It is appropriate that we also observe that even if the evidence justified the erection of a constructive trust with Allen Daywalt as trustee for the benefit of Delbert Daywalt, the trust would not survive the transfer to the plaintiffs. A subsequent conveyance is subject to a constructive trust unless there is a sale to a bona fide purchaser. *Rife v. Guyer,* 59 Pa. 393, 98 A. 351 (1868). At the time of purchase, the Bennetts were aware of the existence of the well and the trees planted by Delbert Daywalt. These permanent improvements were part of the bargained purchase price paid by the Bennetts. They neither bargained for nor anticipated acquisition of the defendants' mobile home, its additions or sheds. They did anticipate either the payment of rent or the termination of defendants' occupancy and the removal of the mobile home. Delbert Daywalt only notified the Bennetts of a possible title defect relating to his mother's interest. The Bennetts commissioned a survey and reviewed the chain of title paying particular attention to Delbert's claims. They found nothing amiss. We are persuaded that if a constructive trust had been erected, it was extinguished by the conveyance to the Bennetts for value and without notice of facts giving rise to the existence of a constructive trust or breach thereof.

We conclude nothing appears in the record to indicate that the Bennett's acquisition and retention of the real estate would result in their unjust enrichment. We, therefore, also conclude as a matter of law if a constructive trust was imposed upon the property for the benefit of the defendants, it would not have been carried forward to affect the fee simple interest of the plaintiffs as innocent purchasers for value.

Failing to establish a constructive trust, defendants assert a counterclaim for the value of the permanent improvements which they made to the land. Those improvements are claimed to be the mobile home, the addition of a room and porch, a driveway, well, cleared lot and tree plantings. The trailer can be moved from the property with the addition of axles and wheels, much of the additions can be salvaged. The value of the construction of the driveway and the clearing of the lot was not established. The various sheds can be removed. The well and the trees are permanent improvements to the land. The value of these improvements was presumably included in the purchase price paid by the plaintiffs. The plaintiffs were innocent purchasers for value and may not be required to pay twice for these improvements. The defendants' action, if any, for the value of the improvements lies against Allen Daywalt.

The plaintiffs made a claim for rent by advising the defendants of their ownership and charging rent in the amount of $50.00 per month beginning November 1, 1986. The defendants are entitled to rent in that amount due the first of each month from November 1, 1986 to the present: $50.00 per month x 15 months or $75.00.

Plaintiffs asked for their counsel fees and costs of this action. They presented no authority for their entitlement or evidence of amount expended. Therefore, we will consider this claim abandoned.

ORDER OF COURT

NOW, this 3rd day of February, 1987, the defendants are ordered to vacate and give up possession of the real estate at 11884 South Mountain Road, Quincy Township, Franklin County, Pennsylvania forty-five (45) days from the date of service of this order.

Verdict is entered in favor of the plaintiffs and against the defendants for $750.00 with accrued interest. From and after February 1, 1987 rent shall accrue in favor of the plaintiffs and against the defendants at the rate of $50.00 per month.

KOZIEL v. ZONING HEARING BOARD OF BOROUGH OF WAYNESBORO, C.P. Franklin County Branch, Miscellaneous Vol. Y, Page 552

Zoning Appeal - Permit Erroneously Issued - Vested Right in Variance

1. A property owner acquires a vested right as a result of a permit issued in error by establishing the following: (a) due diligence; (b) good faith; (c) expenditure of substantial unrecoverable funds; (d) expiration of appeal period; (e) no evidence to prove adverse effect on individual property rights or the public health, safety or welfare.

2. The exacerbation of an existing parking space problem does not rise to the level of a threat to public health, safety or welfare.

3. A $2,000.00 expenditure of unrecoverable funds is not a "substantial" expenditure under the guidelines set forth in *Petrosky v. Zoning Hearing Board of Upper Chichester,* 485 Pa. 501, 402 A.2d 1385 (1979).

William S. Dick, Esquire, Counsel for Appellants
Thomas B. Steiger, Jr., Esquire, Counsel for Appellee
Stephen E. Patterson, Esquire, Counsel for Intervenors

OPINION AND ORDER

WALKER, J., October 28, 1986:

Appellants, Robert and Sandra Koziel, bought half of a duplex house, located at 517 West Main Street, Waynesboro. Their intention was to reap investment income by renting the house to two families. To do so, appellants needed to convert the second floor into a separate apartment.

On June 28, 1985, appellants signed a purchase agreement for the house. The agreement was conditioned on appellants receiving a loan which, in turn, was contingent on their receipt of the applicable building permits. On July 11, 1985, Sandra Koziel met with zoning officer Larry Garber who took information from her and then issued her the permits.

Within a week, appellants closed on the house and began converting the second floor into an apartment. Appellants put closets in the first floor living room to turn it into a bedroom. Upstairs, appellants converted a bedroom into a kitchen by installing cabinets, a sink, faucets, linoleum, doors, wiring, a circuit box and electrical outlets. Additonally, appellants did extensive painting, put a refrigerator in the second floor kitchen and placed four smoke detectors throughout the house. The work was completed in early September, 1985, at which time borough inspector Chip McCann visited the premises and told Mrs. Koziel that the conversion was "A-OK".

On October 17, 1985, a zoning officer contacted appellants, telling them that they would have to apply for a variance since their conversion was located in a zoned single family residence area. Appeallants applied for a variance on October 21, 1985; a hearing was held January 14, 1986, and appellants' application was denied.

Appellants appealed the zoning hearing board's decision to this court and various neighbors were granted leave to intervene. A

LEGAL NOTICES, cont.

NOTICE OF
WINDING UP PROCEEDINGS
BYER BROS,. INC.,
A PENNSYLVANIA CORPORATION

Notice is hereby given that Byer Bros., Inc., a Pennsylvania corporation having its registered office at 315 Lincoln Way East, Chambersburg, Franklin County, Pennsylvania, has filed a Certificate of Election to Dissolve with the Department of State of the Commonwealth of Pennsylvania, Harrisburg, Pennsylvania pursuant to and in accordance with the provisions of the Business Corporation Law of the Commonwealth of Pennsylvania and that said Corporation is winding up its business in the manner prescribed by said law.

Joan H. Vander Sluis, Secretary
Black and Davison
P.O. Box 513
Chambersburg, PA 17201
12/25/87 & 1/1/88

hearing was held and testimony taken. The issue this court must decide is whether, under the evidence presented, appellants have acquired a vested right in a variance.

Under Pennsylvania law, a property owner who seeks to acquire a vested right as a result of a permit issued in error must establish five elements: (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) an insufficiency of evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected. *Petrosky v. Zoning Hearing Board of Upper Chichester,* 485 Pa. 501, 402 A.2d 1385 (1979). The evidence presented must be examined in light of the standard set forth in *Petrosky.*

Before buying their 317 West Main Street property, appellants considered buying a house in Washington Township. They declined to purchase it when informed that they would need a variance. Appellants exercised similar caution with respect to their Main Street property; their loan and purchase agreement were contingent on appellants receiving all necessary permits.

Prior to beginning work on the second floor, Mrs. Koziel met with zoning officer Larry Garber to find out what the zoning regulations required. She told Garber that she wished to install a second floor apartment and specifically inquired as to (1) parking space requirements, (2) the need for a fire escape, (3) the need for separate water and electric lines for the second floor, (4) the need for a permit to install a kitchen and (5) the propriety of working while tenants were living downstairs. Garber answered these questions, filled out the permits and issued them to Mrs. Koziel. He did not advise Mrs. Koziel that she had to take any other measures to comply with the zoning regulations.

When appellants finished converting the second floor, zoning officer Chip McCann inspected and approved the work. Both Garber and McCann knew of appellants' conversion but neither officer informed the Koziels of a need for a variance.

Intervenors' version of Mrs. Koziel's meeting with Garber, needless to say, varies considerably from appellants'. Under intervenors' scenario, Mrs. Koziel misrepresented her intentions,

telling Garber that the second floor kitchen was merely a "renovation". If Garber had known of Koziels' plan to build a second apartment, intervenors argue, he would have told them that they needed a variance.

The analysis rests on the faulty assumption that Garber had a competent understanding of the zoning ordinance. From the evidence presented, this court finds that the Koziels' failure to apply for a variance was due to a justified reliance on Garber's inept counsel. The uncontradicted testimony revelaed that a second officer even inspected and approved the conversion without alerting appellants to any procedural defects. Accordingly, appellants have proven the first two prerequisites of a vested right, due diligence and good faith as outlined in *Petrosky*.

Intervenors failed to file a timely appeal to the issuance of appellants' permit. Though the Koziels posted their permit in a negligent and improper manner, intervenors were fully aware of the Koziels' conversion. When usage of a property is apparent, the statutory provisions for time to appeal begins to run when others are put on notice of such use. *Three Rivers Youth v. Zoning Hearing Board of Adjustment of Pittsburgh,* 63 Pa. Cmwlth. 184, 437 A.2d 1064 (1981). Various neighbors carried building materials to the upstairs apartment and later observed a family moving into the completed unit. Intervenors certainly knew that appellants were installing a second floor apartment, yet they chose not to appeal issuance of the permits. This factor, expiration of the applicable appeal period, is easily satisfied in the instant case.

Appellants can have no vested right in a variance if sufficient evidence shows that their conversion has an adverse effect on individual property rights or on public health, safety or welfare. *Petrosky,* supra. The only adverse effects resulting from the installation of the second floor kitchen are noise from the upstairs kitchen and increased parking problems.

Testimony indicated that, at one time, a prior upstairs tenant who worked late shift noisily prepared dinner at two in the morning. This only affected the owners of the adjacent duplex unit, and no evidence was presented to demonstrate that this harmed their property rights.

The only other adverse effect directly attributable to appellants' conversion was the exacerbation of an already existing problem, i.e., insufficient parking space. This increased difficulty does not rise to the level of a threat to public health, safety or welfare.

The only remaining factor this court must consider under *Petrosky* is whether or not appellants expended "substantial unrecoverable funds". According to appellants' testimony, the approximate cost of converting the second floor was $2,869; $2,309 in fixtures and $560 in labor. Appellants conceded that most, if not all, of the fixtures could be removed and that much of the labor improved the value of the house as a whole. Counsel for appellants argues in his brief that the costs of buying and selling the house should also be taken into account. No such costs were entered into evidence, however and this court is limited to the evidence presented. This case, then, ultimately hinges on a single question: is appellants' expenditure of about $2,000 in unrecoverable funds "substantial"? The answer, regrettably, is no.

Case law sheds no light on what criteria are to be used in determining "substantiality". In *Petrosky,* $15,000 and the cost of the property itself were at stake. No specific amount was mentioned in *Three Rivers,* but the court held that the cost of renovating a $93,000 house for use as a group home was "substantial". The progenitor for the standard enunciated in both these cases is *Commonwealth of Pennsylvania, D.E.R. v. Flynn,* 21 Pa. Cmwlth. 264, 344 A.2d 720 (1975). Township officials in *Flynn* erroneously issued sewage and building permits to appellee who, in reliance thereon, installed a sewer system and constructed a house on the property. That court found that appellee satisfied the five elements listed above and, therefore, had acquired a vested right in a variance.

There is no doubt that the harm appellants have suffered is due to the incompetence of the zoning officers. Appeallants' loss, however, does not amount to the level of hardship reflected in the cases cited above. Until offered further guidance on the matter, it is the court's belief that the standards set by the Supreme Court in *Petrosky* dictate that appellants' variance must be denied.

ORDER OF COURT

October 28, 1986, the order of the Waynesboro Hearing Board denying plaintiffs' request for a variance is affirmed.