

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-11-23 : HEARING DATE: October 27, 2011

APPLICATION OF: :
Thomas and Melissa Culligan :

PROPERTY: :
2749 Audubon Road :
Audubon, PA 19403 :
Parcel No. 43-00-00931-00-7 :

OPINION, DECISION AND ORDER OF THE LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD

The applicants, Thomas and Melissa Culligan (hereinafter referred to as the “Applicants”), filed an application requesting a variance from Section 143-149 of the Lower Providence Township Zoning Ordinance in connection with construction of an in-law suite addition with an area of more than twenty-five percent of the area of the existing nonconforming building. The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board on October 27, 2011 at the Lower Providence Township Building. The Zoning Hearing Board members present were Eric Frey, James E. Dougherty, Thomas Borai and alternate member Joyce D. Cluley, who served as a voting member due to the absence of two other members of the Board. Also present were the Community Development Director, the Solicitor, and the Court Reporter.

FINDINGS OF FACT

1. The Applicants are Thomas and Melissa Culligan.
2. The Applicants are the owners of the subject property.
3. The subject property is located at 2749 Audubon Road, Audubon, PA 19403 (the “Property”). The parcel number is 43-00-00931-00-7.
4. The applicable zoning is R2, Residential District.

5. The Applicants were not represented by legal counsel.
6. The lot size of the Property is 25,193 square feet.

7. The present use on the Property is residential, which began in 1850.
8. Applicant Thomas Culligan testified as a witness in support of the application.
9. The following exhibits were marked at the hearing:
 - B-1 Application
 - B-2 Advertisement
 - B-3 Proof of publication
 - P-1 Packet of correspondence between Mr. and Mrs. Brian and Kristin Keaveney, 2715 Matlack Drive, Audubon, PA 19403 and the Lower Providence Township Manager and/or Solicitor
10. The existing residential dwelling prior to the addition which is the subject of the application is nonconforming, in that it does not comply with the required setbacks from Audubon Road.
11. In May 2010, the Applicants submitted to Lower Providence Township (the "Township") a residential building permit application for an addition to the existing single family residential dwelling.
12. The Applicants wished to build an addition to the existing dwelling to provide an in-law suite for Mrs. Culligan's parents which would enable necessary help and support for care of Mrs. Culligan's father who suffers from Parkinson's disease and dementia.
13. The Township approved the Applicants' plans for the addition and in May and/or June 2010 issued building, electrical, plumbing, and mechanical permits, at a total cost of \$1,299.60 per receipt of payment dated July 2, 2010.
14. Applicants proceeded with construction of the addition for the in-law suite in July 2010, and construction was completed in December 2010. All inspections were passed and the in-laws moved in to the new addition in December 2010.

15. During the May to June 2010 permit application process the Township did not inform the Applicants that their plans for the addition were in violation of the Township Zoning Ordinance.

16. Section 143-149 of the Township Zoning Ordinance provides that any expansion or extension of an existing nonconforming building shall not exceed 25% of the area of the existing nonconforming building and shall comply with all height, area, width, yard and coverage requirements of the applicable zoning district.

17. The addition to the Applicants' existing home does not comply with Section 143-149 of the Zoning Ordinance, as it significantly exceeds the 25% limitation on expansion of the existing nonconforming building.

18. In August 2011 the Applicants learned they were required to obtain a zoning permit in connection with the in-law suite in the new addition. In a letter dated August 29, 2011 the Township's Director of Community Development informed the Applicants that the new addition on the Property significantly exceeded the 25% limitation on expansion of the area of an existing nonconforming building and that the Applicants therefore were not entitled to a zoning permit for the in-law suite. The Township's Director of Community Development was not a staff member of the Township at the time the permits were issued for Applicants' construction of the new addition and was not involved in that process.

19. The Applicants had not previously known or been informed that the new addition violated the Zoning Ordinance, and instead relied on the Township's issuance of the permits for construction of the addition in May to June 2010.

20. In reliance on the Township's issuance of the permits for construction of the addition in May to June 2010, the Applicants proceeded with construction of the addition, which

the building permit application states has an estimated value in excess of \$200,000.00. If the Applicants had been informed at the time that construction of the new addition was in violation of the Zoning Ordinance they would have pursued other options

21. An adjacent neighbor, Brian Keaveney, 2715 Matlack Drive, Audubon, PA 19403, testified in opposition to the application.

22. Mr. Keaveney testified that he learned of the construction of the new addition on the Property in July 2010 when he returned from vacation, contacted the Township on the beginning of the construction of the addition, and was told that permits had been issued and that everything was legal.

23. Mr. Keaveney did not appeal the issuance of the permits for construction of the addition on the Property.

24. Mr. Keaveney believed that the new addition has had a negative impact on the proposed sale of his property.

25. Applicant Mr. Culligan testified that he has not heard any complaints about the addition from any other neighbor.

26. The Applicants exercised due diligence in attempting to comply with the law and acted in good faith regarding construction of the new addition.

27. The Applicants expended substantial unrecoverable funds in connection with the construction of the addition on the Property.

28. The period for appeal of the permits issued for construction of the addition expired without an appeal having been taken.

29. The new addition to the existing dwelling on the Property is consistent in appearance and design with the existing dwelling, does not adversely affect the character of the

surrounding neighborhood, and does not substantially or permanently impair the appropriate use or development of adjacent property or constitute a detriment to the public welfare.

DISCUSSION/CONCLUSIONS OF LAW

1. The Applicants have standing to appear before the Board regarding the requested relief.
2. The Applicants exercised due diligence in attempting to comply with the law, and acted in good faith, regarding construction of the new addition.
3. In reliance on the Township's issuance of permits for construction of the new addition on the Property, the Applicants expended substantial unrecoverable funds in connection with the construction of the addition.
4. The period for appeal of the permits issued for construction of the addition expired without an appeal having been taken.
5. Insufficient evidence was presented at the hearing to prove that the public, health, safety or welfare would be adversely affected by the new addition which was constructed pursuant to the permits issued by the Township. To the contrary, the addition to the existing dwelling does not adversely affect the character of the surrounding neighborhood, and does not substantially or permanently impair the appropriate use or development of adjacent property or constitute a detriment to the public welfare.
6. The Applicants are entitled to a variance and/or relief from the requirements of Section 143-149 of the Township Zoning Ordinance based on the theory of vested rights.

The Applicants have requested a variance from the requirements of Section 143-49 of the Lower Providence Township Zoning Ordinance in connection with the construction of the addition to the existing dwelling containing in-law quarters for Applicant Mrs. Culligan's parents

including her father who suffers from and needs extensive care for Parkinson's disease and dementia. The Applicants have requested a variance based on a vested right/equitable estoppel theory.

In Appeal of Kreider, 808 A.2d 340 (Pa. Commw. 2002), the court summarized claims seeking to prevent the enforcement of ordinances based on vested rights as follows:

A variance by estoppel is one of three labels assigned in Pennsylvania land use/zoning law to the equitable remedy precluding municipal enforcement of a land use regulation. Our courts have generally labeled the theory under which a municipality is estopped: (1) a "vested right" where the municipality has taken some affirmative action such as the issuance of a permit, (citations omitted); (2) a "variance by estoppel" where there has been municipal inaction amounting to active acquiescence in an illegal use, (citations omitted); or, (3) "equitable estoppel" where the municipality intentionally or negligently misrepresented its position with reason to know that the landowner would rely upon the misrepresentation, (citations omitted);

808 A.2d at 343. The Kreider court described the three classifications further by explaining that:

[E]xcept for the characterization of the municipal act that induces reliance, all three theories share common elements of good faith action on the part of the landowner: 1) that he relies to his detriment, such as making substantial expenditures, 2) based upon an innocent belief that the use is permitted, and 3) that enforcement of the ordinance would result in hardship, ordinarily that the value of the expenditures would be lost. (citations omitted).

Id.

In Petrosky v. Zoning Hearing Board of Upper Chichester Township, 485 Pa. 501, 402 A.2d 1385 (1979), the Pennsylvania Supreme Court outlined a five-pronged test to be applied in considering a vested rights case:

The five factors that must be weighed in determining whether one has acquired vested rights are:

- (1) [an applicant's] due diligence in attempting to comply with the law;
- (2) [an applicant's] good faith throughout the proceedings;

- (3) the expenditure of substantial unrecoverable funds;
- (4) the expiration without appeal of the period during which an appeal could have been taken from the issuance of the permit;
- (5) the insufficiency of the evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the use of the permit.

Petrosky, 485 Pa. at 507, 402 A.2d at 1388.

As noted in the above quote, the five part test is not a checklist. The list sets forth factors which must be considered so that each factor may be weighed in determining the correct outcome. Even if a factor is not met at all in a specific case, an applicant can still obtain a vested right if the weight of the other four elements tips the scale in his favor.

Factors one and two are met in this case because the Applicants proceeded with due diligence in attempting to comply with the law and did so in good faith. Prior to commencing any construction, the Applicants applied for and obtained from the Township a building permit, a mechanical permit, a plumbing permit and an electrical permit for construction of the proposed new addition on the Property. The Township never advised the Applicants that their plans for construction of the new addition for the in-law quarters were in violation of the Township Zoning Ordinance or otherwise required zoning relief or further approval. The Applicants commenced and completed the construction of the new addition pursuant to the permits issued by the Township, and the construction passed all inspections.

The third factor is satisfied because the Applicants expended substantial unrecoverable funds in reliance on the Township's issuance of the necessary permits and communications with the Township regarding construction of the addition. If the application is denied the Applicants

would be required to tear down or otherwise modify the addition at a very substantial monetary loss.

The fourth factor also is satisfied as no appeals were taken from the issuance of the permits for construction of the addition, and all appeal periods have expired.

The fifth factor is satisfied because there is an absence of injury to the public interest. Evidence was not presented that proved the addition has caused or would cause injury or adverse affect to individual property rights or the public health, safety and welfare. The addition is consistent in design and character with the existing dwelling, and does not adversely affect the character of the surrounding neighborhood, substantially or permanently impair the appropriate use or development of adjacent property or constitute a detriment to the public welfare.

The Board finds and concludes that based on the evidence presented by the Applicants the standards for granting a variance based on vested rights (and/or variance by estoppel or equitable estoppel) have been met and the requested relief should be granted.

DECISION

The decision of the Lower Providence Township Zoning Hearing Board by a 4-0 vote, as set forth in the Notice of Decision letter mailed on October 28, 2011, is as follows:

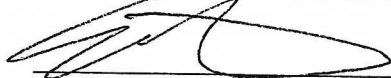
The application of Thomas and Melissa Culligan is **GRANTED**. The Board **GRANTS** a variance from Section 143-149 of the Lower Providence Township Zoning Ordinance with regard to the construction of the addition with an area of more than 25% of the area of the existing nonconforming building, in accordance with the application and documents submitted, based on vested rights, variance by estoppel and/or equitable estoppel.

Dated: December 10, 2011

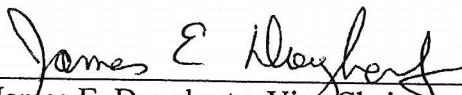
ORDER

The foregoing Findings, Discussion and Decision are hereby approved and ordered.

LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD



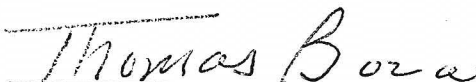
Eric Frey, Chairman



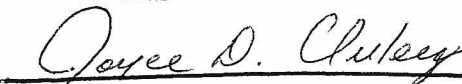
James E. Dougherty, Vice Chairman

William Donovan

Nancy McFarland



Thomas Borai



NOTE TO APPLICANT

There is a thirty (30) day period after the date of a decision for an aggrieved person to file an appeal in the Court of Common Pleas of Montgomery County to contest an approval or denial by the Zoning Hearing Board. If the Applicant has been granted Zoning Hearing Board approval, the Applicant may take action on said approval during the thirty (30) day appeal period; however, the Applicant will do so at his or her own risk. If the Applicant received Zoning Hearing Board approval, the Applicant must secure all applicable permits from Lower Providence Township within one (1) year of the date of the approval or the decision granting approval.