

BEFORE THE ZONING HEARING BOARD

TOWNSHIP OF EAST LAMPETER

IN RE: :
: No. 2016-23
APPEAL/APPLICATION OF GRANNY :
N POPS PLACE, LLC :

DECISION

I. FINDINGS OF FACT

1. Applicant is Granny n Pops Place, LLC, 1519 Wind Mill Road, Gap, Pennsylvania 17527 (hereinafter "Applicant"). The members of Applicant are Darren Phillips and Vicki Lynn Phillips, husband and wife.

2. The property which is the subject of the instant appeal/application is 2939 Lincoln Highway East, East Lampeter Township, Lancaster County, Pennsylvania (the "Property").

3. The Property contains approximately 1.3 acres and is a flag lot.

4. Applicant is the owner of the Property.

5. The Property is located in the Village Commercial (VC) District as shown on the Official Zoning Map of East Lampeter Township.

6. Notice of the hearing on the within appeal/application was duly advertised and posted in accordance with the provisions of the Pennsylvania Municipalities Planning Code ("MPC") and The East Lampeter Zoning Ordinance of 2016 (the "Zoning Ordinance").

7. On or about June 24, 2016, Applicant filed a zoning application with the Zoning Hearing Board of East Lampeter Township ("Board") appealing an Enforcement Notice issued by East Lampeter Township for the Property and also seeking a variance by estoppel to allow a rooming house to be operated on the Property.

8. Applicant provided written notices to the Board waiving applicable time limits for the holding of hearings in this matter, and public hearings were held before the Board on this appeal/application on February 23, 2017, April 13, 2017, and May 11, 2017.

9. Testimony at the hearings was stenographically recorded.

10. Applicant was represented at the hearings by Lee A. Stivale, Esquire.

11. East Lampeter Township participated as a party in this proceeding.

12. The use of the Property is a boarding house, as that term is defined in the Zoning Ordinance. While Applicant referred to the use as a rooming house, there is no definition of a rooming

house in the Zoning Ordinance, and the use falls within the definition of a boarding house.

13. The Township issued an Enforcement Notice to Applicant, dated May 27, 2016, alleging: that the Property was being used as a boarding house; that a boarding house was not a permitted use in the Village Commercial (VC) Zoning District; that a boarding house was not a permitted use in the Commercial (C-2) Zoning District under the prior 1990 Township Zoning Ordinance; and that no zoning relief had been granted for the Property for use as a boarding house.

14. Applicant filed a timely appeal appealing the Enforcement Notice and included in that zoning application a request for a variance by estoppel to allow the boarding house to continue.

15. At the hearing held on February 13, 2017, Applicant and the Township stipulated that a boarding house was not a permitted use in the Village Commercial (VC) Zoning District under the current Zoning Ordinance; was not a permitted use in the C-2 Zoning District under the prior 1990 Zoning Ordinance; and that the Enforcement Notice issued by the Township was valid).

16. Applicant currently has fourteen (14) units on the Property, consisting of eleven (11) units in the main building, two (2) in the garage and one (1) in the barn.

17. Applicant acquired the Property on June 19, 2015, at which time there were thirteen (13) units on the Property, and the purchase price for the Property was \$460,000.00.

18. Subsequent to acquiring the Property, Applicant added an additional dwelling unit in the garage.

19. At no time prior to purchasing the Property did either Mr. or Mrs. Phillips contact East Lampeter Township officials to determine the status of the Property and the use being conducted on it.

20. Deborah Higgins and Cliff Stuckey, witnesses for the Applicant, testified that they allegedly knew that the Property had been used as a boarding house in the mid-to-late 1990s because they both had resided on the Property, and Mr. Stuckey subsequently acquired an equitable interest in the Property.

21. In 1999, the Property was involved in a zoning application filed by Lynn Cole, the then-owner of the Property, docketed as Case No. 99-37, in which Mr. Cole applied for a variance to reduce the required front yard setback to allow a four-unit motel on the Property.

22. By motion, and at the request of the Township, the Board took administrative notice of its Decision in Case No. 99-37.

23. In Finding of Fact No. 11 in the decision in Case No. 99-37, the Board described the Property as being improved with a single family dwelling, garage and barn, not a boarding home.

24. Mrs. Phillips acknowledged that she did not contact the Township prior to adding the additional dwelling unit on the Property to determine the status of the Property or whether a permit was needed, alleging that she had read a Township newsletter and concluded that a permit was not necessary.

25. Mrs. Phillips testified that she made further improvements to the Property. With regard to the main house, she replaced the sewer pump, central air, washer/dryers, well holding tank, light fixtures, and shower stalls. With regard to the former pool house, she installed new doors and windows, siding, gutters, flooring and bathroom fixtures. Mrs. Phillips estimates that she spent approximately \$130,000 to \$150,000 on the improvements.

26. Mrs. Phillips acknowledged that she had no contact with the Township at any time concerning the Property prior to Township representatives coming to the Property for an inspection and Applicant's having received the Enforcement Notice. She performed

no research regarding the zoning of the Property. She did not review the Zoning Ordinance or zoning map.

27. Although both Mr. and Mrs. Phillips claimed to have relied on others, including real estate professionals and the appraiser, to determine the status of the Property, neither person personally checked with the Township or made an inquiry as to the zoning for the Property and the legality of any use on the Property.

II. CONCLUSIONS OF LAW

1. Applicant's application was properly filed, advertised and the Property posted as required by law.

2. The Property is located in the Village Commercial (VC) Zoning District.

3. A boarding house is not a permitted use in the Village Commercial (VC) Zoning District.

4. Under the 1990 East Lampeter Zoning Ordinance, the Property was located in the Commercial (C-2) Zoning District.

5. A boarding house was not a permitted use in the Commercial (C-2) Zoning District under the prior zoning ordinance.

6. The Property is currently being used by the Applicant as a boarding house, as that term is defined in the Zoning Ordinance.

7. Neither Applicant nor any of Applicant's predecessors in title sought or obtained zoning relief to allow the Property to be used as a boarding house.

8. Notwithstanding contrary testimony from Cliff Stuckey and Deborah Higgins that the Property was used as a boarding house in the mid-to-late 1990s, Lynn Cole, the then-owner of the Property, represented to the Board in 1999 that the Property was a single-family dwelling, as confirmed by the written decision in Case No. 99-37, of which this Board took administrative notice in this proceeding.

9. Applicant has failed to establish that the use of the Property was a valid non-conforming use, and counsel for Applicant acknowledged that fact at the initial hearing on this application.

10. The use of the Property as a boarding house is illegal.

11. As stipulated to by Applicant and the Township, the Enforcement Notice dated May 27, 2016, issued to Applicant by the Township is valid, and the appeal of the enforcement notice is without merit.

12. To establish a variance by estoppel, an applicant must establish: (1) a long period of municipal failure to enforce the law, when the municipality knew or should have known of the violation, in conjunction with some form of active acquiescence in

the illegal use, although a mere showing that the municipality has failed to enforce the law for a long period of time is insufficient in itself to support the grant of a variance; (2) that the landowner acted in good faith and relied innocently upon the validity of the use throughout the proceedings; however, in assessing whether a landowner's reliance upon municipal inaction is reasonable, a landowner is duty bound to check the property's zoning status before purchase; (3) that the landowner has made substantial expenditures in reliance upon his belief that the use was permitted; and, (4) that denying the variance would impose an unnecessary hardship on the applicant, such as the cost to demolish an existing building: Mucy v. Fallowfield Township Zoning Hearing Board of Washington County, 609 A.2d 591 (Pa. Cmwlth., 1992).

13. A variance by estoppel is an unusual remedy under the law and is granted in only the most extraordinary of circumstances. Moses v. Zoning Hearing Board of the Borough of Dormont, 487 A.2d 481, Pa. Cmwlth., 1985).

14. For an applicant to prevail under a variance by estoppel theory, it must prove the essential factors by clear, precise and unequivocal evidence. Pietropaolo v. Zoning Hearing Board of Lower Merion Township, 979 A.2d 969, Pa. Cmwlth., 2009.

15. A property owner cannot acquire a right to a variance by estoppel through the actions or representations of prior owners, real estate agents, or other third parties who do not speak for a municipality. A person who purchases property based on the representations of the seller, rather than making an independent investigation of the true status of the property, proceeds at his or her own risk, and cannot later complain that a variance should be granted if those representations prove to be false. Skarvelis v. Zoning Hearing Board of Dormont, 679 A.2d 278 (Pa. Cmwlth., 1996).

16. In assessing whether a landowner's reliance upon municipal inaction is reasonable, a landowner is duty bound to check the property's zoning status before purchase. Skarvelis v. Zoning Hearing Board of Dormont, 679 A.2d 278 (Pa. Cmwlth., 1996).

17. Neither Mr. nor Mrs. Phillips, the principals in Applicant made any inquiry to Township representatives prior to the purchase of the Property to ascertain the zoning status of the Property. Moreover, neither person contacted the township even after the purchase, but prior to making any renovations or changes to the Property, to inquire about the zoning status of the Property.

18. Applicant's testimony does not rise to the level of clear, precise and unequivocal evidence required to support an estoppel against the Township.

19. In addition, Applicant has failed to prove unnecessary hardship. In order to establish unnecessary hardship, an applicant must show more than a mere economic or personal hardship. To accomplish this, the applicant must prove that the hardship is unique to the property, and that the zoning restriction sought to be overcome renders the property practically valueless. Pietropaolo v. Zoning Hearing Board of Lower Merion Township, 979 A.2d 969, Pa. Cmwlth., 2009.

20. Although denial of the variance may result in some economic loss, the Property can be used for a permitted purpose within the Village Commercial (VC) District. Applicant offered no credible evidence to the contrary and denial of the variance would not render the Property valueless.

21. Attorney Stivale has also argued that because the Township failed to call Lee Young, the former Township Zoning Officer, or Scott Wyle, an employee of the sewer department, to testify at the zoning hearing, an adverse inference should be drawn. In his proposed conclusions of law submitted to Board, Attorney Stivale referenced the following case law and treatises:

Generally, when a potential witness is available to only one of the parties to a trial, and it appears this witness has special information material to the issue, and this person's testimony would not be merely cumulative, then if such party does not produce the testimony of this witness, the jury may draw an inference it would have been unfavorable. Commonwealth v. Moore, 453 Pa. 302, 309 A.2d 569. See also O'Rourke v. Rao, 411 Pa. Super.609, 602 A.2d 362 (1992). Alan Stephens, Annotation: Adverse Presumption or Inference Based on Party's Failure to Produce or Question Examining Doctor - Modern Cases, 77 A.L.R. 4th 463; Leonard Packel and Anne Poulin, Pennsylvania Evidence Sections 419-419.3.

22. The cases and treatises cited by Attorney Stivale do not involve zoning hearings. One of the cases cited by Attorney Stivale in support of his argument is a criminal case (Commonwealth v. Moore). The other is a medical malpractice case (O'Rourke v. Rao). One of the treatises cited addresses "failure to produce or question examining doctor" and the other is Pennsylvania Evidence. The rules of evidence do not apply in zoning hearings. The pertinent part of MPC Section 908(6) states as follows: "The formal rules of evidence shall not apply" The cases and treatises cited by Attorney Stivale involve non-zoning cases where rules of evidence do apply. Attorney Stivale did not cite any cases involving zoning and this evidentiary presumption.

23. The evidentiary presumption cited by Attorney Stivale applies when "a potential witness is available to only one of the parties at trial". Neither Lee Young, nor Scott Wyle, are

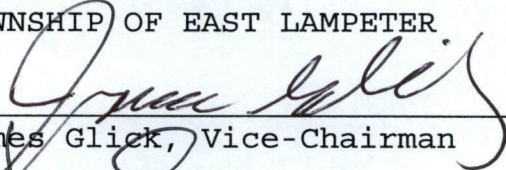
witnesses "only available to the Township at trial". With regard to Lee Young, he is not even the current zoning officer. Moreover, Attorney Stivale could have requested the zoning hearing board issue a subpoena upon Lee Young and Scott Wyle to appear and testify at the zoning hearing. The pertinent portion of MPC Section 908(4) states that "the chairman or acting chairman of the board . . . shall have the power to . . . issue subpoenas to compel the attendance of witnesses and the production of relevant documents and papers, including witnesses and documents requested by the parties." Attorney Stivale failed to do so.

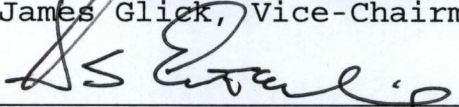
24. Applicant has not sustained its burden of proof in establishing the right to a variance by estoppel, and the request for such variance must be denied.

III. DECISION

Based on the testimony presented at the hearings, the Board upholds the validity of the Enforcement Notice dated May 27, 2016, issued to the Applicant by East Lampeter Township for property located at 2939 Lincoln Highway East, Gordonville, Pennsylvania 17527, and denies and dismisses Applicant's appeal of that Enforcement Notice. In addition, the Board denies Applicant's request for a variance by estoppel to allow a boarding house on the Property.

ZONING HEARING BOARD OF THE
TOWNSHIP OF EAST LAMPETER


James Glick, Vice-Chairman


J. Scott Enterline, Secretary

DISSENT:

Based upon the following, I dissent from the foregoing Decision:

1. Multiple witnesses testified that the previous zoning officer had been to the Property numerous times without informing the owner that the use was inconsistent with the zoning ordinance. As testified, while reviewing a request for expansion, the zoning officer discussed issues related to the proposed project including engineering, sidewalks, parking requirements, dimensional setbacks, handicap accessibility and other issues which are part of the zoning and/ or building code requirements.

2. The Township offered no testimony to rebut the Applicant's witnesses regarding the presence of Township officials on the Property over an extended period of time. A reasonable conclusion would be that the zoning officer either knew the Property was noncompliant, but acquiesced, or was not aware it was

noncompliant. Given the responsibility (as required by the MPC) for the municipality to employ a zoning officer with knowledge of the zoning ordinance, along with the opportunity for the Township Board of Supervisors and other Township employees to interact with the owners over an extended period of time, it is not reasonable to conclude the Township was unaware the Property was noncompliant.

3. Despite having the ultimate responsibility of due diligence, the owner: (i) was offered funds by a bank with financial interests that also failed to discover the zoning issue; (ii) reviewed a property offering brochure by a licensed real estate professional that mis-characterized the Property; and (iii) had years of personal experience with the Property in its current use with Township employee presence on the Property.

4. The presence of a zoning officer discussing zoning issues with the owner by common "reasonableness" standards would satisfy the requirement that the owner is duty-bound to check the zoning status. The Township did not present evidence of any effort on behalf of the Applicant to conceal the use of the Property.

5. Applicant testified to having spent approximately \$130,000 to improve the Property in reliance upon its then current use. It is reasonable to assume denial of a variance would render

the layout and function of the structures nearly useless as a single-family home.

6. The current use has been ongoing for approximately 30 years. Applicant described the tenants as several veterans, several disabled and several low income tenants that provide services in lieu of rent and support one another in a sense of community.

7. The physical property described as a "flag lot" is not visible to passing traffic.

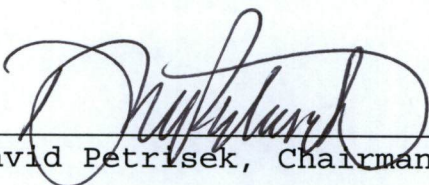
8. The adjacent landowners are known to the owners and tenants and offered support at the hearing.

9. Other than acknowledging in the Enforcement Notice that the Township action resulted from a "complaint", the Township offered no testimony that the use is detrimental to the public health, safety or welfare of the community.

10. The use of the Property and conflict with the Zoning Ordinance has gone unnoticed or unresolved for 30 years pre-dating the owner's purchase of the Property.

11. Applicant has met the requirements for a variance by estoppel. Granting of the variance by estoppel is in the best interest of the community and therefore consistent with the purpose of the Zoning Ordinance (if conditioned upon the Applicant removing

the improvements to the second rooming house located in the garage which will return the Property as closely as possible to the condition and status that was existing when purchased).



David Petrisek, Chairman

Dated and filed June 22, 2017, after hearings held on February 23, 2017, April 13, 2017, and May 11, 2017.

The undersigned certifies that a copy of this Decision was served upon all parties on or prior to June 23, 2017.

