

Zoning Appeal - Scope of Review - Variance Hardship

1. The Court's scope of review where no additional evidence is taken is limited to whether there has been a manifest abuse of discretion or an error of law.
2. A hardship exists when the physical or topological features of a property is such that the property cannot be used for a permitted purpose, or can be used only at prohibitive expense.
3. In developing real estate, traffic safety is a unique circumstance on which the granting of a variance may be based.
4. The mere fact that an applicant for a variance purchases property with knowledge of the hardship and zoning restrictions does not preclude him from being granted variances.

Welton J. Fischer, Esquire, Counsel for Appellant

Gregory L. Kiersz, Esquire, Counsel for H. Eugene Bayer

D. Lloyd Reichard, Esquire, Solicitor for Appellee

OPINION AND ORDER

EPPINGER, P.J., October 24, 1985:

On March 13, 1985, H. Eugene Bayer (Bayer) applied for a building permit for two lots in the Borough of Waynesboro. On the larger lot he proposes to build a twelve-unit townhouse complex. This larger lot fronts only on an alley. Across the alley, on a smaller lot, he proposes to build an eight-unit townhouse complex. This lot fronts on Homewood Avenue.

The application for a building permit for both lots was denied. Provision was made only for a fifteen-foot rear yard on the smaller lot. Section 1-4-2 of the Waynesboro Zoning Ordinance requires a thirty-foot rear yard. Bayer has revised his plan to eliminate two units of the townhouse complex on that lot, so the issue is moot. He now intends to build only six units and in so doing, there will be a thirty-foot rear yard. He may reapply to the Zoning Officer for a permit.



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The application was refused as to the larger lot because it was in violation of Section 4-2-1 of the ordinance. No provision was made for frontage on a municipal street, and because the ratio of off-street parking to yard area did not meet the requirements of Section 4-3-9 of the ordinance.

Bayer appealed the decision of the Zoning Officer to the Zoning Hearing Board (board) which held a hearing. After the hearing the board granted all of the variances needed for the project. Joseph P. O'Donnell (O'Donnell), who owns an adjoining property appealed the board's decision to the court. We have taken no additional testimony.

Our scope of review where we have taken no additional evidence is limited to a determination of whether or not the board committed a manifest abuse of discretion or an error of law. *Appeal of deBotton*, 81 Pa. Cmwlth. 513, 516, 474 A.2d 706, 707 (1984). The board's findings must be supported by substantial evidence that a reasonable man would accept to establish the fact in question. *Appeal of deBotton*, supra at 516, 708. As to the larger tract, we find that the board committed no manifest abuse of discretion or error of law and we affirm its decision.

In order to obtain the variances, Bayer had to prove (1) that the ordinance imposes unnecessary hardship on the property; (2) that the hardship stems from unique physical characteristics of the property; (3) that the variance would not adversely impact on the health, safety or welfare of the general public; (4) that the hardship was not self-inflicted; and (5) that the variance sought is the minimum that will afford relief. *Vacca v. Zoning Hearing Board of Borough of Dormont*, 82 Pa. Cmwlth. 192, 197, 475 A.2d 1329, 1331-32 (1984); 53 Pa. C.S.A. §10912.

The hardship must be unique or peculiar to the property as distinguished from a hardship arising from the impact of zoning regulations on an entire district. *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 555, 462 A.2d 637, 640 (1983). Hardship exists when the physical or topographical features of the property are such that the property cannot be used for a permitted purpose, or can be used for such use only at a prohibitive expense. *Minnick v. Zoning Hearing Board Town of McCandless*, 71 Pa. Cmwlth. 333, 342, 455 A.2d 243, 249 (1983).

A north-south alley separates the larger tract from the smaller one. The larger tract is on the east side of the alley. Homewood Avenue terminates on the west side of the alley so the alley is between the larger tract and a municipal street. Section 4-2-1 of the zoning ordinance and Section 7-1-14 of the Waynesboro Subdivision and Land Development Ordinance of 1978 would require the extension of Homewood Avenue across the alley and require Bayer to build a cul-de-sac in order to develop the larger tract.

Bayer's surveyor and engineer, William A. Brindle, testified at the hearing and a plot plan was presented that would indicate it is not feasible to build on the larger tract after the installation of the required cul-de-sac. Only a small unusable triangle parcel would be left. If it were not for the alleys which bound the larger tract on the west and north, this property would be landlocked. Our Commonwealth Court has held that, "a property which is completely landlocked, with no public street frontage, exhibits a physical feature which can establish unnecessary hardship." *Malakoff v. Board of Adjustment of City of Pittsburgh*, 72 Pa. Cmwlth. 109, 114, 456 A.2d 1110, 1113 (1983); *Vitale v. Zoning Hearing Board of Upper Darby Township*, 63 Pa. Cmwlth., 604, 608, 438 A.2d 1016, 1019 (1982).

Unless the requirement to construct a cul-de-sac is excused, this property is virtually undevelopable for townhouses, a use which is otherwise permitted by the ordinances of the borough. This is a condition unique to the property.

The development on the larger lot could conform to the zoning ordinance requirement regarding the ratio between off-street parking and yard area. What the planner did is set the buildings toward the east side of the lot which backs up on another ten-foot alley. Instead of proposing parking coming directly off what we will call the front of the project onto the alley on the west, the planner proposes that there be a small island between the parking lot and the alley, and that a portion of what would otherwise be a front yard should be part of a bigger parking area. The purpose of this plan is to make it possible to leave the parking stalls on the west side of the proposed townhouses without backing into the alley. The plan seems preferable to one where some of the proposed parking area is set apart for a front yard, with the resulting traffic hazards. We think the variance is appropriate and correctly decided by the board.

If we reversed the board on this ground, Bayer could go ahead with a modified plan which would be less satisfactory than the one presented to them. We believe that in developing a plot, traffic safety is a unique circumstance on which the granting of a variance may be based.

O'Donnell argues that the requested variances are all self-inflicted in that Bayer is proposing to acquire a portion of the land in question with full knowledge of the zoning limitations applicable to that land. The mere fact that an applicant for a variance purchases, or attempts to purchase, property with knowledge of the hardship and any applicable zoning restrictions does not preclude him from being granted the variances. *Marlowe v. Zoning Hearing Board of Haverford Township*, 52 Pa. Cmwlth. 224, 233, 415 A.2d 946, 950 (1980). The hardship is deemed self-inflicted only where he has paid an unduly high price because he assumed the anticipated variances would justify the price, or where the size and shape of the parcel was affected by the transaction itself. *Marlowe*, supra at 233, 951. O'Donnell has made no allegations nor presented any evidence regarding the price Bayer is paying for the property or how the size and shape of the lot is affected by the transaction itself.

O'Donnell also contends that the board did not make specific findings regarding the five requirements of 53 Pa.C.S.A. §10912 and *Vacca*, supra, in violation of 53 Pa.C.S.A. §10908(9) which requires the board to set forth its findings of fact and conclusions together with the reasons therefor. The board's opinion was sufficient to show us that there was "due consideration and a weighing of evidence in its legal relations," *Richman v. Zoning Board of Adjustment*, 391 Pa. 254, 260, 137 A.2d 280, 284 (1958).

The board's opinion refers specifically to the lack of street frontage and refers impliedly to the size of the larger lot - all of which are conditions unique to the property. In discussing the traffic hazards which the variances would alleviate, the board made it clear that the variances would not adversely impact on the health, safety and welfare of the general public.

In short, the opinion shows that the board was aware of the five conditions to be met for a variance listed in 53 Pa.C.S.A. §10912, and discussed in *Vacca*, supra, and its opinion explains, specifically and impliedly, how these conditions were met. It does not have to refer to each condition explicitly and state in precise terms how



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LEGAL NOTICES, cont.

IN THE COURT OF COMMON PLEAS OF THE 39th JUDICIAL DISTRICT OF FRANKLIN COUNTY, PENNSYLVANIA — ORPHANS' COURT DIVISION

The following list of Executors, Administrators and Guardian Accounts, Proposed Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: August 7, 1986.

BITTINGER: First and final account, statement of proposed distribution and notice to the creditors of Mary Bittinger and Charles W. Bittinger, Co-executors of the Estate of Charles W. Bittinger, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

KING: First and final account, statement of proposed distribution and notice to the creditors of Thomas Blickenstaff, Russel Blickenstaff and Millard A. Ullman, Executors of the Estate of Leah C. King, late of Waynesboro, Franklin County, Pennsylvania, deceased.

SCHAFF: First and final account, statement of proposed distribution and notice to the creditors of Georgie P. Schaff, Executrix of the Estate of William D. Schaff, late of Greene Township, Franklin County, Pennsylvania, deceased.

SZYPULSKI: First and final account, statement of proposed distribution and notice to the creditors of Chambersburg Trust Company, Chambersburg, Pennsylvania, Executor of the Estate of Helen F. Tananis Szypulski, late of Greene Township, Franklin County, Pennsylvania, deceased.

LEGAL NOTICES, cont.

WALKER: First and final account, statement of proposed distribution and notice to the creditors of Donald Walker, Executor of the Estate of Ruth E. Walker, a/k/a Ruth C. Walker, a/k/a Ruth Walker, late of Fannettsburg, Franklin County, Pennsylvania, deceased.

Robert J. Woods
Clerk of Orphans' Court
Franklin County, Pennsylvania
7-11, 7-18, 7-25, 8-1

NOTICE

Notice is hereby given that Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania on the 8th day of July, 1986, for the purpose of obtaining a certificate of incorporation. The name of the corporation organized under the Commonwealth of Pennsylvania Business Corporation Law approved May 5, 1933, P.L. 364 as amended, is THE BEACH TANNING SALON, INC., 14 East Baltimore Street, Greencastle, PA 17225.

The purpose for which the corporation has been organized is to engage in and to do any lawful acts concerning any or all lawful business for which corporations may be incorporated under the Business Corporation Law of the Commonwealth of Pennsylvania.

Stephen E. Patterson, Esquire
Patterson, Kaminski, Keller & Kiersz
239 East Main Street
Waynesboro, PA 17268

8-1-86

each condition was met. *Zoning Hearing Board v. Konyk*, 5 Pa. Cmwlth. 466, 469, 290 A.2d 715, 717 (1972). 53 Pa.C.S.A. §10908(9) only requires the board render a written decision with written findings which are, "sufficiently explanatory of the factual questions involved." *Zoning Hearing Board v. Konyk*, supra at 470, 717. The board's opinion satisfies this requirement.

We are not a super zoning board of adjustment. *Haverford v. Zoning Hearing Board of Haverford Township*, 21 Pa. Cmwlth. 207, 212, 344 A.2d 758, 761 (1975). The board is familiar with the property in question and, based upon the facts which were presented to it, it made a decision within its discretionary power.

ORDER OF COURT

October 24, 1985, appellant, Joseph P. O'Donnell's appeal is dismissed, and the decision of the Borough of Waynesboro Zoning Hearing Board is affirmed.

MILLER & CO. V. SCHULTHEISS, C.P. Franklin County Branch, 1985 Equity Docket Vol. 7, Page 402

Equity - Injunction - Certified Public Accountant - Solicitation of Clients

1. Certified Public Accountants have a code of professional conduct which may be enforced in appropriate situations by the courts by the imposition of sanctions.
2. Overreaching means to overdo matters, or get the better of one in a transaction by cunning, cheating or sharp practice.
3. Where employees solicit the employer's clients for employee's new business prior to the employee's resignation and take information from employer's data disc, employee's conduct is overreaching in violation of C.P.A. Code of Professional Ethics.

John N. Keller, Esquire, Counsel for plaintiffs

Robert E. Graham, Jr., Esquire, Counsel for defendants

OPINION AND DECREE NISI

EPPINGER, P.J., November 7, 1985: