[J-94-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

JAMES T. SMALLEY,	:	No. 19 MAP 2002
	:	
Appellant	:	Appeal from the Order of the
	:	Commonwealth Court entered August 3,
	:	2001, at No. 58 CD 2001, affirming the
v.	:	Order of the Court of Common Pleas of
	:	Bucks County entered December 15,
	:	2000, at No. 00-00044-14-5
ZONING HEARING BOARD OF	:	
MIDDLETOWN TOWNSHIP,	:	
	:	
Appellee	:	SUBMITTED: May 16, 2002
	:	
INTERVENORS: DALE AND CONNIE	:	
CUMMINGS	:	

DISSENTING OPINION

MR. CHIEF JUSTICE CAPPY **Decided: October 23, 2003**

I agree that Appellant's home office became a valid and legal nonconforming use in 1991 and that the Zoning Hearing Board ("Board") and the courts below erroneously invoked "non-existent, technical restrictions" to counter such a finding. See Majority Opinion at 12. Nevertheless, I cannot agree that the correct disposition of this case is to issue the certificate of nonconforming use. Instead, for the reasons offered below, I would remand the matter to the Board to determine whether Appellant's use of the property during the relevant time period entitled him to a certificate of nonconforming use.

The majority opinion's ultimate disposition of this case -- to issue the certificate -- is premised on the fact that Appellant, James Smalley, established a lawful prior use of the property. The majority does not reach the question of natural expansion, since the Board

did not make any findings, "even in the alternative, that appellant's business had expanded beyond the bounds permitted under the natural expansion doctrine." Majority Opinion at 14. I do not believe, however, that the Board needed to make such alternative findings, since it concluded that Appellant was not entitled to the certificate of nonconforming use on the basis of his failure to obtain a use and occupancy permit. I agree with the majority that the Board erroneously denied Appellant's request on that basis; but this holding does not answer the question of whether Appellant's use of the property at the time he sought the certificate entitled him to a certificate of nonconforming use.

The law of zoning provides that "the use of property which the ordinance protects, or 'freezes,' is the use which was in existence at the time of the passage of the ordinance or the change of a use district but it offers no protection to a use different from the use in existence when the ordinance was passed." Hanna v. Board of Adjustment, 183 A.2d 539, 543 (Pa. 1962). This maxim is subject to the doctrine of natural expansion, which gives the property owner the right to expand "as required to maintain economic viability or to take advantage of increases in trade" so long as the expansion is not detrimental to the public welfare, safety and health. See Nettleton v. Zoning Bd. of Adjustment, 2003 WL 21697431, *2 n.3 (Pa. July 22, 2003); Silver v. Zoning Board of Adjustment, 255 A.2d 506, 507 (Pa. 1969).

The majority's remedy in this case -- to issue the certificate -- overlooks that Appellant was not requesting the certificate in 1991 when the ordinance first changed, but in 1999. Evidence presented before the Board indicated that the use of the property had changed in the intervening years. Therefore, it would appear that in 1999, when Appellant was actually seeking the certificate, he needed to establish that the use at that time was "frozen," i.e., the same as it was in 1991, or was within the doctrine of natural expansion. The Board made no findings of fact or law regarding the use of the property during that time period, since it denied Appellant's request on an alternative basis. The Board should

address this question so that it will not be deprived of an opportunity to determine whether the expansion of Appellant's use is detrimental to the public welfare, safety and health.[1] Otherwise, under the majority's approach, Appellant may receive a certificate of nonconforming use to which he is not entitled.

For these reasons, I believe the appropriate disposition of this case is to remand the matter to the Board to determine whether Appellant's use of the property during the relevant period is the same as it was in 1991 or within the doctrine of natural expansion. Accordingly, I respectfully dissent.

Mr. Justice Saylor joins this dissenting opinion.

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[1] The trial court looked at the question related to natural expansion and concluded that the change to the property was not within the parameters of the doctrine. As the majority alludes to in its opinion, the trial court's decision to review this issue was erroneous. See Majority Opinion at 14.

"In reviewing the decision of a zoning hearing board where the trial court has not taken any additional evidence, as occurred here, our review, like that of the courts below, is limited to determining whether the board abused its discretion or committed a legal error." Majority Opinion at 4-5 (citations omitted). Thus, the trial court's review of the Board's determination was limited by the findings of fact and conclusions of law made by the Board. Even though Appellant raised the issue before the trial court, the trial court exceeded this limited review when it decided the natural expansion question, since the Board did not make any findings of fact or conclusions of law on this issue. If the trial court determined that this question was necessary to the resolution of the case, then the proper remedy was a remand to the Board to make findings of fact and conclusions of law regarding that issue.