

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW

BARRY L. KATZ,	:	
Appellant	:	
	:	
vs.	:	No. 10-0838
	:	
KIDDER TOWNSHIP ZONING HEARING	:	
BOARD,	:	
Appellee	:	
Carole J. Walbert, Esquire		Counsel for Appellant
Cynthia S. Ray, Esquire		Counsel for Appellee

Nanovic, P.J. - July 1, 2011

MEMORANDUM OPINION

On November 30, 2009, Barry L. Katz (hereinafter "Katz"), the Appellant in these proceedings, filed an application for a variance from the dimensional requirements of the Kidder Township Zoning Ordinance (hereinafter "Ordinance"). The application was heard by the Township Zoning Hearing Board ("Board") on January 25, 2010, and denied that same date. From the Board's written decision dated March 5, 2010, Katz appeals to this court.

PROCEDURAL AND FACTUAL BACKGROUND

Katz purchased the property which is the subject of this appeal, 142 North Lake Drive, on May 11, 2009, for \$555,000.00. The property on its southern end contains a 50 foot frontage along Lake Harmony and, on its northern end, a 50

foot frontage on North Lake Drive (hereinafter "Property"). The Property is located in an R-2 zoning district, which is a medium density residential district allowing for single family and two family homes. Two homes, which predate the Ordinance, are located on the Property. The Property contains 13,771 square feet and, except for a slight irregularity in width, is 50 feet wide by 280.5 feet in length.

The Property does not conform with the Ordinance in various respects. In an R-2 District, no more than one principal building or use is permitted on a lot, and lots with on-lot water and central sewage, applicable to the Property, must contain a minimum of 30,000 square feet and be no less than 100 feet wide. (Zoning Ordinance Section 180-55(D) and Table 1 (Schedule of District Dimensional Regulations)). Additionally, while the Ordinance requires a minimum setback for side yards of 10 feet and a maximum impervious surface coverage ratio of thirty-five percent, the Property complies on only one side (the east side) and the percentage coverage for the Property is forty percent.

Katz proposes to subdivide the Property into two lots, with each home sitting on a separate lot.<sup>1</sup> Each will be 50 feet in width. Lot No. 1 (the roadside lot) will be a 50 foot by 150

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<sup>1</sup> Before seeking approval for this subdivision, Katz sought to obtain the dimensional variances at issue.

foot parcel, and Lot No. 2 (the lakeside lot) will be 50 feet by 130.5 feet. Thus, Lot No. 1 would be 7,500 square feet and Lot No. 2 would be 6,271 square feet. The proposal would require a variance from the front yard setback for Lot No. 2, in that the proposed dividing line between the two lots would result in Lot No. 2 being nine feet short of the required forty foot front yard setback.

Katz currently uses one of the homes for his family and rents the other for single-family use. He wants to subdivide the Property for estate planning purposes or, alternatively, to enable him to separately sell one of the parcels in the future. He does not seek to erect any additional structures or alter any existing conditions.

In denying Katz's requested variances for minimum lot size;<sup>2</sup> width; front, rear and side yard setbacks; and maximum lot coverage for an R-2 District, the Board concluded:

- (1) There are no unique physical circumstances or conditions peculiar to the Property which create an unnecessary hardship, inasmuch as Katz knew at the time he purchased the Property that the lot and buildings thereon were not in conformance;

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<sup>2</sup> Given our disposition of this specific request, the focus of the discussion which follows, the remainder of Katz's request is moot.

- (2) A variance is not necessary to enable the reasonable use of the Property, inasmuch as the Property is being reasonably used in its present condition and has been so used for years;
- (3) Any hardship that may exist has been created by Katz, inasmuch as he purchased the Property knowing of its nonconformities and that any economic hardship he now claims would have been known to him at the time of purchase;
- (4) The essential character of the neighborhood in which the Property is located would be altered by granting the variance, thus being detrimental to the public welfare, inasmuch as Katz seeks to drastically increase the level of nonconformity; and
- (5) No relief is necessary, inasmuch as the Property is presently being used in conformity with the Ordinance.

Katz challenges each of these conclusions.

Both parties filed briefs in support of their respective positions. Argument was held on October 27, 2010. No additional testimony or evidence was taken, and we are now ready to rule on Katz's appeal.

## DISCUSSION

Where the trial court takes no additional evidence, as here, the standard for review of a decision of a zoning hearing board is limited to determining whether the board abused its discretion or erred as a matter of law. To be valid, the board's decision must be supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Hertzberg v. Zoning Bd. of Pittsburgh, 721 A.2d 43, 46 (Pa. 1998). And while "[d]eterminations as to the credibility of witnesses and the weight to be given to evidence are matters left solely to the [ZHB] in the performance of its factfinding role," the board may not capriciously disregard material, competent evidence. Pennsy Supply, Inc., v. Zoning Bd. Of Dorrance Township, 987 A.2d 1243, 1248 (Pa.Cmwlth. 2009); Leon E. Wintermyer, Inc. v. W.C.A.B. (Marlowe), 812 A.2d 478, 487 (Pa. 2002). Finally, Pennsylvania courts are not "super zoning [hearing boards] nor [master planners] of last resort"; rather, the task of the court is to review the merits of the appeal based only on the findings of the municipal hearing board. Shelley v. Zoning Bd. of Adjustment of the City of Corry, 302 A.2d 526, 527 (Pa.Cmwlth. 1973). "[A]n appellate tribunal is not to substitute its judgment for that of the lower tribunal and the standard 'is not to be applied in such a manner as would

intrude upon the agency's fact-finding role and discretionary decision-making authority.'" Pennsy Supply, 987 A.2d at 1252.

A variance may be granted where the provisions of the zoning ordinance would otherwise inflict unnecessary hardship on the applicant. For a hardship to support a variance all of the following must be shown where relevant:

- (1) unique physical circumstances or conditions peculiar to the property, rather than the operation of the ordinance generally, have created an unnecessary hardship;
- (2) because of such physical characteristics, the property cannot be developed in strict conformity with the provisions of the zoning ordinance and the authorization of a variance is therefore necessary to enable the reasonable use of the property;
- (3) the applicant did not create the unnecessary hardship;
- (4) the grant of a variance will not be detrimental to the public welfare; and
- (5) the variance sought is the minimal variance that will afford relief and the least deviation from the ordinance provision at issue.

53 P.S. § 10910.2; see also Zoning Ordinance, Section 180-68. These criteria apply whether a use or dimensional variance is sought. Schomaker v. Zoning Hearing Bd., 994 A.2d 1196, 1199-1200 (Pa.Cmwlth. 2010).

The burden is upon the applicant to establish the need for a variance. Northeast Pennsylvania SMSA Limited Partnership v. Scott Township Zoning Hearing Board, 18 A.3d 1272, 1276 (Pa.Cmwlth. 2011). However, in the case of a dimensional variance, a lesser quantum of proof of hardship is required.<sup>3</sup> Hertzberg, 721 A.2d at 43, 47-48. In either case, a variance is appropriate only if the property, not the person, is subject to hardship. Yeager v. Zoning Hearing Bd., 779 A.2d 595, 598 (Pa.Cmwlth. 2001).

Katz argues that because the variance requested is dimensional, the Board erred in a strict application of traditional variance standards to his request. On this point, Katz quotes the following language from Hertzberg:

The issue here involves a dimensional variance and not a use variance - an important distinction ignored by the Commonwealth Court. When seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations. Thus, the grant of a dimensional variance is of lesser moment than the

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<sup>3</sup> "A dimensional restriction deals with restrictions caused by the size of the lot, not, . . . , by conditions of the lot." Schomaker v Zoning Hearing Bd., 994 A.2d 1196, 1202 n.5 (Pa.Cmwlth. 2010) (citation omitted).

grant of a use variance, since the latter involves a proposal to use the property in a manner that is wholly outside the zoning regulation.

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In addition, we now hold that in determining whether unnecessary hardship has been established, courts should examine whether the variance sought is use or dimensional. To justify the grant of a dimensional variance, courts may consider multiple factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.

721 A.2d at 47 and 50.

As is evident from this language, under Hertzberg multiple factors are to be considered in determining whether an unnecessary hardship exists and whether a dimensional variance should be granted, including the economic consequences of a decision. Hertzberg, however, 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, 779 A.2d at 598. In easing the standards for granting a dimensional variance, Hertzberg did not make

dimensional requirements ... "free-fire zones" for which variances could be granted when the party seeking the variance merely articulated a reason that it would be financially "hurt" if it



could not do what it wanted to do with the property, even if the property was already being occupied by another use. If that were the case, dimensional requirements would be meaningless - at best, rules of thumb - and the planning efforts that local governments go through in setting them to have light, area (side yards) and density (area) buffers would be a waste of time.

Society Created to Reduce Urban Blight v. Zoning Hearing Bd. Of Adjustment, 771 A.2d 874, 877-78 (Pa.Cmwltth 2001), *appeal denied*, 786 A.2d 992 (Pa. 2001).

At a minimum, Hertzberg, does not permit "more than a *technical* and *superficial*" departure from the zoning ordinance and requires that this adjustment be reasonable "in order to utilize the property in a manner consistent with the applicable regulations." Hertzberg, 721 A.2d at 47, including note 7; Schomaker, 994 A.2d at 1203. Nor does Hertzberg "alter the [basic] principle that a substantial burden must attend *all* dimensionally compliant uses of the property, not just the particular use the owner chooses." Yeager, 379 A.2d at 598.

In Yeager, the dimensional regulations at issue were well-suited to the permitted purpose for which the applicant desired to use the property, as a car dealership, and in no way burdened that usage of the property. Instead, it was because of the specific requirements of the type of franchise (Land Rover) which the applicant desired to operate pertaining to the location and size of the sales and service building, and the

need for an off-road demonstration course, that dimensional variances were sought. In this context, in affirming the trial court's denial of the variance, the Court found that Hertzberg "did not alter the [basic] principle that a substantial burden must attend *all* dimensionally compliant uses of the property, not just the particular use the owner chooses." This bears emphasis: the focus of a variance analysis is a hardship arising out of the proposed characteristics of the property, not out of the personal circumstances of the owner. Yeager, 779 A.2d at 598.

In the instant case, Katz seeks relief from the minimum lot size requirements of the Ordinance not to use the Property for a permitted purpose, but in order to subdivide the Property for estate planning or future sale. Katz also argues that to grant this variance would bring the Property into compliance with Section 180-55 of the Ordinance: that no lot or tract shall contain more than one principal building or use for the required minimum lot area in the district where the lot is located. Neither reason withstands analysis under the legal standards for the grant of a dimensional variance.

"A foundational prerequisite to a request for a dimensional variance is a determination that the proposed use for the property is itself permissible, and such permitted use is, in turn, the benchmark from which the entitlement to a

dimensional variance must be assessed." Hertzberg, 721 A.2d at 54 (Saylor, J., dissenting). Here, the proposed use is the existing use: two homes each used for residential purposes. No change in use is contemplated by Katz. This, however, is a necessary threshold to the grant of a dimensional variance under Hertzberg: "When seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations." 721 A.2d at 47.

Nor is the adjustment Katz seeks a "mere technical and superficial deviation from space requirements" of the Ordinance. Hertzberg, 721 A.2d at 47 n.7. Under the Ordinance, properties situated like Katz's are required to have a minimum of 30,000 square feet. The Property as it exists, is only forty-six percent of this size. Lot No. 1, as proposed by Katz, will be twenty-five percent of the required lot size, and Lot No. 2, as proposed, only twenty-one percent of this size.

The lot size requirements set by the Kidder Township Supervisors in an R-2 District serve, in a significant manner, to control the density of development in that area of the Township. Pursuant to Section 180-3A of the Ordinance, the Ordinance's purposes include "coordinated and practical community development and proper density of the population," and

pursuant to Section 180-3B, "to prevent . . . overcrowding of land." With specific reference to the R-2 District, the purpose of the District is "to provide for single-family and two-family dwellings at medium densities in areas already developed in this manner and in areas where similar development is desirable." (Ordinance, Section 180-14A). Katz seeks, in effect, to eviscerate this exercise of a legislative prerogative by the Township Supervisors on the relatively specious argument that to do so will bring the Property into conformity with Section 180-55, with no corresponding benefit to the public interest.

To the extent the Board concluded the hardship of which Katz complains was self-created and the grant of the variance would change the essential character of the neighborhood, we disagree. Notwithstanding that Katz knew of the Property's nonconformities at the time of purchase and purchased with the intent of subdividing - the property was purchased by Katz on May 11, 2009, and the variance application was filed on November 30, 2009 - "mere knowledge alone of an impediment to building under the terms of a zoning ordinance is insufficient to deny a variance." Somers v. Stroud Tp. Zoning Hearing Bd., 913 A.2d 306, 312 (Pa.Cmwlt. 2006), *appeal denied*, 934 A.2d 1280 (Pa. 2007).

With respect to the impact on neighboring properties if the variance were granted, the record does not support an

adverse effect. The development of the area where the Property is located - which predates the Ordinance - consists primarily of lots 50 feet by 200 feet in size. Most are nonconforming. Many have existing homes and several have been previously subdivided. The subdivision Katz intends will change neither the physical characteristics of the Property nor the density of the development. Given these facts, Katz's variance request, if granted, would not change the character of the neighborhood. See Upper Leacock Tp. Sup'rs v. Zoning Hearing Bd. of Upper Leacock Tp., 393 A.2d 5, 7 (Pa. 1978) (finding that the essential character of the neighborhood will not be altered where owner seeks to continue a pre-existing use rather than develop a new one).

#### CONCLUSION

Under Hertzberg to establish that unnecessary hardship will result from the denial of a requested dimensional variance, the party seeking the variance bears the burden of proving that "the zoning requirements work an unreasonable hardship in the owner's pursuit of a *permitted* use." Hertzberg, 721 A.2d at 47. This, Katz has failed to do.

Katz's evidence shows that a variance is not necessary to enable the reasonable use of the Property. Here, the Property is being used in accordance with the Ordinance, as a

legal nonconforming use, and its use is reasonable: as a home for Katz and his family, and as a rental home for a second family. Hertzberg neither authorizes nor requires the grant of a variance on property whose use is unaffected by the dimensional requirements of the Ordinance: where the planned use of the Property after the grant of the requested variance will be identical to that existing before the variance grant, with no changes to be made in the physical characteristics of the Property. Cf. Cardamone v. Whitpain Tp. Zoning Hearing Bd., 771 A.2d 103 (Pa.Cmwlth. 2001) (upholding denial of dimensional variances requested to enable subdivision of property into two lots); see also Township of East Caln v. Zoning Hearing Bd. of East Caln Township, 915 A.2d 1249 (Pa.Cmwlth. 2007) (denying dimensional variance in pertinent part because a reasonable use was already being made of the property, and based on that fact, the applicant failed to demonstrate a burden associated with the property).

To the extent Katz argues that denial of the variance will limit his ability to subdivide the Property for estate planning purposes or to separately sell one of the parcels in the future, the law is against Katz. "[E]conomic and personal considerations in and of themselves are insufficient to constitute hardship" for purposes of obtaining a zoning

variance. McNally v. Bonner, 645 A.2d 287, 289 (Pa.Cmwlth. 1994), *appeal denied*, 655 A.2d 516 (Pa. 1995).

Absent a showing of hardship, Katz is entitled to no variance.

BY THE COURT:

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P.J.