

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NOS.	Z-12-01	:	HEARING DATE:	June 28, 2012
		:		
		:		
APPLICATION OF:		:		
Wayne Arena		:		
		:		
PROPERTY:		:		
3501 Germantown Pike		:		
Lower Providence Township		:		
Collegeville, PA 19426		:		
Parcel No. 43-00-05305-00-7		:		

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

The applicant, Wayne Arena (hereinafter "Applicant") filed an application requesting a variance from the Sections 143-32 and 143-140 of the Lower Providence Township Zoning Ordinance in connection with the proposed use of a residential property as an office building and the construction of a related sign. The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the "Board") on June 28, 2012 at the Lower Providence Township Building. All members of the Board were present except for William Donovan, who was excused, Kathie Eskie, alternate, served in his absence. Also present were the Solicitor, the Zoning/Code Enforcement Officer and the Court Reporter.

FINDINGS OF FACT

1. The Applicant is Wayne Arena.
2. The Applicant is the owner of the subject property located at 3501 Germantown Pike, Collegeville, PA 19426 (hereinafter the "Property"). The parcel number is 43-00-05305-00-7.
3. The applicable zoning district is R-1, residential district.
4. The Applicant was represented by George J. Ozorowski, Esquire of Huhges,

Kalbrenner & Ozorowski, LLP.

5. The lot size is 70,952 square feet.

6. The building on the Property is presently not in use but is a home that was built in or around 1890.

7. Applicant purchased the property in 1997 and claims that he has been unable to sell the property as a residence.

8. Mr. Arena served as a witness in support of the application.

9. The following exhibits were marked at the hearing:

B-1 Application filed at Z 12-02

B-2 Advertisement

B-3 Proof of publication

A-1 Zoning application

A-2 Letter dated June 5, 2012 seeking amendment of application

A-3 Deed of Property dated June 18, 1997

A-4 Plumbing Permit and Application dated August 19, 2010

A-5 Electrical Permit and Application dated March 19, 2012

A-6 Zoning Hearing Plan

A-7 Case: Petrosky v. Zoning Hearing Board of Upper Chichester

A-8 Photographs of Property

10. Applicant proposes to use the Property for office space.

11. Applicant is unsure of the hours during which the space would be in use.

12. Applicant also wishes to erect a three by four foot (twelve square foot) double sided free standing sign.

13. Applicant further asserts that he is entitled to use the Property as office space pursuant to the vested rights doctrine.

14. There was no public comment regarding this application.

15. There is no unnecessary hardship requiring the grant of a variance.

16. There are no unique physical characteristics of the property which require the proposed use of a related sign.

DISCUSSION and CONCLUSIONS OF LAW

1. Applicant has standing to appear before the Board regarding the requested relief.

2. Denial of the requested relief will not impose an unnecessary hardship on the Applicant.

3. The hardship is self-imposed and is not due to the unique physical circumstances of the Property.

4. The requested relief is not necessary to enable the Applicant's reasonable use of the Property, does not represent the minimum that will afford relief, and does not represent the least modification possible of the regulation at issue.

5. The proposed use of the Property as an office building and the erection of a related sign are inconsistent in this well-known R-1 District.

6. The vested rights doctrine is inapplicable to warrant a variance particularly whereas here the alleged hardship was created by the applicant.

The Applicant has requested a variance from Sections 143-32 and 143-140 of the Lower Providence Township Zoning Ordinance. The request seeks relief as to the use requirements imposed in the R-1 Residential district, along with the related limitation on signs to one square foot.

Differing standards apply to use and dimensional variances. Generally, a variance requires the applicant to show that unnecessary hardship will result if a variance is denied, and that the proposed use will not be contrary to public interest. Hertzberg v. Zoning Bd. Of Pittsburgh, 554 Pa. 249, 257, 721 A.2d 43, 47 (1998) (citing Allegheny West Civic Council, Inc. v. Zoning Bd. Of Adjustment of the City of Pittsburgh, 547 Pa. 163, 167, 689 A.2d 225, 227 (1997)). The quantum of proof required to establish unnecessary hardship in the case of a dimensional variance is, however, lesser than when a use variance is sought. *Id.* at 258-59.

Regardless of the type of variance sought, the reasons for granting a variance must be substantial, serious, and compelling. POA Company v. Findlay Township Zoning Hearing Board, 551 Pa. 689, 713 A.2d 70 (1998); Evans v. Zoning Hearing Board of the Borough of Spring City, 732 A.2d 686 (Pa. Commw. 1999); Soteneanos, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 711 A.2d 549 (Pa. Commw. 1998). Pursuant to the Municipalities Planning Code the following must be found in order for the Board to grant the requested variance:

(1) That there are unique 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.

(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.

(3) That such unnecessary hardship has not been created by the applicant.

(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 or development of adjacent property, nor be detrimental to the public welfare.

(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. 53 P.S. § 10910.2.

In its review of these factors, the Board determined that a variance was inappropriate. In addition, the Board found that there were no unique circumstances that require a variance from the prescribed use or sign ordinances.

Nevertheless, an applicant who fails to obtain a variance based upon the above factors may still prevail if he/she can establish rights under the vested rights doctrine. The doctrine is analogous to the equitable concept of detrimental reliance designed to provide a remedy to one who, due to no fault of their own, suffers a harm. The vested rights doctrine provides relief to a landowner permitting him or her to use property without obtaining a variance Hitz v. Zoning Hearing Board of South Annville Township, 734 A.2d 60, 66 (Commw. 1999). The doctrine, however, only applies provided the applicant, in good faith relies upon a permit issued in error and incurs significant non recoverable costs. The doctrine is inapplicable where the permits in question were not issued in error or where an error was caused or created by the applicant or the applicant otherwise failed to act in good faith. In determining whether the Applicant is entitled to rely on the vested rights doctrine the following five factors must be considered:

- 1) his due diligence in attempting to comply with the law;
- 2) his good faith throughout the proceedings;
- 3) the expenditure by him 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. Highland Park Community Club of Pittsburgh v. The Zoning Board of Adjustment of the City of Pittsburgh, 509 Pa.605, 506 A.2d 887,891 (1986)(internal citations omitted).

Where an applicant does not act in good faith or with reasonable diligence to conform to the applicable zoning ordinance, the doctrine of vested rights will not apply. For example, in Highland Park, where applicant, when purchasing the property, knew it was in an R-2 district. The R-2 district precluded multi-family occupancy. Nevertheless, the applicant, without any regard for the residential restrictions in the zoning code, sought to house multi-families on the property. Thus, good faith was not found. Id. at 892.

In the instant case Applicant did not act in good faith or with due diligence and therefore the vested rights doctrine is inapplicable. The Applicant purchased the Property in 1997 with full knowledge that it was subject to the restrictions of an R-1 residential district. His knowledge is further established by his alleged attempts to sell the Property as a residence for twelve (12) years. Further, Applicant failed to apply for the needed changes in zoning until fifteen (15) years after the initial purchase. Fifteen (15) years can hardly be considered timely or acting with due diligence to comply with the law.

Finally, the permits upon which Applicant attempts to rely are not sufficient for a claim that he has a vested right to use the Property as an office. The application for a plumbing permit provided by Applicant's plumber merely stated that the space was used as an office. Clearly that statement was false when it was made as the building was vacant and never used as an office. Additionally, the application clearly states that the Applicant agrees that any permit issued based upon a misstatement or misrepresentation would result in a revocation of the permit. What is more, on its face, the plumbing permit application merely refers to a stack, sink and water closet alteration, all consistent with a residential use. The electrical permit application submitted by the applicant's agent expressly states the property was residential. The renovations made to the property on their face appeared consistent with an R-1 district. The permits were not issued in

error by the Township. Further, the fact that the permits themselves conflict evidences a clear lack of good faith reliance.

The Applicant cannot circumvent the applicable zoning ordinances by misrepresenting the use of the building, expending money under a permit issued based upon that misrepresentation and then complain that he was the victim of an error by the Township. Any error was caused by the applicant. To hold otherwise would be like the proverbial person who killed his parents only to complain that he was now an orphan.

Applicant knew that the Property was zoned R-1 for many, many years. The mere fact that his agents filed applications that included at best misstatements and at worst misrepresentations will not support a finding that the vested rights doctrine applies.

As the Property cannot be used for office purposes the related sign is not necessary and therefore a variance from the applicable sign requirements is also improper.

Accordingly, the Board finds that the application for a variance from Sections 143-32 and 143-140 of the Lower Providence Township Zoning Ordinance is denied.

DECISION

The decision of the Lower Providence Township Zoning Hearing Board by a 5-0 vote is as follows:

The application for a variance from Sections 143-139.A(5) and 143-140.B(1) of the Lower Providence Township Zoning Ordinance is denied.


Dated: June 28, 2012

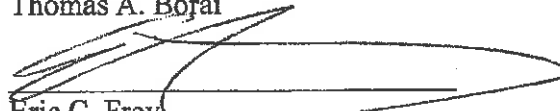
ORDER


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

**LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD**


Nancy McFarland, Chair


Thomas A. Borai


Eric C. Frey


Joyce D. Cluley


Kathie A. Eskie

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.