

**CAPTION:** Stephen Rickert  
Vs.  
Zoning Hearing Board of the  
Borough of Roseto

**DOCKET NO.:** 1996-C-6887

**JUDGE:** McFadden

**DECISION DATE:** May 13, 1997

**ATTORNEYS:** D. Danser  
A. Martino

**DISPOSITION:** Denied

**NATURE OF ACTION:** Land use appeal

**DIGEST TOPIC:** Zoning and Planning

**KEY NO.:** Zoning and Planning 497

**DESCRIPTION OF DECISION**

Land use appeal is denied where Board's denial of applicant's de minimis variance was based on sufficient evidence that appellant willfully violated the zoning ordinance.

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

STEPHEN RICKERT,	:	
Appellant	:	
	:	No. 1996-C-6887
	:	
v.	:	
	:	
	:	
THE ZONING HEARING BOARD	:	
OF THE BOROUGH OF ROSETO,	:	Land Use Appeal
Appellee	:	

OPINION OF THE COURT

This matter is before the Court pursuant to Stephen Rickert's (Appellant's) land use appeal from the decision of the Zoning Hearing Board of the Borough of Roseto (Appellee) (Board) rendered on September 30, 1996.

Appellant, Stephen Rickert, is the owner of property located at 817 Roosevelt Avenue in the Borough of Roseto. On October 26 and November 23, 1994, Appellant appeared before the Board to apply for residential construction on his property. On December 13, 1994, the Board granted Appellant a variance for relief from setback restrictions enabling him to construct a second story addition on his property, so long as the construction conformed to plans which had already been approved by the Board specifically for the purpose of Appellant's variance. (See Appellant's Land Use Appeal Exhibit A). On October 23, 1995, the Board filed a Complaint with this Court alleging that the construction on Appellant's property failed to conform with the plans that had been approved by the Board on December 13, 1994, for the purpose of Appellant's variance. Pursuant to an Order of Court issued by the Honorable Richard D. Grifo on June 14, 1996, Appellant was to appear before the Board at its next meeting to request that it modify its decision to conform such decision to the as-built structure which forms the

basis of this suit. On September 30, 1996, the Board denied Appellant's request to modify the original decision of December 13, 1994 to conform with the structure as it currently exists on the subject property. The September 30, 1996 decision of the Board is the subject of this land use appeal.

### **DISCUSSION**

Appellant argues that Appellee improperly denied his request for a *de minimis* variance. We disagree. The "scope of review in a zoning appeal, where the Common Pleas Court takes no additional evidence, is limited to determining whether the zoning hearing board committed a manifest abuse of discretion or an error of law." Appeal of Eureka Stone Quarry, Inc, 539 A.2d 1375, 1378 (Pa.Cmwlth. 1988); In re Appeal of Shirk, 539 A.2d 48, 50 (Pa.Cmwlth. 1988). An abuse of discretion can only be found if the Board's findings are not supported by substantial evidence, that is, such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Valley View Civic Assoc. v. Zoning Board of Adjustment, 462 A.2d 637 (Pa. 1983). This court may not overrule the Board because the Board's decision is against the weight of the evidence. Krum v. Montour County Zoning Hearing Board, 452 A.2d 306 (Pa.Cmwlth. 1982). Nor will this Court reverse the Board's decision because the Board could have reached a contrary decision based upon the same evidence. The Board is better positioned to make these decisions, as it is familiar with the land in question. Board of Commissioners v. Zoning Hearing Board of Upper Moreland Township, 361 A.2d 455 (Pa.Cmwlth. 1976). This Court will not impose its preferences on communities nor should it act as a "super zoning board." Township of Haverford v. Zoning Hearing Board of Haverford Township, 344 A.2d 758

(Pa.Cmwlth. 1975).

In the instant case, Appellant alleges that the Board committed an error of law when it refused to grant Appellant a *de minimis* variance. Generally, a party seeking a variance bears the burden of proving that (1) unnecessary hardship will result if the variance is denied, (2) the hardship is shown to be unique or peculiar to the property as distinguished from a hardship arising from the impact of zoning regulations on the entire district, and (3) the proposed use will not be contrary to the public interest." Chacona v. Zoning Board of Adjustment, 599 A.2d 255, 257 (Pa.Cmwlth. 1991) (citing Valley View Civic Association v. Zoning Board of Adjustment, 462 A.2d 637 (Pa. 1983)). However, the *de minimis* doctrine, which is applicable in the instant case, is a narrow exception to the heavy burden of proof generally placed on a party seeking a variance." Leonard v. Zoning Hearing Board, 583 A.2d 11, 12 (Pa.Cmwlth. 1990). The *de minimis* doctrine provides that where only a minor deviation from the zoning ordinance is sought and, as a result, strict compliance with the ordinance is not necessary to further its purpose, the variance may be granted despite its non-compliance with the zoning ordinance. Chacona, 599 A.2d at 259. The decision to grant a *de minimis* variance is within the discretion of the local zoning board. Alpine Inc. v. Abington Township Zoning Hearing Board, 654 A.2d 186 (Pa.Cmwlth. 1995).

In this case, the Board denied Appellant's application for a *de minimis* variance, because the Board concluded that Appellant's actions demonstrated a willful violation of the zoning ordinance.<sup>1</sup> The law is clear

---

<sup>1</sup>The Zoning Hearing Board has the authority to grant a

that a "variance is properly refused where the hardship results from the applicant's own willful violation of the zoning regulations." Stratford Arms, Inc. v. Zoning Board of Adjustment, 239 A.2d 325, 327 (Pa. 1968) (citing Moyerman v. Glanzberg, 138 A.2d 681 (Pa. 1958)). We find that sufficient evidence was presented to the Board to justify its denial of Appellant's variance on this ground.

The Board considered the testimony of Mr. Wayne Yeisley, an immediate neighbor of Appellant and Mr. Stanley Lysek, the Zoning Officer of the Board of Roseto. Mr. Yeisley and Mr. Lysek both testified that Mr. Lysek had, at some time in May of 1995, told Appellant that he was to stop building the structure, as he was not building the structure according to the initially submitted plans. (N.T. 8/21/96 at 25-26). Despite this notification from Mr. Lysek, Appellant continued building. (N.T. 8/21/96 at 26). Thereafter, Mr. Lysek issued a Cease and Desist Order to Appellant directing him to cease and desist all construction on his property. (N.T. 8/21/96 at 31). The reasons for the issuance of the Order were Appellant's failure to comply with conditions and safeguards of the Board and Appellant's

---

variance pursuant to 53 P.S. §10910.2. Such section provides in pertinent part that:

(a) The board shall hear requests for variances where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant. The board may by rule prescribe the form of application and may require preliminary application to the zoning officer. The board may grant a variance, provided that all of the following findings are made where relevant in a given case:

. . .

(3) That such unnecessary hardship has not been created by the appellant.

failure to follow the specifically approved plans upon which the Board's granting of the variance was contingent. (See, Complaint, 1995-C-8379, Exhibit "C").

The Board also considered the testimony of Mr. Dale Cerino, a resident of the Borough of Roseto, who testified that even after the Cease and Desist Order was issued, Appellant did not stop building. (N.T. 7/31/96 at 30). On the basis of the evidence and testimony considered by Appellee, we find that Appellee's decision to deny Appellant's application for a *de minimis* variance on the ground of Appellant's willful violation of the zoning ordinance was not an error of law. See eg., Polonsky v. Zoning Hearing Board, 590 A.2d 1388 (Pa.Cmwlth. 1991) (holding that property owners' hardship of having to move fence behind property line was self-created where they had constructed the fence beyond building line of property); Immordino v. Zoning Hearing Board, 441 A.2d 818 (Pa.Cmwlth. 1982) (holding that any hardship that resulted from appellants' conversion of the premises prior to obtaining borough approval was self-inflicted.)

The Board also concluded that the measurements of Appellant's existing structure constituted "significant deviations" from the initial plans that had been approved by the Board specifically for the purpose of Appellant's variance. (See, Appellant's Motion, dated October 25, 1996, Exhibit "A," Paragraph 24). We find that sufficient evidence was presented to justify the Board's denial of Appellant's variance application on this ground. Appellee introduced Board Exhibit #2 at the August 21, 1996 hearing, which represented, at that time, the existing structure on Appellant's property. The Board compared Board Exhibit #2 to Applicant's Exhibit #1,

Appellant's original plans that had been approved by the board for the purpose of Appellant's variance. (N.T. 8/21/96 at 37-43). Following a comparison of both plans, the Board found that cement block piers supporting the enclosed stairwell did not exist in the original plans. Moreover, the stairs had been modified from a width of thirty-eight inches in the original plan to fifty-four inches in the modified plan; the northwest corner of the existing stairwell is in excess of thirty-six inches from the northern boundary line, a distance which is at least one foot less than that which had been approved in the initial plans. On the basis of the evidence considered by the Appellee, we find that Appellee's decision to deny Appellant's application for a *de minimis* variance on the ground that Appellant's modified plan constituted "significant deviations" from the initial plan was not an error of law.

**CONCLUSIONS OF LAW**

1. Appellee did not commit an error of law in denying Appellant a *de minimis* variance for the construction on his property located at 817 Roosevelt Avenue in the Borough of Roseto on the basis of Appellant's willful violation of the applicable zoning ordinance.

2. Appellee did not commit an error of law in denying Appellant a *de minimis* variance on the basis that the existing structure on Appellant's property constituted a significant deviation from the initial plans submitted by Appellant to the Board.

WHEREFORE, we enter the following:

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA  
CIVIL DIVISION**

STEPHEN RICKERT,  
Appellant

v.

THE ZONING HEARING BOARD  
OF THE BOROUGH OF ROSETO,  
Appellee

:  
:  
: No. 1996-C-6887  
:  
:  
:  
:  
: Land Use Appeal  
:

ORDER OF COURT

AND NOW, this                    day of May, 1997, it is hereby ordered  
and decreed that the Land Use Appeal of Appellant is DENIED and DISMISSED.

The decision of the Zoning Hearing Board of the Borough of Roseto  
rendered on September 30, 1996 is hereby AFFIRMED.

BY THE COURT:

\_\_\_\_\_  
F.P. KIMBERLY McFADDEN, Judge