

CHARLES LEWIS AND RHONDA LEWIS, Appellants

v.

ZONING HEARING BOARD OF NORTHAMPTON TOWNSHIP, Appellee, KEVIN GOTTLIEB, Applicant/Intervenor

No. 2008-5830-18-5

Common Pleas Court of Bucks County, Pennsylvania, Civil Division

November 10, 2009

David F. Gould, III, Esquire, GOULD LAW ASSOCIATES, PC, Doylestown, PA.

Scot W. Semisch, Esquire, SEMISCH and SEMISCH, Willow Grove, for ZHB of Northampton Twp.

Edward Rudolph, Esquire, RUDOLPH, PIZZO & CLARKE, LLC, Trevese, PA, for Northampton Township.

Melvin C. McDowell, Esquire, ROTHBERG & FEDERMAN, P.C., Bensalem, PA, for Kevin Gottlieb, Applicant/Intervenor.

OPINION

MEMORANDUM OPINION and ORDER

This is a de minimis case. Applicant/Intervenor Kevin Gottlieb ("Gottlieb") was granted a variance [1] by the Northampton Township Zoning Hearing Board (the "ZHB") to exceed the permitted impervious surface ratio of 10% and approve a 13.1% impervious surface ratio after the addition of a tennis court to his property at tax parcel 31-010-070-015 in Richboro, Northampton Township, Bucks County, Pennsylvania. Appellants Charles and Rhonda Lewis (the "Appellants") are immediate neighbors to Gottlieb's property and attended the four (4) meetings held on this matter.

On May 12, 2008 the ZHB entered its written decision, granting the variance with three conditions: 1) that the Applicant must submit plans to the Township that are acceptable to the Township, 2) that Applicant must remove his driveway and replace it with a pervious surface, and 3) that Applicant's plan for the tennis court must contain at least 150 square feet of pervious surface. Gottlieb sought to add a 7,200 square foot tennis court to his property, of which 150 square feet would be pervious. Gottlieb will

remove the current impervious driveway and replace it with pervious pavers. Under the zoning code, Gottlieb's property is permitted 8,719 square feet of impervious surface. With the removal of the driveway and addition of the tennis court, the Property would contain 10,028 square feet of impervious surface. [2]

Where, as here, the trial court has not taken any additional evidence, this court's scope of review is limited to determining whether the ZHB committed an error of law or a manifest abuse of discretion. *See Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 462 A.2d 637 (1983). The ZHB abuses its discretion where its findings are not supported by substantial evidence, *id.* Substantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a conclusion, *Id.*

On appeal, the Lewises argue that Gottlieb did not meet the requirements for variance relief pursuant to the Municipalities Planning Code § 10910.2, but their analysis of the law as related to the instant matter is flawed. In the case of *West Bradford Township v. Evans*, 35 Pa.Cmwlth. 167, 384 A.2d 1382 (1978), the Pennsylvania Commonwealth Court applied the rule that where a variance is "de minimis" it may be granted even if the traditional grounds for a variance have not been met. There are no set criteria for a de minimis variance. Rather, de minimis variances are granted according to the particular circumstances of each case. *See Stewart v. Zoning Hearing Bd. of Radnor Township*, 110 Pa.Cmwlth. 111, 531 A.2d 1180, 1182 (1987).

Although a zoning hearing board should consider the size of the proposed deviation in determining whether a variance is de minimis, the Commonwealth Court reiterated that it is equally important for a board to consider whether rigid compliance is necessary to preserve the public interests sought to be protected by the ordinance. *Bailey v. Zoning Bd. of Adjustment of City of Philadelphia*, 569 Pa. 147, 801 A.2d 492, 166, 569 Pa. 147, 801 A.2d 492, 504 (Pa., 2002).

When seeking a dimensional variance within a permitted use, a landowner is asking only for a reasonable adjustment of zoning regulations in order to utilize property in a manner consistent with applicable regulations. *Hertzberg v. Zoning Bd. of Adjustment of City of Pittsburgh* 554 Pa. 249, 721 A.2d 43 (Pa., 1998). Appellants' application of *Hertzberg* does not reconcile with the de minimis doctrine. *Hertzberg* would not be offended by the grant of the instant variance and the Appellants conveniently disregard the ZHB's response to the concerns of neighboring property owners and the imposition of conditions to ensure that the grant of this variance would not result in a negative impact

to the neighborhood by flooding or drainage issues.

We will not quibble with Appellants' various mathematical permutations rendered in an effort to make the " numbers" behind the impact of this variance appear more significant than they are. A variance is measured from that which is allowed; here the amount allowed is 10%, the amount needed is 13.1%. The impact here is minimal.

Because the proposed de minimis deviations from the zoning requirements are dimensional and the insistence on rigid compliance is not absolutely necessary to preserve the public interest sought to be protected, the ZHB did not commit an abuse of discretion or an error of law in granting a de minimis variance. The ZHB concluded that the variance requested, granted subject to the enumerated conditions, would have a de minimis effect on the surrounding properties. It is noteworthy that the construction of this tennis court will not obstruct light or air, but only surface water and the record substantiates that the area is well drained. The ground and aerial photographs in the record show expansive areas of pervious surface together with an excellent topographical drain. Gottlieb also offered the expert report of engineer H. Joon Pak, who confirmed " there would be little or no adverse impacts to the stormwater runoff if a tennis court were to be constructed on the subject property."

We agree with the ZHB's conclusion and hold that the ZHB did not commit any error of law or abuse of discretion in applying the " de minimis" principle to the variance request. We therefore enter the following:

ORDER

AND NOW, this 10th day of November, 2009, upon consideration of the appeal filed by Charles and Rhonda Lewis, and response thereto, it is hereby ORDERED and DECREED that the appeal is DENIED. The decision of the Northampton Township Zoning Hearing Board is AFFIRMED.

BY THE COURT:

/s/ John J. Rufe

JOHN J. RUFÉ, Judge

Notes:

[1]The variance seeking to permit a fence for a tennis court to be closer than 50 feet abutting a residential property was withdrawn.

[2]The term " pervious" generally refers to material which

is capable of being penetrated or infiltrated by water. Impervious surfaces are defined to mean those areas that prevent or impede the Infiltration of storm water into the soil. Impervious areas are defined as any man-made surface that is resistant to the penetration of water. *Arduino v. ZHB of Borough of Dunmore* , 2005 WL 4124885 (Pa. Com. Pl.)(citations omitted)
