IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dorothy E. Coleman Revocable Trust, Appellant	:	
v.	:	No. 895 C.D. 2014
	:	Submitted: December 8, 2014
Zoning Hearing Board of the Borough of Phoenixville	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE LEADBETTER **FILED: January 6, 2015**

The Dorothy E. Coleman Revocable Trust (Trust) appeals from an order of the Court of Common Pleas of Chester County denying the Trust's appeal and sustaining the decision of the Zoning Hearing Board (ZHB) of the Borough of Phoenixville to deny the Trust's application for a variance, variance by estoppel, equitable variance and relief under a theory of vested rights. We affirm.

The subject property, located at 266 Morris Street, Phoenixville, PA, consists of a single-family residence and a garage to the rear of the property which originally contained space for two cars. In 1974, the previous owners, the Coines, sought zoning relief in order to allow a portion of the garage to be converted into an apartment for family use only. In November 1974, the ZHB rejected their

application. In 1977, however, the ZHB granted the Coines' application for the same relief but with the condition that the garage living quarters not be used as a rented apartment unit. Notwithstanding the fact that the Coines never appealed from that condition, sometime between 1977 and 2003, they constructed a second apartment within the garage without the benefit of either a building permit or a use and occupancy permit. Accordingly, the structure that began as a two-car garage, with no apartments, became a two-apartment garage building.

Interested in purchasing the property, the Trust, via trust administrator and realtor Ms. Coleman, made inquiries of the Borough before entering into an agreement of sale with the Coines. The Borough's code enforcement officer issued a December 2003 certificate of compliance and, without any further inquiry, the Trust purchased the property. Ms. Coleman resided in the permitted single-family dwelling. After the Borough's inspection of the two apartments and issuance of rental permits, the Trust rented the apartments to a succession of persons, unrelated to Ms. Coleman, for approximately ten years. During that time period, the Phoenixville Police Department has received many complaints involving the tenants and their friends, *e.g.*, issues involving noise disturbance, fights and even a suspicious death.

In March 2013, the code enforcement officer issued an enforcement notice to the Trust pertaining to the garage apartments, which stated that, "[e]ach apartment has been and is rented to a person not a member of the Coine family or a member of the family of the person or persons [currently] owning the Property." ZHB's December 18, 2013 Decision, Finding of Fact (F.F.) No. 26. Further, it provided that both of the apartments were illegal and that the Trust either had to remove them within 180 days or seek zoning relief from the ZHB. In response, the

Trust filed a June 2013 application seeking zoning relief and alleging that the certificate of compliance was equivalent to a representation by the Borough that the two garage apartments were legal and that "these inspections, and the reports and licenses resulting from them, constituted further representations by the Borough of the legality of the two apartments." *Id*., F.F. No. 20. Accordingly, the Trust maintained that it was entitled to a variance, or to a variance by estoppel, or to an equitable estoppel, or to relief under a theory of vested rights.

At the December 2013 hearing before the ZHB, Ms. Coleman and her realtor at the time of purchase testified as to their respective beliefs in 2003 regarding the legality of the garage apartments. In opposition, and consistent with a hearing exhibit containing police incident reports made over the years, neighbors testified that the tenants, their friends and acquaintances have "engaged in rowdy behavior – drinking parties, damage to other peoples' lawns, and the like." *Id*., F.F. No. 23. Ultimately, the ZHB concluded that the Trust failed to meet the very high burdens of proof mandated in order to receive the variances sought. Accordingly, it issued a letter decision rejecting the Trust's application and requiring it to vacate the apartments within one year of the decision and to cease using them for human habitation thereafter. Without taking additional evidence, common pleas affirmed. The Trust's timely appeal to this Court followed.[1] We consider on appeal whether the ZHB erred in denying the Trust's application.[2]

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[1] Where, as here, common pleas takes no additional evidence, we are limited to determining whether the ZHB committed an error of law or abused its discretion. *Hertzberg v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 721 A.2d 43, 46 (Pa. 1998).

[2] Because it failed to raise it before the ZHB, the Trust has waived its second issue: whether the enforcement notice was legally insufficient for failure to specify a section of an ordinance or other regulation purportedly violated. *Borough of Latrobe v. Pohland*, 702 A.2d 1089, 1097 n.6 (Pa. Cmwlth. 1997) (by failing to raise it below, the landowners waived any issue concerning the

(Footnote continued on next page…)

Section 910.2(a) of the Pennsylvania Municipalities Planning Code (MPC),[3] circumscribes the power of a zoning hearing board to grant a variance to only those circumstances where the landowner proves, where relevant, that a zoning restriction imposes an unnecessary hardship due to unique physical conditions on his property that are not self-created; that the requested variance is necessary to enable a reasonable use of the property; that the grant of a variance will not alter the essential character of the neighborhood, nor substantially or permanently impair appropriate use or development of adjacent property, nor be detrimental to the public welfare; and that the requested variance represents the minimum variance that will afford relief and the least possible modification of the requirement. *Hunt v. Zoning Hearing Bd. of Conewago Twp*., 61 A.3d 380, 384 n.7 (Pa. Cmwlth.), *appeal denied*, 72 A.3d 605 (Pa. 2013).

Clearly, the Trust failed to establish grounds for a traditional variance. As the ZHB determined, even without the garage apartments, the Trust would "still have a property of substantial value consisting of a residence with a garage to the rear capable of housing two cars." ZHB's December 18, 2013 Decision, F.F. No. 29. Notwithstanding the loss of any rental income, it is well established that, "[a] variance will not be granted because a zoning ordinance deprives the landowner of the most lucrative and profitable uses." *Wilson v. Plumstead Twp. Zoning Hearing Bd.*, 936 A.2d 1061, 1070 (Pa. 2007). In addition, taking into consideration the neighbors' testimony and the police incident reports, the ZHB concluded that the

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(continued…)

borough's failure to make specific numerical reference to the section of the zoning code alleged to have been violated).

[3] Act of July 31, 1968, P.L. 805, *added by* Section 89 of the Act of December 21, 1988, P.L. 1329, *as amended*, 53 P.S. § 10910.2(a).

use of the garage for two apartments "has adversely affected the character of the neighborhood and the grant of the relief sought would perpetuate this." ZHB's December 18, 2013 Decision, Conclusion of Law No. 8. Accordingly, we conclude that the ZHB did not err in determining that there were no grounds for a traditional variance. We turn now to the ZHB's denial of the Trust's application on its remaining grounds for relief: variance by estoppel, vested rights, and equitable estoppel.

Estoppel grounds for relief have been described 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; [(2)] a "variance by estoppel" where there has been municipal inaction amounting to active acquiescence in an illegal use; or, [(3)] "equitable estoppel" where the municipality intentionally or negligently misrepresented its position with reason to know that the landowner would rely upon that misrepresentation. . . . Except 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 values of the expenditures would be lost.

Vaughn v. Zoning Hearing Bd. of the Twp. of Shaler, 947 A.2d 218, 224-25 (Pa. Cmwlth. 2008) [quoting *Appeal of Kreider*, 808 A.2d 340, 343 (Pa. Cmwlth. 2002) (citations and footnote omitted)].

More specifically, a vested rights case is one where the municipality has taken some affirmative action, such as issuing a permit, and then realizes that the action was a mistake. In such cases, the landowner must show: (1) due diligence in attempting to comply with the law; (2) good faith throughout the

proceedings; (3) expenditure of substantial unrecoverable funds; (4) expiration of the applicable appeal period; and (5) the action will not adversely affect individual property owners or the public welfare. *Rudolph v. Zoning Hearing Bd. of Cambria Twp.*, 839 A.2d 475, 478-79 n.7 (Pa. Cmwlth. 2003). A landowner seeking a variance by estoppel must show: (1) a long period during which the municipality knew, or should have known, about a violation and failed to enforce the law; (2) the landowner acted in good faith and innocently relied on the validity of the use; (3) the landowner made substantial expenditures in reliance upon a belief that the use was permitted; and (4) denial of the variance would impose an unnecessary hardship on the landowner. *Borough of Dormont v. Zoning Hearing Bd.*, 850 A.2d 826 (Pa. Cmwlth. 2004).

Notwithstanding the different labels given to these remedies, we have noted that the categories may overlap and that any analytical rigidity based on their labels may not be helpful. *Vaughn*, 947 A.2d at 225. In any event, "[e]stoppel under these theories is an unusual remedy granted only in extraordinary circumstances and the landowner bears the burden of proving his entitlement to relief." *Id.* The estoppel applicant must prove the essential criteria by clear, precise and unequivocal evidence. *Pietropaolo v. Zoning Hearing Bd. of Lower Merion Twp.*, 979 A.2d 969, 980 (Pa. Cmwlth. 2009).

The ZHB concluded that the Trust failed to establish any of the estoppel theories of relief, finding the present case to be analogous to *Skarvelis v. Zoning Hearing Board of Borough of Dormont*, 679 A.2d 278 (Pa. Cmwlth. 1996). We agree that *Skarvelis* is instructive. In that case, the landowner purchased the subject property as a two-family dwelling based on his realtor's representations. Previously used as a single-family dwelling, the former owner had illegally

converted it. Following an inspection by the borough two months after the purchase, the borough notified Skarvelis that, without the grant of necessary variances, the use of the property as a two-family dwelling was in violation of the ordinance and that, if he took no action, it would presume that he intended to officially re-establish the property's single-family use. After seven years of inaction, the borough issued an enforcement notice requiring removal of the second unit. In response, Skarvelis applied to the zoning hearing board for the required variances. The borough denied most of his requests on the ground that he presented no evidence that he had detrimentally relied on the borough's inaction.

On appeal, we reinstated the board's decision, noting that the mere passage of time did not entitle the landowner to a variance by estoppel. We indicated that the municipality had to do more than passively stand by and that an affirmative act was required. In that regard, we concluded that the borough did not take any action which constituted active acquiescence, instead advising Skarvelis a mere two months after his purchase that the property was illegal. Further, we concluded that he failed to demonstrate good faith because he failed to make a reasonable attempt to ascertain the actual status of the property before purchasing it. To that end, a search of the borough's records would have revealed that no occupancy permits for the property as a two-family dwelling had ever been issued. Additionally, there were no substantial expenditures because structural improvements had been made before purchase. Finally, even though we noted that denial of the variances would diminish the value of his property, we concluded that there was no unnecessary hardship because the property would not be rendered almost valueless without the grant of the necessary variances. Accordingly, we concluded that Skarvelis failed to establish entitlement to a variance by estoppel.

In the present case, while it is true that there was belated enforcement, the ZHB determined that the landowner failed to exhibit good faith throughout in that, as a realtor administering the trust, she should have requested more specific written assurance from the Borough, before the sale, that the garage apartments were legal.[4] The ZHB found this to be especially true given the fact that the December 2003 certificate of compliance did not include the apartments and contained clear disclaimers. Specifically, it provided that the property's use was single-family and that the code enforcement officer was not certifying, guaranteeing or warranting the condition of the premises inspected or that it was free from any "violation of the current Borough Code, Ordinances, or other law." ZHB's October 16, 2013 Hearing, Exhibit B-4, Certificate of Compliance at 1; Reproduced Record (R.R.) at 173a. In addition, the ZHB noted that its 1977 decision "specifically provided [that] the apartment which it approved [for family use only] could not be rented out." ZHB's December 18, 2013 Decision, F.F. No. 25.

Moreover, the ZHB determined that Ms. Coleman could not have relied on the Borough's inspection reports as an inducement to purchase because they were issued thereafter. As the ZHB concluded, "[e]ven if the inspection

[4] In that regard, the ZHB found as follows:

> The Trustee of the Applicant Trust was and still is a realtor. The Trustee, Dorothy Coleman, while of an advanced age impressed the Board with her mental sharpness. There is no reason to think that 10 years ago – 2003 when the decision to purchase was made – she was any less sharp. If the main concern of the Trustee was the legality of the double-apartment garage building, which almost certainly it was, she should have sought a written statement specifically addressing this issue. This the trustee did not do.

ZHB's December 18, 2013 Decision at 7.

reports had been issued prior to purchase, they could not reasonably have been construed as being representations to the effect that the apartments . . . were in conformity with all Borough ordinances or rules and regulations; rather, they indicated compliance with the Borough's building code." ZHB's December 18, 2013 Decision, Conclusion of Law No. 5.

Finally, the ZHB found that the garage apartments were constructed before the sale and that the Trust had not made any substantial expenditure on them thereafter. In that regard, Ms. Coleman testified that, but for the inclusion of a storage closet in the upstairs unit and a stove repair, expenditures were for cosmetic items. ZHB's October 16, 2013 Hearing, N.T. at 27; R.R. at 114a. Accordingly, the ZHB determined that denial of the variance would not impose an unnecessary hardship because, even without the apartments, the landowner would have the single-family residence with a double garage. We agree that the Trust failed to establish grounds for any estoppel theories of relief. Accordingly, we affirm.

BONNIE BRIGANCE LEADBETTER,
Judge

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O R D E R

AND NOW, this 6th day of January, 2015, the order of the Court of Common Pleas of Chester County is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
Judge