IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Caroleanne Hensley and John Greisiger, Appellants	:	
v.	:	
West Rockhill Township Zoning Hearing Board and West Rockhill Township	:	No. 2475 C.D. 2009
	:	Argued: October 14, 2010

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: November 18, 2010

Caroleanne Hensley and John Greisiger (Appellants) appeal the November 9, 2009 order of the Court of Common Pleas of Bucks County (trial court) denying Appellants' application for a variance for a barn that they intended to use as a dog kennel. The issue before this Court is whether the trial court erred in determining that Appellants had not met their burden of proof in establishing the elements necessary to grant a variance, including failing to find that, pursuant to *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 554 Pa. 249, 721 A.2d 43 (1998), the zoning requirements create an unreasonable hardship on Appellants' pursuit of a permitted use within an existing building on the property. For the following reasons, we affirm the order of the trial court.

Appellants are owners of the property located at 32 Barndt Road, West Rockhill Township (Township), Bucks County, Pennsylvania. The property is made up of approximately 8.32 acres, and is located in an area zoned residential/agricultural. Improvements on the property include a single family dwelling, garage, barn, and paved parking area. Appellants purchased the property in May of 2008 with the intention of using the existing barn as a dog kennel for a dog care and boarding business. Under the Township's Zoning Ordinance, a kennel is a permitted use for the property, however, Section 405.A.A.-5.2 of the Zoning Ordinance states: "No animal shelter or runway shall be located closer than 200 feet to any property line or street line." At the time of purchase, Appellants claim to have relied on representations from their real estate agent that the barn was located 196 feet from the adjacent property line and 208 feet from the street line. While a distance of 196 feet is four feet too close to the property line for a dog kennel, Appellants claim that they did not plan to use that area for the kennel.

Appellants maintain that they were aware of the zoning requirements for kennels and had visited the property four or five times, but never sought to have the land surveyed prior to purchasing it. After purchasing the property, Appellants had the property surveyed, and learned that the barn was actually located approximately 160 feet from one of the adjacent property lines and only 145 feet from the street line. Accordingly, Appellants filed an application with the Township seeking a dimensional variance from Section 405.A.A.-5.2, in order to utilize the existing barn as a kennel.

A hearing was held before the West Rockhill Zoning Hearing Board (Board) on June 10, 2009. Appellants presented testimony and exhibits in support of their request for a variance. In addition to the testimony of Appellants, several of

Appellants' neighbors testified concerning their fears that the noise from the kennel would negatively affect the quiet, peaceful character of the neighborhood.

The Board found that Appellants failed to meet the first and fourth requirements of Section 1109a of the Zoning Ordinance. Specifically, the Board found that a unique physical circumstance did not exist on the property, and any hardship imposed upon Appellants was personal in nature, not a result of any unique physical attribute of the property. It also found that Appellants failed to prove that the proposed use would not alter the essential character of the neighborhood. Appellants appealed to the trial court which reviewed the hearing transcript, the Board's decision, and briefs from the parties. Ultimately the trial court denied the appeal because the Board's findings were supported by substantial evidence, and because the Board had not abused its discretion. Appellants appealed to this Court.[1]

As stated, Appellants seek a dimensional variance in order to use an existing barn as a dog kennel in a rural, residential neighborhood. "When seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations." *Hertzberg*, 554 Pa. at 257, 721 A.2d at 47. In this case, Section 1109a of the Zoning Ordinance provides, in relevant part:

> The Board shall hear requests for variances where it is alleged that the provisions of the Zoning Ordinance inflict unnecessary hardship on the applicant. . . . The Board may grant a variance provided the following findings are made where relevant in a given case:

[1] "In land use cases, such as this one, in which the trial court has taken no additional evidence, this Court's scope of review is limited to determining whether the decision of the [Board] was supported by substantial evidence and is free of legal error." *In re Boyer*, 960 A.2d 179, 181 (Pa. Cmwlth. 2008).

> 1. That there are unique physical circumstances or conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions, peculiar to the particular property and that the unnecessary hardship is due to such conditions, and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located;
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> 2. That 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 that the authorization of a variance is therefore necessary to enable the reasonable use of the property;
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> 3. That such unnecessary hardship has not been created by the applicant;
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> 4. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use of development of adjacent property, [nor] be detrimental to the public welfare; and,
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> 5. That the variance if authorized will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.
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> . . . .
>
> In granting any variance, the Board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purpose of this Ordinance.

Reproduced Record (R.R.) at 21a-22a.[2]

[2] The Zoning Ordinance and Section 910.2(a) of the Municipalities Planning Code (MPC). are identical in so far as the requirement of the first five findings that a zoning board must make. See Section 910.2(a) of the MPC, Act of July 31, 1968, P.L. 805, *as amended*, added by Section 89 of the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10910.2(a). The Zoning Ordinance adds a floodway provision which is not at issue in the present case.

Appellants' position is that they have met all of the requirements of Section 1109a of the Zoning Ordinance in that: 1) the unique physical circumstance that creates the unnecessary hardship is the location of the existing barn; 2) unreasonable hardship exists because the barn existed for more than fifteen years before they bought the property, and the cost to relocate the barn to another area of the property would be excessive; 3) they did not create the unnecessary hardship because the barn has been in its present location for more than fifteen years; 4) the granting of the variance will not alter the essential character of the neighborhood because the neighborhood is zoned residential/agricultural, which contemplates various agricultural uses, including a dog kennel; and, 5) granting this variance will represent the minimum variance that will afford relief because the barn already exists in its present location. On appeal, Appellants argue that the trial court failed to find that, pursuant to *Hertzberg*, the zoning ordinance worked an unreasonable hardship on their pursuit of a permitted use of the existing barn.

The first factor we address, pursuant to Section 1109a of the Zoning Ordinance, is whether Appellants' property has unique physical circumstances, and whether unnecessary hardship is due to such conditions. The record in this case is clear that the subject property does not have unique physical circumstances that create an undue hardship. The hardship now faced by Appellants was created by them. They bought the property at issue with the intention of using the existing barn as a kennel. At that time, they knew that the barn was at least four feet short of being compliant with the Zoning Ordinance. Due diligence would have called for a survey of the property prior to purchasing it, and would have revealed the fact that the location of the barn was much further from being compliant for use as a dog kennel. In addition, it is only Appellants' desire that places the kennel in the existing barn;

the property is more than 8 acres in size, and there are various locations on which a kennel can be built that would not require a variance.

The Pennsylvania Supreme Court held in *Hertzberg* that:

> To justify the grant of a dimensional variance, courts may consider multiple factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.

Id. at 263-64, 721 A.2d at 50. Further,

> while *Hertzberg* eased the requirements for granting a variance for dimensional requirements, it did not make dimensional requirements . . . 'free-fire zones' for which variances could be granted when the party seeking the variance merely articulated a reason that it would be financially 'hurt' if it could not do what it wanted to do with the property, even if the property was already being occupied by another use. If that were the case, dimensional requirements would be meaningless-at best, rules of thumb-and the planning efforts that local governments go through in setting them to have light, area (side yards) and density (area) buffers would be a waste of time. Moreover, adjoining property owners could never depend on the implicit mutual covenants that placing dimensional restrictions on all property would only be varied when there were compelling reasons that not to do so would create a severe unnecessary hardship.

Soc'y Created to Reduce Urban Blight v. Zoning Bd. of Adjustment of the City of Phila., 771 A.2d 874, 877-78 (Pa. Cmwlth. 2001). Finally,

> [e]ver since our Supreme Court decided *Hertzberg*, we have seen a pattern of cases arguing that a variance must be granted from a dimensional requirement that prevents or financially burdens a property owner's ability to employ his property *exactly as he wishes*, so long as the use itself is permitted. *Hertzberg* stands for nothing of the kind.

> *Hertzberg* articulated the principle that unreasonable economic burden may be considered in determining the presence of unnecessary hardship. It may also have somewhat relaxed the *degree* of hardship that will justify a dimensional variance. However, it did not alter the principle that a substantial burden must attend *all* dimensionally compliant uses of the property, not just the particular use the owner chooses. This well-established principle, unchanged by *Hertzberg*, bears emphasizing in the present case. A variance, whether labeled dimensional or use, is appropriate only where the *property*, not the person, is subject to hardship.

Yeager v. Zoning Hearing Bd. of the City of Allentown, 779 A.2d 595, 598 (Pa. Cmwlth. 2001) (emphasis in original) (quotation marks omitted).

Both the Board and the trial court considered the financial costs involved in bringing the barn into compliance. The trial court specifically considered *Hertzberg* and relevant case law, and concluded:

> personal financial costs, without more, are generally insufficient to justify the issuance of a variance. The Appellants' desire to use the barn as a kennel is understandable; however, that does not necessarily mean a 'hardship' exists. Accordingly, this court found that the [Board] did not abuse its discretion when it found that the projected cost for moving the barn did not constitute a hardship.

Tr. Ct. Op. at 7. We agree.

Appellants refer to *Appeal of Crawford*, 358 Pa. 636, 57 A.2d 862 (1948) to bolster their argument that moving the existing barn would be a practical difficulty and unnecessary hardship. In *Crawford*, the Supreme Court considered not only the high cost of moving an existing structure, but the spirit of the zoning ordinance, which was based on aesthetic considerations as well as concerns of a fire hazard. *Crawford* is not applicable here. In the present case, the reason for the

setback requirements for dog kennels in the Zoning Ordinance is to help minimize the increased noise levels that may occur, rather than simply preserving aesthetic value. Here, granting Appellants a variance would seem to go against the spirit of the Zoning Ordinance at issue.

Finally, even though *Boyer*, *Yeager*, and *Soc'y Created to Reduce Urban Blight* concern dimensional variances for structures that the applicant wanted to build, rather than existing structures such as the barn in the present case, we hold that there was no error because Appellants' property has ample room to construct another building in compliance with the Zoning Ordinance. Appellants' desire to use an existing barn does not give this property a unique physical circumstance that would require a reversal of the trial court/Board's decision. Therefore, Appellants' property does not meet the first element of Section 1109a of the Zoning Ordinance.

Because Section 1109a of the Zoning Ordinance authorizes the Board to grant a variance only when all of the listed findings are made, and the evidence in this case supports the trial court's conclusion that Appellants' request for a variance does not meet the unique physical circumstances requirement, we decline to address the remaining requirements of Section 1109a of the Zoning Ordinance.

Based on the foregoing, we hold that the trial court did not err in affirming the Board's denial of Appellants' application. The trial court's order is, therefore, affirmed.

JOHNNY J. BUTLER, Judge

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O R D E R

AND NOW, this 18th day of November, 2010, the November 9, 2009 order of the Court of Common Pleas of Bucks County is affirmed.

JOHNNY J. BUTLER, Judge