

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

MCLOGIE PROPERTIES, INC.,	:	
	:	
Appellant	:	
	:	
v.	:	No. 21-1169
	:	
KIDDER TOWNSHIP ZONING	:	
HEARING BOARD,	:	
	:	
Appellee	:	

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CARBON COUNTY
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Chad J. Sweigart, Esquire	Counsel for Appellant
Cynthia S. Yurchak, Esquire	Counsel for Appellee

MEMORANDUM OPINION

Serfass, J. - November 16, 2021

Here before the Court is the appeal of our Order of September 15, 2021 denying the land use appeal filed by McLogie Properties, Inc. (hereinafter "Appellant") and affirming the decision of the Kidder Township Zoning Hearing Board (hereinafter "Appellee"). We file the following Memorandum Opinion pursuant to Pa.R.A.P. 1925(a) and respectfully recommend that our Order of September 15, 2021 be affirmed for the reasons set forth hereinafter.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant is the owner of the property located at 74 Lakeview Drive, Lake Harmony, Kidder Township, Carbon County, Pennsylvania. Appellant purchased this property in the summer of 2019 with the intent to develop a dwelling. Prior to construction of that dwelling, Appellant interacted with Robert Dobosh, who at the time

served as both the zoning officer and building code official of Kidder Township. Following Mr. Dobosh's retirement, Cindy Norato became the zoning officer and Dave Williams became the building code official. On August 4, 2019, Appellant submitted a zoning permit application. On September 6, 2019, Ms. Norato approved the zoning application. Appellant's zoning permit application described a three-story residence.

Construction began in October 2019 and shortly after, Appellant became aware of an elevation issue that prevented completion of the residence as originally designed. Following communication with Mr. Williams, Appellant obtained revised plans that included a partially finished basement which houses several utilities and a recreation room. On October 30, 2020, Ms. Norato issued an Enforcement Notice. Appellee asserts that the enforcement notice was issued because the partially finished basement was not described in the zoning application and Appellant did not inform the zoning officer of these changes. On November 30, 2020, Appellant filed an appeal of the enforcement notice and a variance application with Appellee. Following zoning hearings held on April 8, 2021 and April 26, 2021, Appellee denied Appellant's enforcement notice appeal and variance application on April 26, 2021 and again, in writing, on May 7, 2021.

On May 26, 2021, Appellant filed a Notice of Land Use Appeal with this Court concerning the zoning hearing board's denial of

its enforcement notice appeal and variance application. On June 10, 2021, Appellee filed an answer to Appellant's appeal requesting that this Court deny and dismiss said appeal.

On July 21, 2021, Appellant filed a supporting brief in which it argued that Appellee abused its discretion when it denied Appellant's variance request and that the record contained sufficient evidence to show that it was entitled to a variance by estoppel. (Appellant's Brief, 7/21/21). On July 30, 2021, Appellee filed a brief in opposition. Appellee argued that Appellant did not qualify for either a traditional or equitable variance. (Appellee's Brief, 7/30/21). Following oral argument before the undersigned on August 18, 2021, we denied the appeal and affirmed Appellee's decision finding that there was substantial evidence to support the findings of the zoning hearing board and that Appellant failed to establish claims for variance by estoppel and equitable estoppel. (Court's Order of 9/15/21).

On October 13, 2021, Appellant filed an Appeal to the Commonwealth Court of Pennsylvania requesting review and reversal of this Court's September 15, 2021 Order wherein we denied Appellant's land use appeal. On that same day, we entered an order directing Appellant to file a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). In compliance with our order, Appellant filed its "Statement of Errors Complained of on Appeal" on or about October 27, 2021.

ISSUES

In its Concise Statement, Appellant raises the following issues:

1. Whether the Court erred in determining that McLogie was not entitled to a variance by estoppel; and
2. Whether the Court erred in determining that McLogie was not entitled to a variance by equitable estoppel.

DISCUSSION

The doctrine of variance by estoppel applies when a property owner has maintained a use of property contrary to applicable zoning laws for an extended period of time such that the municipality has acquiesced to the use. Springfield Twp. v. Kim, 792 A.2d 717, 721 (Pa.Cmwlth. 2002) (quoting Colelli v. Zoning Bd. of Adjustment of the City of Pittsburgh, 571 A.2d 533, 534 (Pa.Cmwlth. 1990)). To establish a claim for variance by estoppel, the property owner must prove: 1) a municipality's failure to enforce a zoning ordinance for a long period of time; 2) that the municipality knew or should have known of the illegal use and actively acquiesced in the illegal use; 3) reliance by the owner on the appearance of regularity that the municipality's inaction has created; 4) hardship created by cessation of the illegal use; and 5) that the variance will not be a threat to the health, safety, or morals of the community. Id.

The property owner must prove all the essential elements by clear, precise, and unequivocal evidence. Id. Moreover, mere knowledge of a violation of a zoning ordinance does not, in and of itself, prove that a municipality actively acquiesced in the use of the property. Anderson v. Zoning Hearing Bd. of Hampton Twp., 690 A.2d 1328, 1330-31 (Pa.Cmwlth. 1997).

We find that Appellant has failed to satisfy the first prong of this analysis. The record shows that Appellant was issued a zoning permit on September 6, 2019 indicating a three-story residence. Appellant completed construction of the residence with a partially finished basement in July 2020. Cindy Norato, Kidder Township's Zoning Officer, learned of the zoning violation on September 28, 2020 and emailed Appellant concerning the violation that same day. Ms. Norato then mailed an Enforcement Notice to Appellant on October 30, 2020. Based on the foregoing, we cannot find that the township failed to act for such an extended period of time that it actively acquiesced in Appellant's nonconforming use. Because Appellant has failed to satisfy the first prong, we need not address the remaining elements and, therefore, find that Appellant has failed to establish a claim for variance by estoppel.

Appellant next argues that it is entitled to relief under the doctrine of equitable estoppel. Although Appellant did not specifically plead this claim in its "Notice of Land Use Appeal", we find that the claim is so similar to its claim for variance by

estoppel that we will address it here. See Vaughn v. Zoning Hearing Bd. of Twp. of Shaler, 947 A.2d 218, 225 n. 12 (Pa.Cmwlth. 2008).

To establish a variance by equitable estoppel, the property owner must prove that the municipality intentionally or negligently misrepresented its position with reason to know that the property owner would rely upon the misrepresentation. Victory Gardens, Inc. v. Warrington Twp. Zoning Hearing Bd., 224 A.3d 1110, 1115 (Pa.Cmwlth. 2020) (citing Lamar Advantage GP Co. v. Zoning Hearing Bd. of Adjustment of City of Pittsburgh, 997 A.2d 423, 441 (Pa.Cmwlth. 2010)). The property owner must also establish the following elements of good faith action: 1) that he relied 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. Id. The property owner must prove these essential factors by clear, precise, and unequivocal evidence. Id.

We find that there was no intentional nor negligent misrepresentation on the part of the township. The record demonstrates that Ms. Norato issued the subject zoning permit to Appellant on September 6, 2019, and that Dave Williams, Kidder Township's Building Code Official, issued the building permit to Appellant on October 17, 2019. Thomas O'Connell, Appellant's contractor, testified that he reviewed the Kidder Township Zoning

Ordinance. Section 180-12 of the zoning ordinance designates the zoning officer as "the administrative officer charged with the duty of enforcing the provisions of [the zoning ordinance]." Section 180-170(F)(1) of the zoning ordinance provides that "after the issuance of a zoning permit" the application "shall not be changed without written consent of the Township." Appellant interacted with Ms. Norato in her capacity as the zoning officer and Appellant's contractor was aware of the requirements of the zoning ordinance. Therefore, we find that Appellant has also failed to establish a claim for equitable estoppel.

On both issues, Appellant argues that this Court failed to consider the significance of Mr. Dobosh's retirement as both the zoning officer and building code official during the construction period and the subsequent division of his roles to two (2) township employees, and that this information was not communicated to Appellant. However, the record indicates that Appellant was aware of Mr. Dobosh's successors as Appellant interacted with both Ms. Norato and Mr. Williams in their respective positions following Mr. Dobosh's retirement. As such, we cannot find that the requested relief is warranted.

CONCLUSION

For the foregoing reasons, this Court concludes that Appellant cannot establish claims under the doctrines of variance by estoppel or equitable estoppel. Therefore, we respectfully

recommend that the instant appeal be denied and that our Order of September 15, 2021 be affirmed accordingly.

BY THE COURT:

A handwritten signature in black ink, appearing to read "S.R. Serfass", written over a horizontal line.

Steven R. Serfass, J.