applied to the OPD for and eventually received a building permit. He also sought and obtained approval from the Pennsylvania Department of Transportation because the building fronts on a state highway. Based on these permits and without returning to the Borough for further approvals, Varner obtained and mounted the signs at a cost of several thousand dollars.

Three days later Borough Manager, Ken Gabler, notified Varner that the signs must be permitted by the Borough. Varner applied for a zoning permit and the Borough denied his request on the grounds that the signs are not permitted uses in the C-1 District and that they do not comply with the sign regulations in Article 5 of the Zoning ordinance. Varner appealed this denial to the ZHB, contending that he received "misleading information from Borough personnel (zoning)." Following two hearings (the second to take testimony from Peterson and

M. J. Smith, the Building Code Official and Deputy Director for Indiana County), the ZHB concluded that Varner had failed to establish grounds justifying the requested variances on the basis of either hardship arising from unique physical characteristics of the property or equitable estoppel arising from conversations with Borough officials.

Varner then filed his Notice of Land Use Appeal with common pleas. Common pleas ordered the ZHB to make more specific Findings of Fact with respect to two issues:

[1] What information, if any, did Appellant provide to the Zoning Office, regarding the signs he wished to hang?

[2] What instructions, if any, did the Zoning Office give to Appellant, with respect to the steps Appellant needed to take in order to hang his signs?

Order of the Court of Common Pleas of Indiana County, dated April 25, 2007.

Following the order, the ZHB filed a second set of Findings of Fact. Varner then filed another Land Use Appeal. Common pleas did not take any new evidence and affirmed the decision of the ZHB.

Varner contends that ZHB's findings are not supported by substantial evidence and he argues that the evidence established his right to variances under the doctrine of equitable estoppel. In addition, Varner contends that because the ZHB's decision failed to include any reasoning as required by Section 908(9) of the Pennsylvania Municipalities Planning Code,¹ 53 P.S. § 10908(9), the ZHB has committed an error of law by capriciously disregarding material and competent evidence.

¹ Act of July 31, 1968, P.L. 805, *as amended*.

Our review in a zoning case, where common pleas has taken no additional evidence, is limited to determining whether the ZHB's findings are supported by substantial evidence or whether it based its decision on an error of law. *Zoning Hearing Bd. of Sadsbury Twp. v. Bd. of Supervisors of Sadsbury Twp.*, 804 A.2d 1274, 1278 (Pa. Cmwlth. 2002). Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* If the record demonstrates substantial evidence, the court is bound by the ZHB's findings which result from resolutions of credibility. *Id.*

Variance by estoppel in Pennsylvania zoning law is a doctrine which precludes municipal enforcement of a land use regulation. “[E]quitable estoppel [is] where the municipality intentionally or negligently misrepresented its position with reason to know that the landowner would rely upon the misrepresentation. Estoppel. . . is an unusual remedy granted only in extraordinary circumstances and the landowner bears the burden of proving his entitlement to relief.” *In re Krieder*, 808 A.2d 340, 343 (Pa. Cmwlth. 2002).

In order to apply equitable estoppel to a governmental agency, the party sought to be estopped (1) must have intentionally or negligently misrepresented some material fact, (2) knowing or having reason to know that the other party would justifiably rely on the misrepresentation and (3) inducing the other party to act to his detriment because of his justifiable reliance on the misrepresentation.

Cicchiello v. Bloomsburg Zoning Hearing Bd., 617 A.2d 835, 837 (Pa. Cmwlth. 1992).

Varner failed to provide a basis for variance under the doctrine of equitable estoppel. Most of Varner's supporting documents are dated April and May, 2006, illustrating that Varner could not have brought them to the meeting

with Peterson and Kirk in March, 2006. Both Peterson and Kirk testified that Varner did not provide either official with any photographs or specifications of the signs, leading them to believe Varner's appearance was merely a preliminary inquiry. Peterson testified that if he had seen photographs of the signs he would have told Varner that they were not permitted under Borough ordinances. In addition, Varner paid his initial five-thousand dollar deposit for the signs on April 12, 2006, two months before he applied for the Off Premise Outdoor Advertising Device Permit with the Pennsylvania Department of Transportation on June 11, 2006 and two weeks before he applied for his Building Permit from the OPD on April 27, 2006. Varner testified that he hung the signs himself, and although it may cause him inconvenience and minimal cost, he can re-hang the signs elsewhere. Thus, Varner did not rely upon any municipal approval to outlay funds for his advertising venture, nor did he experience hardship as a result of the information that he was provided by Peterson and Kirk.

Even though Peterson may have been initially confused or uncertain about whether a zoning permit was required to hang the signs, he nevertheless told Varner that he needed to return to the Zoning Office after receiving his building permit from the OPD in order to receive zoning approval to ensure he complied with all ordinances. Since it was made clear to Varner that he needed some sort of zoning approval before hanging the signs, the Borough did not negligently misrepresent its position, nor induce Varner to act to his detriment because of justifiable reliance. After a review of the record, we hold that the ZHB and the lower court committed no error of law and the findings were supported by substantial evidence.

Varner also argues that the ZHB capriciously disregarded material and competent evidence. “[W]here there is substantial evidence to support an agency’s factual findings, and those findings in turn support the conclusions, it should remain a rare instance in which an appellate court would disturb an adjudication based upon capricious disregard.” *Wintermyer, Inc. v. Workers’ Comp. Appeal Bd. (Marlowe)*, 571 Pa. 189, 204, 812 A.2d 478, 488 (2002). In addition, this court in *Taliaferro v. Darby Township Zoning Hearing Board*, 873 A.2d 807, 814 (Pa. Cmwlth. 2005), concluded that capricious disregard occurs only when the fact-finder has deliberately ignored relevant, competent evidence. *Taliaferro* is similar to the case at bar in that the court did not deliberately ignore certain expert testimony, but rather considered it and chose to reject it. *Id.* at 815-16. Here, the ZHB rejected as unpersuasive Varner’s testimony that he provided Peterson with photographs of his signs and that Peterson never told him he had to return to the Zoning Office for approval. Moreover, there is no requirement that the ZHB cite specific evidence in support of each of its findings; where the decision is clear and reflects the application of the law governing variances, the decision is sufficient. *Id.* at 816.

For all of the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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The Zoning Hearing Board of the :
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ORDER

AND NOW, this 20th day of October 2008, the order of the Court of Common Pleas of Indiana County in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge