

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

ROCKLAND ENERGY, INC.,	:	
Appellant	:	
	:	
vs.	:	No. 12-0238
	:	
FRANKLIN TOWNSHIP ZONING	:	
HEARING BOARD,	:	
Appellee	:	
Keith R. Pavlack, Esquire		Counsel for Appellant
Jenny Y.C. Cheng, Esquire		Counsel for Appellee

Matika, J. - September 12<sup>th</sup>, 2012

MEMORANDUM OPINION

On August 8, 2011, Appellant, Rockland Energy, Inc. (hereinafter "Rockland") submitted a request to the Franklin Township Zoning Officer for a permit to "raze existing building and construct a new convenience store." The Zoning Officer, Matthew T. Neeb, denied that request. On that same date, Rockland filed a notice of appeal from that decision, and in so doing requested variances from several sections of the zoning ordinance. Specifically, the Zoning Officer denied the permit for the following reasons: 1) the lot in question did not meet the minimum lot size for the zoning district in which the subject property was located; 2) the proposed new and expanded convenience store did not meet the minimum yard (setback)

dimensions; and 3) the application was devoid of any information regarding parking spaces, truck loading space and building height. Hearings were held before the Franklin Township Zoning Hearing Board (hereinafter "The Board") on September 15, 2011, and December 15, 2011. The variance requests were denied on that latter date. From the Board's "Letter Decision" dated January 4, 2012, Rockland filed a timely appeal to this Court.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

Rockland purchased the subject property in November, 2007. At that time there was, and there continues to be, situated thereon a gas station consisting of a single building of approximately one hundred fifty (150) square feet and one gas pump with two dispensers under an overhanging canopy. The lot is, for the most part, a triangular piece of ground bordering Interchange Road on the north, Court Street on the west, and the Kintz property to the south and east. The subject lot measures .092 acres. The existing building, according to the testimony and gleaned from the exhibits presented at the hearings, is situated approximately thirty-five (35) feet from Interchange Road (the "front" of the property), twenty (20) feet from the western property line, approximately thirty-five (35) feet from the Kuntz property on the eastern side, and anywhere from seven (7) to fifteen (15) feet in the rear adjacent to a road owned

and used by the Kintzes to access their property. This road is situated between the subject property and Court Street.

As currently situated, both the size of the lot and the placement of the existing building on that lot do not fully conform to the requirements of the ordinance.<sup>1</sup>

Rockland proposes to demolish the existing building and replace it with a structure over two times its present size (approximately 455 square feet). The new structure would be built in the south eastern corner of the a lot. The design of this structure would be in such a configuration that it would follow the contour of the property and be tucked tightly into the corner of the parcel. The proposed construction would place the building two (2) feet from both the eastern side yard and southern rear side yard. The location of the building would meet the setback requirements for the other side yard and front setback. Rockland's proposal would increase the capacity of the gas filling area, doubling in size the number of dispensers and filling locations. Additionally, Rockland also seeks to increase the number and size of the underground fuel storage tanks so as to allow for the sale of diesel, home heating oil, and kerosene, in addition to the gasoline presently capable of

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<sup>1</sup> The Franklin Township Zoning Ordinance, §404.4, requires the minimum lot size in this zoning district to be 20,000 square feet. Additionally, §404.5 sets the side yards at: a) front - 35 feet; b) side - 25 feet; and c) rear - 20 feet.

being sold on the property. Rockland also proposed that by enlarging the size of the "snack shop" it would be capable of selling additional snacks, cigarettes, lottery tickets, and other small retail items customarily sold at such locations. Rockland's President, Paul Sandhu, also testified that the present size of the operation does not allow this business to be as economically feasible as he would like it to be, despite the fact that the ordinance, as he readily admitted, is not an impediment to operating such a business, but only an impediment to its expansion; thus, the request for the variances.<sup>2</sup>

#### **LEGAL DISCUSSION**

When passing judgment on a Zoning Appeal, the standard of review utilized by the trial Court when no additional evidence is taken is limited to a determination of whether or not the zoning hearing board abused its discretion or committed an error

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<sup>2</sup>It should be noted that the variance requests dealt only with the issues pertaining to minimum lot size and setbacks, however, reference was made on the denial from the Zoning Officer that Rockland's application was devoid of any information pertaining to parking spaces, truck loading spaces, and building height, and that the permit was being denied for these reasons as well. Testimony was presented on behalf of Rockland that the site would provide for five (5) spaces, two (2) of which would be at the pumps themselves and the other three (3) located in the northeast portion of the lot bordering the Kintz property. Additionally, the truck loading area would be located to the rear of the property but nearest the border of the south side of the property. Lastly, Mr. Sandhu testified that the new structure would be one story high with a flat roof.

Since these issues were identified as reasons for denying the application for a zoning permit, and notwithstanding that the notice published and identified as "Zoning Hearing Board Exhibit #5" does not include them as separate variance requests, we are constrained to reference them in this Opinion since they were part and parcel of the reasons for the denial, the appeal of which is now before the Court.

of law. *Zitelli v. Zoning Hearing Board of Borough of Munhall*, 850 A.2d 769 (Pa. Cmwlth. 2004). An abuse of discretion occurs when the findings of the Board are not supported by substantial evidence which is defined as evidence that a reasonable mind might accept as adequate to support a conclusion. *Glenside Center, Inc. v. Abington Township Zoning Hearing Board*, 973 A.2d 10 (Pa. Cmwlth. 2009). Since the courts are not "super zoning hearing boards," we will not substitute our judgment for that of the Zoning Hearing Board, but rather simply review this case based on the findings of the Board. *Kirk v. Zoning Hearing Board of Honey Brook Township*, 713 A.2d 1226 (Pa. Cmwlth. 1998).

Rockland had requested that the Franklin Township Zoning Hearing Board grant variances from certain sections of the zoning ordinance to allow it to raze the existing structure and replace it with a larger structure in a different location on the subject property. The burden is on Rockland to establish entitlement to the variances. *Northeast Pennsylvania SMSA Limited Partnership v. Scott Township Zoning Hearing Board*, 18 A.3d 1272, 1276 (Pa. Cmwlth. 2011). In doing so, evidence should be presented with regard to the following factors, where applicable, as set forth in §802.4 of the Ordinance:

- a. That there are unique physical circumstances including irregularity, narrowness, or shallowness of lot size, of 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 circumstances or conditions generally created by the provisions of the Zoning Ordinance in the neighborhood or district in which the property is located;
- b. 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;
  - c. That said special circumstances or conditions have not resulted from any act of the applicant subsequent to the adoption of this Ordinance, whether in violation of the provisions hereof or not, and that such circumstances or conditions are such that strict application of the provisions of this Ordinance would deprive the applicant of the reasonable use of such land, structure, or building;
  - d. That for reasons fully set forth in the findings of the Board, the granting of the variance is necessary for the reasonable use of the land or buildings and that the variance as granted by the Board is the minimum variance that will accomplish this purpose;
  - e. That the granting of the variance under such conditions as the Board may deem necessary or desirable, will be in harmony with the general purpose and intent of this Ordinance, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare, and will not alter the essential character of the neighborhood district in which the property is located;
  - f. That any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privilege inconsistent with the limitations upon other properties in the vicinity, and district in which the subject property is situated, nor substantially or permanently impair the appropriate use or development of adjacent property;
  - g. That no non-conforming use of neighboring lands,

structures or buildings in the same district, and no permitted or non-conforming use of land, structure, or buildings in other districts shall be considered grounds for the granting of a variance;

- h. That in no case shall a variance be granted solely for reasons of additional financial gain on the part of the applicant;
- i. That the jurisdiction of the Governing Body shall not be infringed upon by action of the Board in any matter which should appropriately be the subject for an amendment to the Zoning Ordinance or Zoning Map. No variance shall be granted under this Section to allow a structure or use in a zone restricted against such structure or use.

These criteria apply whether the request is for a use variance, or, as the case is here, a dimensional variance. *Schomaker v. Zoning Hearing Board of Borough of Franklin Park*, 994 A.2d 1196, 1199-1200 (Pa. Cmwlth. 2010). These requirements are somewhat relaxed in cases of dimensional variances pursuant to the decision in *Hertzberg v. Zoning Board of Adjustment of City of Pittsburgh*, 721 A.2d 43 (Pa. 1998); however, the holding in *Hertzberg* is not completely dispositive of the case before the Court.

Rockland argues that *Hertzberg* controls the Board's decision making in this case insofar as the Board should have relaxed the strict requirements of the variance criteria as applicable to it. Rockland goes on further to argue that the evidence presented at the two (2) hearings was sufficient to establish a hardship, and therefore the variances under this

relaxed standard. We agree that the Board should have applied a relaxed standard, nevertheless, even under that standard we find that the evidence presented still does not meet the requirements necessary for dimensional variances regarding the setback issues. As the Court stated in *One Meridian Parkway, LLP v. Zoning Hearing Board of Adjustment of City of Philadelphia*, 867 A.2d 706 (Pa. Cmwlth. 2005), *Hertzberg* does not stand for the proposition that a dimensional variance must be granted if a zoning provision prevents an owner from using his or her property exactly as desired. An applicant must still satisfy a substantial burden even if the degree of hardship is relaxed under *Hertzberg*. The Court reiterated the principle that a "variance, whether labeled dimensional or use, is appropriate 'only where the property, not the person, is subject to hardship.'" *Id.* 867 A.2d at 710 (quoting *Szmigiel v. Kranker*, 298 A.2d 629, 631 (Pa. Cmwlth. 1972)); see also, *Township of Northampton v. Zoning Hearing Board of Northampton Township*, 969 A.2d 24, 27-28 (Pa. Cmwlth. 2009).

Rockland's rationale for razing the existing building and replacing it with a larger building in a location, which seriously intrudes and extends into the rear and side yards, is purely and simply financial. While various aspects of the voluminous testimony dealt with other issues relative to the overall operation of the business, none of that bears on the



issue of the dimensional variances as much as the motivation of Rockland to enlarge the operations: financial profitability.

Despite the lesser quantum of proof required by *Hertzberg*, that case does not stand for the proposition that "a variance must be granted from a dimensional requirement that prevents or financially burdens a property owner's ability to employ his property exactly as he wishes, so long as the use itself is permitted." *Yeager v. Zoning Hearing Board of the City of Allentown*, 779 A.2d 595, 598 (Pa. Cmwlth. 2001). Further, *Hertzberg* also did not establish "free-fire zones" for which variances could be granted when the person seeking the variance merely articulates a reason that it would be financially "hurt" if it could not do what it wants to do with the property, even if the property was already being occupied for another use. *Society Created to Reduce Urban Blight v. Zoning Board of Adjustment of City of Philadelphia*, 771 A.2d 874, 877 (Pa. Cmwlth. 2001). In the case at bar, Rockland presented testimony that for several months it operated the gas station and snack shop in the manner it anticipated when it purchased the property, and it "made money" despite not being as profitable as it desired. Notwithstanding, the desire to increase the financial profitability of the business at this location through the erection of a larger, more expansive snack shop in an area of the subject property, which significantly encroaches into two

(2) yards, is insufficient to meet even the less stringent variance requirements espoused by *Hertzberg*. Rockland is already making reasonable use of the property and therefore no variances are required.<sup>3</sup>

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<sup>3</sup> While we have not delved into the issue of a variance request regarding lot size, or the issues with parking spaces, truck loading spaces, and building height, we find that further discussion on these issues is rendered moot based on our decision regarding the dimensional variance requests vis-à-vis the setbacks.

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ORDER

AND NOW, this                      day of September, 2012, upon consideration of the Zoning Appeal of Rockland Energy, Inc., the briefs lodged by the parties and after argument thereon, it is hereby **ORDERED** and **DECREED** that the Appellant's Appeal is **DENIED**.

BY THE COURT:

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Joseph J. Matika, Judge