

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

STEPHEN BICKFORD and JENNIFER	:	
BICKFORD,	:	
Appellants	:	NO. C-48-CV-2008-12027
	:	
v.	:	
	:	
ZONING HEARING BOARD OF	:	
LOWER MOUNT BETHEL	:	
TOWNSHIP,	:	
Appellee	:	
	:	

OPINION OF THE COURT

Presently before the court is Appellants’ appeal from the Zoning Hearing Board of Lower Mount Bethel Township’s denial of Appellants’ variance requests.

This case was assigned to the Honorable F.P. Kimberly McFadden on the January 6, 2009 argument list. Following review of the briefs submitted by the parties and the certified record from Lower Mount Bethel Township, this matter is now ready for disposition.

FACTS/PROCEDURAL HISTORY

Appellants, Stephen and Jennifer Bickford, are the owners of property located at 2058 Abbruzzi Avenue, Martins Creek, Pennsylvania. The property is approximately 15,000 square feet and contains two residential structures. Each of the residences is constructed on a separate lot in a subdivision known as Hutchinson Heights which was laid out in 1948. Both lots have been under common ownership since before the enactment of the Lower Mount Bethel Township Zoning Ordinance of 1972. Appellants acquired the property from Jennifer Bickford’s parents

in 2006 as one lot with two residences.

Appellants sought to subdivide the property into two lots, with each lot containing one of the existing residences. Proposed Lot No. 1 would utilize Abbruzzi Avenue as its front yard, would have a lot size of 125 feet by 65 feet, totaling 8,125 square feet, and would contain the residence identified as the “stone house.” Proposed Lot No. 2 would utilize Fourth Avenue as its front yard, would have a lot size of 55 feet by 125 feet, totaling 6,875 square feet, and would contain the structure identified as the “block building,” a garage with a residential unit on top. The minimum lot size for a lot with on-lot septic and well is 35,000 square feet in a medium density residential zoning district.

In addition to subdivision, Appellants requested a number of variances from the provisions of the Zoning Ordinance to permit the subject property to be divided into two separate lots, including variances from the requirements of lot area, lot width, lot coverage, front, rear and side yard setbacks and parking requirements. The matter came before the Lower Mount Bethel Township Zoning Hearing Board (hereinafter “the Board”) on September 17, 2008. No persons appeared in opposition to Appellants. At the conclusion of the hearing, the Board denied Appellants’ requested variances. Appellants filed the instant appeal on November 12, 2008.

STANDARD OF REVIEW

The standard of review in the instant matter is well-defined. Since we are not taking additional evidence, our scope of review is limited to determining whether the governing body committed a manifest abuse of discretion or an error of law. Baker v. Chartiers Township Zoning Hearing Board, 677 A.2d 1274, 1276 (Pa. Cmwlth. 1996), appeal denied 690 A.2d 238

(Pa. 1997). A conclusion that the governing body abused its discretion may be reached only if the governing body's findings are not supported by substantial evidence. Id. Assuming the record demonstrates the existence of substantial evidence, we are bound by its findings which are the "result of resolutions of credibility and conflicting testimony rather than a capricious disregard for evidence." See Vanguard Cellular System, Inc. v. Zoning Hearing Board of Smithfield Township, 568 A.2d 703 (Pa. Cmwlth. 1989), appeal denied, 590 A.2d 760 (Pa. 1990). Thus, if a governing body's decision is legally sound and supported by substantial evidence, that decision must be upheld. D'Amato v. Zoning Board of Adjustment of City of Philadelphia, 585 A.2d 580 (Pa. Cmwlth. 1991). Our Courts have defined "substantial evidence" as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. See Bailey v. Upper Southampton Township, 690 A.2d 1324 (Pa. Cmwlth. 1997).

Finally, it is well-settled that the interpretation of local ordinance provisions is "within the sole discretion" of the local governing body, subject to the abuse of discretion and error of law standards. Morris v. South Coventry Board of Supervisors, 836 A.2d 1015, 1023 (Pa. Cmwlth. 2003).

DISCUSSION

Appellants assert that they are entitled to zoning relief, on the basis of one or all of the following theories: (a) variance as the result of a hardship; (b) a reapportionment of a non-conforming lot/structure/use; (c) constitutional right to a natural expression of a non-conforming lot/structure/use; (d) a right incident to a non-conforming use; and (e) application of statutory rights contained under Section 813 of the Ordinance entitled "small lots

of record,” Section 850 and Section 992. Appellants contend the Board committed an error of law and/or abused its discretion in refusing to grant zoning relief.

Non-Conforming Lot/Structure/Use

The subject property is non-conforming as it was created and developed prior to any zoning ordinance adopted by the Township. Specifically, the Board found that the property was created in its current configuration prior to the enactment of the Zoning Ordinance. See Opinion of the Lower Mount Bethel Township Zoning Hearing Board at No. 12. Thus, Appellants assert that they are entitled to subdivide their property as a matter of right pursuant to a natural expansion of a non-conforming use, a reapportionment of a non-conforming use, or a right incident to a non-conforming use. In support of their position, Appellants cite to Baer v. Zoning Hearing Board of North Whitehall Township, Court of Common Pleas of Lehigh County (1984). However, we note that this unreported and non-precedential decision is not binding authority. Additionally, the factual circumstances of the instant case are distinguishable from the facts of Baer.

In Baer, property owners sought to subdivide a self-service gasoline station and a mobile home park located on the same premises. The property was non-conforming due to the existence of the two uses on the same parcel. After the proposed subdivision, the two uses would also fail to satisfy the dimensional requirements of the zoning ordinance. However, in the instant case, the subject property is nonconforming both because it is too small under the current zoning ordinance and for the existence of the two residences on one lot. While in Baer there was no evidence that the property was dimensionally nonconforming prior to subdivision, in the instant case, the subject property is dimensionally nonconforming even before subdividing,

which will only be exacerbated by splitting the property into two even smaller lots. Under the current Zoning Ordinance, the minimum lot size required is 35,000 square feet. The subject property, before subdividing, is only 15,000 square feet. Consequently, the Board concluded that “granting Applicant’s request for numerous variances to permit the creation of two separate lots would increase the dimensional non-conformity with regard to each separate lot so created, although it would eliminate the non-conformity of having two principle uses on one lot.” See Opinion of the Lower Mount Bethel Township Zoning Hearing Board at No. 19.

“The right to the natural expansion of a valid nonconforming use is a constitutional one protected by the due process clause.” In re Freid-el Corp., 383 A.2d 1286, 1288 (Pa. Cmwlth. 1978). “The owner of a nonconforming use, however, may be required to meet the rigorous standards necessary for a variance before his right to expand the use may be exercised.” Id.

The Pennsylvania Municipalities Planning Code (MPC) provides the requirements for a dimensional variance, which are:

- (1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or 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 the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.
- (2) 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.
- (3) That such unnecessary hardship has not been created by the
appell
ant.
- (4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor

substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

(5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

53 P.S. §§10910.2. These requirements are also mirrored in the Lower Mount Bethel Township Zoning Ordinance at Section 991. In evaluating the above criteria, the Board held that “separation of the subject property into two separate lots would inhibit any future improvement of each individual lot such as for adding a garage to lot one or a swimming pool to either lot.” See Opinion of the Lower Mount Bethel Township Zoning Hearing Board at No. 16.

The Board also argues that Appellants have not established the requisite hardship necessitating the variances. In order to be entitled to a variance, Appellants have the burden of proving that an unnecessary hardship exists due to unique physical circumstances peculiar to the property in question. Gamestown, Inc. v. Zoning Board of Adjustment of City of Pittsburgh, 452 A.2d 584 (Pa. Cmwlth. 1982). The Board argues that the physical characteristics of Appellants’ property are not unique, as it is surrounded by other lots of similar size and shape. The Board further argues that the subject property is currently being used as a lawful non-conforming use. An unnecessary hardship is shown only where evidence establishes that using the property in strict conformity with the Zoning Ordinance would render the property practically useless. Rittenhouse Row v. Aspite, 917 A.2d 880, 885 (Pa. Cmwlth. 2006). Here, it is clear that the property is not useless. To the contrary, it is fully utilized and Appellants testified that they wanted to subdivide the property in order to provide flexibility should they wish to sell one residence and maintain the other.

However, economic and personal considerations in and of themselves are insufficient to constitute hardship. McNally v. Bonner, 645 A.2d 287, 289 (Pa. Cmwlth. 1994). A property owner's desire to maximize a property's profitability does not constitute hardship. Ken-Med Associates v. Board of Township Supervisors of Kennedy Township, 900 A.2d 460, 466 (Pa. Cmwlth. 2006). Unless a property is rendered valueless, financial hardship alone is not a sufficient basis for granting a variance. Society Created to Reduce Urban Blight v. Zoning Board of Adjustment, 804 A.2d 116, 120 (Pa. Cmwlth. 2002). Property owners do not have a right to utilize land for their highest and best financial gain. Id. Consequently, the Board further concluded that "[a]s the subject property is currently being lawfully used by the Applicants, the Board finds that Applicant will not suffer a hardship by the denial of the variance." See Opinion of the Lower Mount Bethel Township Zoning Hearing Board at No. 20. We find that the Board's conclusions are supported by substantial evidence and Appellants have not demonstrated the requisite hardship to entitle them to the numerous variances requested.

Small Lots of Record

Appellants also contend that they are entitled to zoning relief under Section 813 of the Zoning Ordinance. Specifically, the Board found that "as the property was created in its current configuration prior to the enactment of the Zoning Ordinance, that the subject property constitutes a small lot of record governed by the provisions of Section 813 of the Lower Mount Bethel Township Zoning Ordinance." See Opinion of the Lower Mount Bethel Township Zoning Hearing Board at No. 12. Section 813 of the Ordinance states as follows:

813 Small Lots of Record Notwithstanding the Lot Area, Lot Width and Lot Coverage requirements of any District listed in Sections 500, 600 and 700, a building or structure containing a permitted, accessory, or special exception use, may be erected on any lot with less than the required lot width or lot area if separately owned and not adjacent to any lot in the same ownership at the effective date of this ordinance; provided that the lots is not less than 2,200 square feet, has a minimum width of 30 feet, that the aggregate width of the side yards be not less than 30 percent of the lot width, and that the narrower side yard be not less than five (5) feet in width.

However, while it is clear that the above cited section provides relief for the subject property in its current configuration as a merged single lot, it does not provide for Appellants' requested relief of subdivision into two parcels. Section 813 explicitly requires that a lot be separately owned and not adjacent to any lot in the same ownership at the effective date of this ordinance. As stated above, at the time of original development, the subject property consisted of two adjacent lots in the Hutchinson Heights development. However, since that time, and at the time of the enactment of the Zoning Ordinance, the properties were under common ownership and therefore merged to become the single lot of the subject property. Consequently, Section 813 cannot be considered a basis under which Appellants may seek a subdivision of their property. Moreover, Section 813 would only provide relief as to the lot area, lot width and side yard setback requirements. Appellants would need additional variances from the lot coverage, front yard and rear yard setbacks, and parking requirements. Consequently, as the variances requested by Appellants to enable subdivision would be substantial deviations from the requirements of the Zoning Ordinance, the Board's denial of the requested variances was not an abuse of discretion or an error of law.

CONCLUSION

For the above stated reasons, Appellants' appeal from the decision of the Zoning Hearing Board is Denied and Dismissed.

WHEREFORE, we enter the following:

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BICKFORD,	:	
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ZONING HEARING BOARD OF	:	
LOWER MOUNT BETHEL	:	
TOWNSHIP,	:	
	:	
Appellee	:	
	:	

ORDER OF COURT

AND NOW, this day of February, 2009, upon consideration of the Land Use Appeal filed by Appellants, Stephen and Jennifer Bickford, the parties briefs thereto, and the Record, it is hereby **ORDERED** and **DECREED** that the Appellant's Land Use Appeal is **DENIED** and **DISMISSED**. The decision of the Zoning Hearing Board of Lower Mount Bethel Township denying Appellants' variance requests is **AFFIRMED**.

BY THE COURT:

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F.P. KIMBERLY MCFADDEN, P.J.