IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marisa R. Lauman and the Estate of William J. Lauman,	:	
Appellants	:	
	:	No. 331 C.D. 2008
v.	:	Argued: November 13, 2008
	:	
Salford Township Zoning Hearing Board	:	
	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge (P)
HONORABLE ROBERT SIMPSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: December 17, 2008**

This land use appeal involves a zoning board's decision to deny a side yard variance because the landowners created their hardship. Marisa R. Lauman and the Estate of William J. Lauman (Landowners) assign error in the Salford Township (Township) Zoning Hearing Board's (ZHB) conclusion that Landowners' two adjoining but separately taxed parcels merged into one lot. The ZHB determined Landowners' subsequent sale of one parcel improperly subdivided the lot thus creating the hardship from which they sought variance relief. Pursuant to the Pennsylvania Municipalities Planning Code (MPC),[1] variance applications must be denied where the appellant created an unnecessary hardship. We affirm on other grounds.

[1] Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §§10101-11202.

In 1993, Landowners purchased 1.449 acres of land (Subject Property) on Allentown Road, Salford Township, from Ray and Marlene Nase (previous owners). The Subject Property is located in a Residential Agricultural (RA-3) District, which permits single family detached dwellings. Presumably, Landowners simultaneously purchased previous owners' home on an adjoining parcel (house lot).

In 2005, Landowners entered into a sales contract for the Subject Property with BJ Homes, Inc. (Developer). The agreement was contingent on Developer obtaining a variance from the ZHB. Developer subsequently contacted Township solicitor for an opinion as to whether construction could occur on the Subject Property. Township solicitor responded the Subject Property existed as a separate parcel prior to the 2004 adoption of Zoning Ordinance §903 (relating to calculation of developable area) and was therefore a nonconforming lot. Pursuant to Zoning Ordinance §801,[2] Developer could build on the Subject Property. The

[2] Salford Township Zoning Ordinance (Zoning Ordinance) §801 provides:

> A lot which is not of the required lot area but which is of public record and in single and separate ownership; or which is assessed as a separate parcel for real estate tax purposes as of the date of application for Zoning Permit may be used for a permitted use in the district in which it is located, provided that all other requirements of the district are met. The Zoning Officer shall have the authority to determine whether a lot is a lot of record for purposes of issuing a Zoning Permit under this Section.

Reproduced Record (R.R.) at 95a (emphasis added).

solicitor cautioned, however, the Property would not meet the side yard requirements in an RA-3 district.[3]

In May 2006, Developer filed an application with the ZHB seeking a variance from the Zoning Ordinance's side yard setbacks in an RA-3 district. A hearing before the ZHB ensued.

Developer testified he wished to construct a single family, 2,500-square foot residence on the Subject Property. He stated the minimum lot requirement in an RA-3 district is two acres, but the Property is one and-a-half acres. Developer sought ZHB approval for side yard variances of 45 and 50 feet. Notably, Developer testified the Subject Property is not unique and he chose the particular home plan because he thought it would fit nicely on the Property; he has both larger and smaller home plans. Without elaboration, Developer further stated the Subject Property could not be reasonably developed in accord with the Zoning Ordinance and the grant of a variance would not adversely affect the neighborhood.

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[3] Relevantly, Zoning Ordinance §1102(C) provides:

> C. Side Yards
> …
> 2. On each lot other than a corner lot, there shall be 2 side yards having an aggregate width of not less than 150 feet neither side yard having a width of les than 50 feet.

R.R. at 114a.

Over Developer's objection, the ZHB admitted into evidence a letter from the Township Planning Commission. The letter stated the previous owner's father filed a subdivision plan in 1979 indicating the Subject Property would not be used as a building lot.[4] The ZHB also admitted the 1979 subdivision plan over Developer's objection.[5] The 1979 subdivision plan verifies the Township Planning Commission's records.

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[4] In part, the Township Planning Commission's letter explained:

> [T]his parcel was the subject of a prior sub-division plan in 1979…. During the subdivision process, the owner Mr. Paul Nase requested that he retain this small portion of land to be in common deed with the remainder of his farm on the other side of Allentown Road. Based on this request, the parcel in question in this application was joined in common deed with the lands of Paul Nase. It was specifically noted on the subdivision plans "to be retained by Paul Nase, Not to be used as a building lot."
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> It appears that Paul Nase sold this "lot" to [Landowners] in 1994 [sic] without completing a subdivision to divide this parcel from the property across Allentown Road as noted in the 1979 plans. Further the deed references a "LOT 2" which is not consistent with the 1979 drawings. Finally, the stipulation of the 1979 [plan] was not included in the deed that was created in 1994 [sic]. The lot of record as stated in the application was never approved by the township and created in direct violation of the subdivision agreement. Due diligence (title search) by the [Landowners] in 1994 should have uncovered that this lot had never existed previously.

Notes of Testimony (N.T.), 8/21/06, Ex. A. As explained above, Dale Ruster (Neighbor) testified Paul Nase is the father of Ray Nase (previous landowner). It appears Paul Nase transferred the Subject Property to his son who subsequently sold the Property to Landowners.

[5] Hearsay evidence, properly objected to, is not competent evidence to support a finding of fact. Walker v. Unemployment Comp. Bd. of Review, 367 A.2d 366 (Pa. Cmwlth. 1976). However, hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding of fact, if it is corroborated by any competent evidence in the record,
(Footnote continued on next page…)

Dale Ruster (Neighbor) also testified. He stated that previous owner's father, Paul Nase, represented to the Township during the 1979 subdivision approval process the Subject Property would not be built. Previous owners came into ownership of the Subject Property and subsequently sold it to Landowners. Landowners sold the house lot and retained ownership of the Subject Property. Of particular note, Neighbor testified the Subject Property is used as a hay field.

The ZHB found the Subject Property was not a legal non-conforming lot because Paul Nase subdivided his property which left the Property an undersized lot. When Paul Nase transferred the Subject Property to previous owners, the Subject Property and the house lot merged. Landowners subsequently created their own hardship by selling only the house lot. Accordingly, the ZHB denied Developer's variance request.

On Landowners' appeal, the Court of Common Pleas of Montgomery County (trial court) affirmed. Landowners appeal. Where the trial court took no additional evidence, our review is limited to determining whether the zoning board abused its discretion or committed an error of law. Alpine, Inc. v. Abington Twp. Zoning Hearing Bd., 654 A.2d 186 (Pa. Cmwlth. 1995). Where substantial evidence does not support the board's findings, the board abused its discretion and

(continued…)

but a finding of fact based on hearsay alone will not stand. Id. As noted above, a neighboring landowner corroborated the Township Planning Commission's assertions Paul Nase represented during subdivision proceedings he did not intend to build on the Subject Property.

reversal is warranted. Baker v. Chartiers Twp. Zoning Hearing Bd., 677 A.2d 1274 (Pa. Cmwlth. 1996).

Landowners assign error in the ZHB's application of the merger doctrine. They contend Section 801 of the Zoning Ordinance, above, permits construction on the Subject Property without compliance with the Ordinance's minimum lot requirements because the Property is separately owned and taxed. The merger doctrine, Landowners claim, is irrelevant.

The doctrine of merger of estates in land provides that whenever a greater estate and a lesser estate meet in the same person, the lesser estate is merged in the greater one. W. Goshen Twp. v. Crater, 538 A.2d 952 (Pa. Cmwlth. 1988). However, the merger doctrine has no application to the law of zoning and the construction of a zoning ordinance where the issue is the physical merger of parcels or lots of land. Id. Mere common ownership of adjoining parcels does not automatically establish a physical merger of two parcels for the purposes of determining whether those lots comply with zoning requirements. Tinicum Twp. v. Jones, 723 A.2d 1068 (Pa. Cmwlth. 1998). However, adjoining properties under common ownership can merge when a zoning ordinance provision renders one or more of the adjoining lots undersized, depending on the facts and circumstances of each case. Twp. of Middletown v. Middletown Twp. Zoning Hearing Bd., 548 A.2d 1297 (Pa. Cmwlth. 1988).

We recently reviewed the merger doctrine in Cottone v. Zoning Hearing Bd. of Polk Twp., 954 A.2d 1271 (Pa. Cmwlth. 2008). Succinctly, we explained:

> [i]n general, mere common ownership of adjoining properties does not automatically result in a physical merger of the properties for zoning purposes. On the other hand, adjoining properties under common ownership can merge when a zoning ordinance provision causes one or more of the adjoining lots to become undersized, depending on the facts and circumstances of each case. The focus of the inquiry is upon (1) when the properties in question came under common ownership and (2) the effective date of the applicable zoning ordinance.
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> Adjoining lots under separate ownership before a zoning ordinance enactment makes the lots too small to build upon are presumed to remain separate and distinct lots. Should those adjoining, undersized lots be thereafter acquired by a single owner, the burden is on the municipality to show the new common owner has merged the two lots into one. Otherwise, the result would be to permit separate development of each lot by any person other than the common owner.
>
> …
>
> On the other hand, lots are presumed to merge as necessary to comply with a zoning ordinance's lot size requirements where they are under common ownership prior to the passage of the ordinance. It is the landowner's burden to rebut this presumption by proving an intent to keep the lots separate and distinct. In doing so, the landowner's subjective intent is not determinative; rather, there must be proof of some overt or physical manifestation of intent to keep the lots in question separate and distinct.
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> …
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> In summary, if two adjoining, but separately-owned, lots are rendered undersized by a zoning ordinance enactment, the two properties will not be affected by the ordinance. Each lot will continue to be a

> lawful, non-conforming size for purposes of the zoning ordinance. If those two lots later come under common ownership, the burden is upon the municipality to prove that the new owner intended to use the two lots as one integrated parcel. On the other hand, if the same two adjoining lots are under common ownership when a zoning ordinance is passed that renders the property undersized, then the two lots are presumed to have merged. The burden is on the landowner to rebut the presumption.

Id. at 1275-77 (citations omitted).

Assuming the merger doctrine is relevant, Landowners contend the Township bore the burden of proving merger but failed to meet its burden. We agree.

Explained above, the issue of whether commonly owned adjoining parcels merged is dependent on the date on which the adjoining parcels come under common ownership and the effective date of the applicable zoning ordinance rendering the property undersized. Cottone. Here, the record shows the Subject Property became undersized in 1979, long before the Township's adoption of §903, relating to developable area calculations. See Notes of Testimony (N.T), 8/21/06, Ex. A ("[a]t the time of subdivision by [Paul Nase] it was felt that this parcel was too small to meet the zoning requirements at that time. Please note that the requirements for developable acreage, sewer, drainage, etc are much more stringent today than in 1979.").

In 1979, Paul Nase owned the undersized Subject Property. At some later point in time, previous owners obtained common ownership of the Subject Property and the house lot.[6] In accord with Cottone, Township bore the burden of proving the two parcels merged because the Subject Property was rendered undersized by a zoning ordinance adopted prior to common ownership of the two parcels. The Township, however, offered no evidence to prove previous owners' intended the two parcels to merge.

Similarly, Landowners purchased the Subject Property in 1993, and presumably the house lot at the same time. See Reproduced Record (R.R.) at 60a (Subject Property deed) and 19a-20a (Neighbor's testimony regarding Subject Property ownership). Because Landowners came into common possession of the Subject Property and the house lot after adoption of the applicable Zoning Ordinance rendering the Subject Property undersized, Township bore the burden of proving merger. Cottone. The Township failed, however, to produce evidence of some overt or physical manifestation of Landowners' intent to integrate the Subject Property and the house lot. Consequently, the ZHB erred by concluding the two properties merged.

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[6] Developer's inquiry to Township solicitor as to whether the Subject Property is buildable infers previous owners obtained common ownership of the house lot and the Subject Property in 1988, advising "[t]he lot in question … was split from an existing parcel … on January 1, 1988." R.R. at 36a. We note, however, Developer's letter to Township solicitor was not admitted into evidence before the ZHB. See N.T., 8/21/06; Original Record (O.R.) at Item 22, Exs. A1-5. It is a fundamental rule of appellate review that the court is confined to the record before it. McCaffrey v. Pittsburgh Athletic Ass'n, 448 Pa. 151, 293 A.2d 51 (1972); Andracki v. Workmen's Comp. Appeal Bd. (Allied E. States Maint.), 508 A.2d 624 (Pa. Cmwlth. 1986). Therefore, we may not consider Developer's letter to Township solicitor as proof previous owner came into common ownership of the Subject Property and house lot in 1988.

Our analysis, however, is not concluded. We may affirm the trial court on other grounds where the basis for our decision is clear on the record. Reardon v. Dep't of Transp., Bureau of Driver Licensing, 935 A.2d 63 (Pa. Cmwlth. 2007).

Section 910.2 of the MPC, 53 P.S. §10910.2,[7] grants zoning boards authority to grant a variance providing the applicant shows (1) unique physical circumstances or conditions of the property; (2) there is no possibility that the property can be developed in strict conformity with the ordinance; (3) the hardship was not self-inflicted; (4) the grant of a variance will not adversely impact the public welfare; and the variance is the minimum that will afford relief. Twp. of E. Caln v. Zoning Hearing Bd. of E. Caln Twp., 915 A.2d 1249 (Pa. Cmwlth. 2007).

Here, Developer failed to prove the Subject Property cannot be developed in strict conformity with the Zoning Ordinance. We note other permitted uses in an RA-3 district include agricultural activities. R.R. at 113a. Neighbor testified the Subject Property is used as a hay field, Id. at 21a, and Landowners conceded this point at oral argument. Thus, the Subject Property serves a permitted use in compliance with the Zoning Ordinance. Under these circumstances, Developer failed to prove the Subject Property requires a variance before it can be used in accordance with the Zoning Ordinance. 53 P.S. §10910.2(a)(2).

[7] Added by the Act of December 21, 1988, P.L. 1329.

In addition, Developer failed to prove the requested variance was the minimum that would afford relief. As noted above, Developer testified he has smaller home plans, but chose the 2,500 square foot home plan because he thought it would fit nicely on the Subject Property. R.R. at 11a. Developer failed to testify that smaller home plans would require the same side yard variances. Thus, the record lacks evidence the side yard variances sought were the minimum needed to afford relief. 53 P.S. §10910.2(a)(5).

Based on the foregoing alternate reasoning, we affirm.

ROBERT SIMPSON, Judge

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O R D E R

AND NOW, this 17th day of December, 2008, the order of the Court of Common Pleas of Montgomery County is **AFFIRMED**.

ROBERT SIMPSON, Judge