

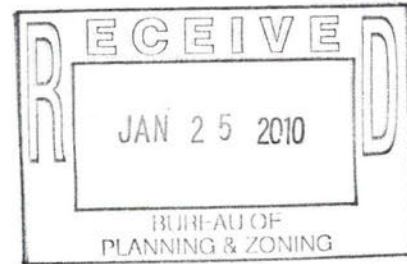
THOMPSON LAW OFFICES

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

January 21, 2010

James J. Holzinger, Esquire
[REDACTED]
[REDACTED]

RE: MATTER: Appeal of Kevin Horvath
ADDRESS: 1801 Elliot Avenue
FILE: 2009-44



Dear Attorney Holzinger:

Enclosed please find the original Findings of Fact, Conclusions of Law, and Formal Written Decision of the City of Bethlehem.

Additionally, this letter constitutes written notification to those individuals who entered their appearance at the Hearing of the above decision of the Zoning Hearing Board under Section 908(10) of the Pennsylvania Municipalities Code. The Zoning Hearing Board granted a favorable interpretation regarding time-limitations in relation to the specific application.

A copy of this decision will be on file and may be examined for inspection at the Planning and Zoning Office of the City of Bethlehem located at 10 East Church Street, Bethlehem, Pennsylvania. The appeal period expires thirty (30) days from the date of the decision, which is January 21, 2010.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Mickey K. Thompson".

Mickey K. Thompson
Solicitor

MKT/owk
c: John Lezoche, Zoning Officer
Michael Shay, Esquire
Kathy Detzi Light
William Schreier
Jerry Green
Patrick McGinty
Mary Lou Hatcher
Martha Christine

Kevin Brezack
Keith Gurman

**Before the Zoning Hearing Board
of the City of Bethlehem, Pennsylvania**

Lehigh County Division

Appeal & Application of
KEVIN HORVATH,
Fee Simple Owner.

) November 2009
) Re: ~~1301 Linden Street~~
) File: #2009-44
) INTERPRETATION

1801 Elliot Ave

**NOTICE OF RIGHT OF APPEAL
OF AGGRIEVED PARTY**

You have the right to appeal this Decision if you are an “aggrieved party” under the Pennsylvania Municipalities Planning Code. You must appeal to the Court of Common Pleas of the county in which the subject property is situated. The City of Bethlehem is located partly in Northampton County and partly in Lehigh County.

In order to properly file an appeal, you should seek the advice of a lawyer. Please note that neither the Zoning Officer nor the Zoning Board Solicitor is permitted to give you legal advice. PLEASE DO NOT CALL THIS OFFICE.

You must file your appeal in writing within thirty (30) calendar days of the date of this Decision or your right to such an appeal is lost.

**YOUR APPEAL PERIOD BEGINS
JANUARY 21, 2010**

**Before the Zoning Hearing Board
of the City of Bethlehem, Pennsylvania**

Lehigh County Division

Appeal & Application of
KEVIN HORVATH,
Fee Simple Owner.

) November 2009
) Re: ~~1301 Linden Street~~
) File: #2009-44
) INTERPRETATION

DECISION

I. Synopsis of Decision

The Board found in favor the Applicant's Interpretation that the previous Interpretation granted on June 7, 2008 was not subject to the time limitation provisions under Section 1325.09 of the Zoning Ordinance.

II. Preliminary Matters

A public hearing was held on November 18, 2009 at 7:00 p.m. before the Zoning Hearing Board of the City of Bethlehem, regarding the Applicant's request for an Interpretation as to whether an earlier Interpretation granted by the Board was subject to Section 1325.09's one year time limitation provision.

The Applicant first sought a zoning permit from the Zoning Officer. The Zoning Officer denied the permit. Thus, the Applicant filed this appeal with the Zoning Hearing Board.

A. Parties

1. APPELLANT/APPLICANT(S)¹: Kevin Horvath appeared at the hearing and was represented by James J. Holzinger, Esq. of Boyer, Holzinger, Harak and Scamilio of Bethlehem, Pennsylvania. The Applicant had standing to appear before the Board as the fee simple owner of the premises.

2. ZONING HEARING BOARD: The Board, consisting of Chairman Gus Loupos and Members William Fitzpatrick and Kenneth Kraft, was represented by its Solicitor, Mickey K. Thompson, Esq. of Thompson Law Offices in Bethlehem, Pennsylvania.

3. PROTESTANT(S)/INTERESTED PARTIES: Jerry Green, Kathy Detzi Light, William Schreier, Patrick McGinty, Mary Lou Hatcher, Martha Christine, Kevin Brezack, and Keith Gurman appeared at the Hearing as objectors to the proposed plan.

B. Notice

Notice of the hearing was given by newspaper advertisement, by physical posting of the property, and by regular mail to neighboring property owners pursuant to the applicable provisions of the Pennsylvania Municipalities Planning Code,² the Zoning Ordinance of the City of Bethlehem³, citations *infra*, and the Rules of the Board.⁴

¹ Those persons or entities who have sought a permit from the Zoning Officer and were denied a permit have appealed from his denial and are thus "appellants" in a certain sense; they also are applying for relief from the Zoning Hearing Board and are thus "applicants."

² MPC § 10908(1) provides that "[p]ublic notice shall be given and written notice shall be given to the applicant, the zoning officer, such other persons as the governing body shall designate by ordinance and to any person who has made timely request for same. Written notices shall be given at such time and in such manner as shall be prescribed by ordinance or, in the absence or ordinance provisions, by rules of the board. In addition to the written notice provided herein, written notice of said hearing shall be conspicuously posted on the affected tract of land at least one week prior to the hearing."

³ Article 1325.04(a) provides for notice to be given as follows: "(1) At least seven (7) days prior to the date fixed for public hearing, publish a public notice describing the location of the building or lot and the general nature of the question involved in a newspaper of general circulation in the City. (2) Give written notice to parties in interest at least seven (7) days in advance of such hearing."

III. Applicable Law

This case was considered under the following statutory authority, as well as under applicable reported decisions of the appellate courts in Pennsylvania:

1. *The Codified Zoning Ordinance of the City of Bethlehem*, Ordinance No. 2210, effective September 25, 1970, amended to April 2008 (hereinafter, the “Zoning Ordinance”).
2. *The Pennsylvania Municipalities Planning Code*, 53 P.S. § 10101, *et seq.*, as reenacted 1988, Dec. 21. P.L. 1329, No. 170, § 2, effective in 60 days (hereinafter, the “MPC”).

IV. Nature of Relief Sought

The Applicant sought an Interpretation under Section 1325.05 of the Ordinance as to whether or not an earlier Interpretation was subject to the time limitation provisions under Section 1325.09 of the Zoning Ordinance.

V. Evidence Received by the Board

Board Exhibit #1: Application.

Such parties shall be at least those persons whose properties adjoin and face on the same street as the property in question, and the City Planning Commission.”

4 The custom and practice in the City of Bethlehem is for the Zoning Officer to place the notice in the newspaper and to send written notice to interested parties by regular mail. The Applicant is given a fluorescent sign by the Zoning Officer at the time the Application is filed and the fee paid, and the Applicant is instructed to conspicuously post the property with the sign giving notice of the particulars of the hearing at least seven (7) days prior to the hearing.

The Applicant came before the Board in November 2009 looking for an Interpretation as to whether the provision in Section 1325.09 which places time limitations on approvals by the Zoning Board applies to Interpretation. Section 1325.09 states:

1325.09 Actions of the Board on Exercising Powers

...No decision of the Board permitting the use of a building or land shall be valid for more than one (1) year unless such use is established within this period. Where such use is dependent upon the erection or alteration of a building, the Board's decision shall continue in force and effect if a building permit for such work is obtained within such period, and such erection or alteration is started and proceeds to completion in accordance with the terms of the decision.

The Zoning Board is granted the power of Interpretation under Section 1325.05 of the Ordinance, which states:

1325.05 Powers and Duties - Interpretation

Upon appeal from a decision by the Zoning Officer of the Zoning Hearing Board shall decide any question involving the interpretation of any provision of this Ordinance, including determination of the exact location of any district boundary line if uncertainty exists with respect thereto; where it is alleged there is an error of any order, requirement, decision or determination made by the Zoning Officer in the enforcement of this Ordinance.

There is no controlling precedent which illuminates how to determine whether or not an "Interpretation" is subject to time-limitations as found in municipal zoning ordinances. In order to determine whether not said time-limitations do apply to Interpretations, the Board looked at the statutory language of Section 1325.09. It is clear that the decision of the Board in 2008 granting an Interpretation that the slopes that affected the property were man-made and that the

relative slope of the land was 15% was not “permitting the use of a building or land” necessarily. In fact, no plan accompanied the Interpretation request in 2008. The Applicant merely was looking for guidance as to what could be constructed on the property because the Steep Slope Ordinance dictates the density or intensity of the use of the property depending on the slope of the parcel. Because the Board granted the requested Interpretation in 2008, the Applicant knew what was permissible for the development of the parcel at a future date. But no such use was proposed at that time for the Board to find that the one-year limitation applied to the respective Interpretation request.

Upon looking at the powers granted to the Board under Section 1325.05, the Board has the power to review and determine the exact locations of district boundary lines if an applicant disagrees with the stated location. In analyzing this power, it seems obvious that once a determination is made by the Board as to the exact location of a district boundary without higher court review, there would be no need to re-litigate that matter in the future. As such, would the one-year time limitation be in effect for the determination of a district boundary line if no use was proposed to coincide with that specific request for Interpretation relief? The obvious answer is that implementing a time-limitation requirement on the establishment of a district boundary line would be wasteful to the quasi-judicial economy of the Board as well as fly in the face of the Doctrine of Res Judicata which serves to prevent the endless and needless re-litigation of matters already determined by a court.

In this instance, the Board made the determination in 2008 that the slope affecting the property was man-made and that the relative or average slope of the property was 15%. There

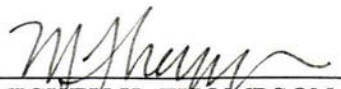
was testimony offered by the Applicant and by the Objectors appearing at the Hearing in 2008 as to the issues of slope and the average grade. The determination of whether or not the slope was man-made and the relative grade of the slope are facts which are not subject to dispute once determined by the Board. Much like a district boundary line determination, the finding made about the nature and degree of a steep slope is not going to shift with the prevailing wind of discourse by opposing parties. In this case, the facts are incontrovertible and thus should not be subject to further review or time-limitations as stated in Section 1325.09.

Finally, the Board will not concede that any Interpretation request is not subject to time-limitations. Simply, not all Interpretations are created equal. Some Interpretations rendered by a Board actually do permit the use of a building or land and thus would be subject to a timely building plan by an applicant.

VIII. Decision of the Board

Based upon the foregoing, the Zoning Hearing Board granted the Interpretation request in favor of the Applicant.

THE BOARD:


MICKEY K. THOMPSON
Solicitor

/s/ Gus Loupos*
GUS LOUPOS
Chairman

/s/ John R. Lezoche*
JOHN R. LEZOCHÉ
Zoning Officer

/s/ William Fitzpatrick*
WILLIAM FITZPATRICK
Member

/s/ Kenneth Kraft*
KENNETH KRAFT
Member

DATE OF HEARING: November 18, 2009 and December 16, 2009

DATE OF ORAL DECISION: December 16, 2009

DATE OF FORMAL WRITTEN DECISION: January 21, 2010

*The above individuals were unavailable at the date of mailing.

Certification of Service

I, Mickey K. Thompson, Solicitor to the Zoning Hearing Board of the City of Bethlehem, do hereby certify that I sent a true and correct copy of the foregoing Decision to the Applicant listed below at the address set forth below, by regular U.S. Mail sent First Class on or before the date set forth below.

Further, I certify that I sent notice to the Objectors/Interested Parties who participated in the Hearing and provided to them notice as to the location of the original decision for the purposes of obtaining copy of said Decision.

Applicant

James J. Holzinger, Esq.

Attorney

[REDACTED]
[REDACTED]

Objectors

Michael Shay, Esquire
Shay Santee and Kelhart

[REDACTED]
[REDACTED]

Kathy Detzi Light

[REDACTED]
[REDACTED]

William Schreier

[REDACTED]
[REDACTED]

Jerry Green

[REDACTED]
[REDACTED]

Patrick McGinty

[REDACTED]
[REDACTED]

Mary Lou Hatcher

[REDACTED]
[REDACTED]

Martha Christine

[REDACTED]
[REDACTED]

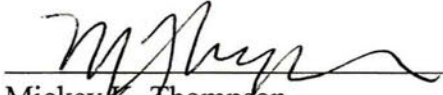
Kevin Brezack

[REDACTED]
[REDACTED]

Keith Gurman

[REDACTED]
[REDACTED]

DATE: January 21, 2010


Mickey K. Thompson

BEFORE THE ZONING HEARING BOARD OF THE CITY OF BETHLEHEM,
PENNSYLVANIA
LEHIGH COUNTY DIVISION

APPEAL AND APPLICATION OF	)	November 2009
ELLIOTT AVENUE LLC	)	Re: 1801 Elliott Avenue
FEE SIMPLE OWNER	)	INTERPRETATION

BRIEF OF THE APPLICANT, ELLIOTT AVENUE LLC

I. PROCEDURAL HISTORY

By its Decision dated June 7, 2008, the Zoning Hearing Board of the City of Bethlehem (the "Board") granted Elliott Avenue LLC's (the "Applicant's") request for an Interpretation of the applicability of Code Section 1329(b)(3) to its property, namely that the same did not apply since the existing slopes at the property greater than fifteen (15%) percent were man-made, and the gradient or natural slope of the subject property was less than fifteen (15%) percent. This favorable Interpretation did not specifically permit the use of a building or land, but would rather affect the density of residential uses permitted by right in Code Article 1306, R-G Residential Zoning District (referencing Code Article 1305).

On June 4, 2009, within one (1) year of the Board's decision, the Applicant filed a development plan with the City of Bethlehem, which plan depicted a development consistent with Code Articles 1306 and 1305, and further consistent with the Board's

Interpretation of Code Section 1329(b)(3). During the standard departmental review process to which all development plans are submitted, a question was raised by the reviewing authorities as to whether Code Section 1324.06(b) acted to cause a lapse of the Board's Interpretation, since even though the Applicant filed a development plan within one (1) year of the Board's Decision, the Applicant had yet to commence and proceed with substantial construction within one (1) year thereof.

Following discussion between the Applicant and the City's Law Bureau, the Assistant City Solicitor, by letter dated August 24, 2009, agreed that Code Section 1324.06(b) did not apply, but raised the possibility that the one (1) year limitation set forth in Code Section 1325.09 might. Specifically, he indicated that it would be "prudent" for the Applicant to receive an interpretation from the Zoning Hearing Board that Section 1325.09 "was not meant to limit to one year..." the prior Interpretation by the Board. The Assistant City Solicitor's letter further stated that "[t]his is not something a Zoning Officer could and should pass judgment on absent some input from the Zoning Hearing Board."

Since the position of the Law Bureau did not constitute a "... decision by the Zoning Officer..." which would allow an applicant the right to appeal to the Zoning Board for an interpretation (see Code Section 1325.05), the Applicant was placed in the untenable position of either appealing from the position

statement set forth in the Law Bureau's letter, or awaiting a "decision" by the Zoning Officer. Fortunately, or perhaps not, a review letter was issued by the Bureau of Planning and Zoning, dated September 1, 2009, in which the City Director of Planning and Zoning, Darlene L. Heller, AICP, began by stating that "...the prior zoning appeal for this site had lapsed,..." referencing the "Assistant City Solicitor's letter of August 24, 2009". Further, the comments under the Zoning portion of the Director's review letter recited that "[a]s per the Assistant City Solicitor's letter dated August 24, 2009, Section 1325.09 of the Zoning Ordinance provides for a one year expiration for any zoning approval. Since the initial written decision was dated June 7, 2008 and the use has not been established within this one year period, the prior Zoning Hearing Board approval has expired." Clearly, the Zoning Officer believed that the Law Bureau felt the one year limitation did apply, and whether it did or not, he issued his decision based upon his belief, which was incorporated into the official review letter.

The Applicant thereafter, and as "suggested" by the Law Bureau, filed a timely request for an Interpretation of whether 1325.09 applies to an Interpretation granted by the Zoning Hearing Board, and in the alternative, if a favorable ruling was not rendered on that issue, an Interpretation that the slope at the site in excess of fifteen (15%) percent remained man-made and that the gradient slope remained less than fifteen (15%) percent. At a

hearing on November 18, 2009, the Applicant requested that the hearing be bifurcated to allow the Board to hear argument on only the Interpretation of whether 1325.09 applied to the Interpretation by the Board, the Applicant believing that if a favorable interpretation was granted there would be no need for the Zoning Hearing Board to open the prior record. The Board granted the request for bifurcation, heard oral argument on the first issue, and requested that the parties file written briefs in support of their positions.

This brief is filed in support of Applicant's position thereon.

II. ISSUE PRESENTED

WHETHER THE ONE (1) YEAR LIMITATION SET FORTH IN CODE SECTION 1325.09 SHALL BE APPLIED TO INTERPRETATIONS BY THE BOARD WHERE SUCH INTERPRETATION DOES NOT ACT TO PERMIT THE USE OF A BUILDING OR LAND, BUT RATHER AFFECTS ONLY THE DENSITY OF AN OTHERWISE PERMITTED USE OF THE LAND.

SUGGESTED ANSWER: NO

III. ARGUMENT

THE ONE (1) YEAR LIMITATION SET FORTH IN CODE SECTION 1325.09 DOES NOT APPLY TO INTERPRETATIONS BY THE BOARD WHERE SUCH INTERPRETATION DOES NOT ACT TO PERMIT THE USE OF A BUILDING OR

LAND, BUT RATHER AFFECTS ONLY THE DENSITY OF AN OTHERWISE PERMITTED USE OF THE LAND.

Whenever there is any interpretation of a provision of a Zoning Ordinance, it is important to review the provision in its entirety. For example, the City in the instant situation initially thought that Code Section 1324.06(b) imposed a one (1) year limitation on the Board's Interpretation, believing that this Code Section applied to any "approval" by the Board, and that the Board's Interpretation constituted an "approval". Whether the Interpretation granted by the Board constituted an "approval", however, never had to be addressed because viewing the Code Section 1324.06(b) in its entirety clearly revealed that the time limitation in Section 1324.06(b) only applied when "[t]he holder of any approval or variance granted by the Zoning Board of Adjustment's Ordinance 1390, adopted November 22, 1955, fails to commence and proceed with substantial construction... within one (1) year of the effective date of this Ordinance...". In realizing that this Code Section applied to approvals or variances under the 1955 Zoning Code, it becomes clear that the efficacy of this Code Section expired one year following the adoption of the City's 1972 Zoning Ordinance. Realizing such, it becomes readily apparent that the City's initial reference to only the word "approval" in this section clearly demonstrates the need to review any ordinance in its entirety.

Applying this same principal to Code Section 1325.09 dictates that the one (1) year limitation applies only to decisions by the Board that permit the use of a building or land. At the outset, it must be recognized that not all decisions of the Board permit the use of a building or land. If all Board decisions were believed to permit same, why wouldn't Code Section 1325.09 merely read "No decision of the Board shall be valid for more than one (1) year..." rather than the operative language clearly limiting the impact to decisions "permitting the use of a building or land...(emphasis added)". At best for the City and the Objectors, this merely creates an ambiguity with ambiguities being generally resolved in favor of the landowner. See 53 P.S. §10603.1.

Perhaps the reason for the language difference is because the Courts have consistently recognized the distinction between a "use" and "density of use". For example, in Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 555 Pa. 249, 721 A.2d 43(1998), the Pennsylvania Supreme Court found that:

"The issue here involves a dimensional variance and not a use variance-an important distinction ignored by the Commonwealth Court. When seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations. Thus, the grant of a dimensional variance is of lesser moment than the grant of a use variance, since the latter involves a proposal to use the property in a manner that is wholly outside the zoning regulation." Id. at Page 47.

Applied here, the Interpretation entered by the Board merely concluded that the slope ordinance does not apply, which would have otherwise acted to reduce density. By any stretch of the imagination, it did not allow the use of a building or land.

It is interesting to further note in this regard, that the Zoning Officer in the review letter under Zoning, indicated that "...[s]ince the initial written decision was dated June 7, 2008 and the use has not been established within this one year period, the prior Zoning Hearing Board approval has expired" (emphasis added). Clearly the Zoning Officer fails to understand the concept of "use" versus "density of use" that the Supreme Court in Hertzberg recognized. It is surprising that it appears so when the Zoning Officer only need realize that had he reached the same conclusion as the Board, i.e., that the slopes at the Applicant's property in excess of fifteen (15%) percent were man-made, and the gradient slope was less than fifteen (15%) percent, his conclusion would not have subjected the Applicant to a one (1) year limitation to establish the Applicant's use. The only thing that would alter a change in the Zoning Officer's conclusion would be a change in the slope ordinance itself.

Next, in order for any Zoning Ordinance or a Zoning Board to impose conditions or limitations, there must be a legal basis to do so. Any such basis in Pennsylvania would have to emanate from the Pennsylvania Municipalities Planning Code, 53 P.S. §10101, et

seq. (the "MPC"). A review of the MPC results in a clear indication that reasonable conditions can only be placed on variances, special exceptions and conditional uses. Professor Ryan, in Pennsylvania Zoning Law and Practice at §9.4.18, succinctly summarizes the same when he states that:

"The Pennsylvania Municipalities Planning Code codifies the prior practice and permits a board to impose in a variance or special exception reasonable conditions and safeguards...as it shall deem necessary to supplement the purposes of this Act and the zoning ordinance. See 53 P.S. §910.2(b) and 53 P.S. § 10912.1. The 1988 revision to the Municipalities Planning Code added explicit statutory authority permitting the imposition of reasonable conditions on the grant of permission for a conditional use. Code §603(b)(2), 53 P.S. § 10603(b)(2)." *Id* at p. 145.

Further along this same line of reasoning, Professor Ryan further states that:

"The policy behind a limitation on the life of a variance or special exception is to prevent an applicant from obtaining a permission and "sitting" on it,..." *Ryan*, at §9.4.30, p 189.

Moreover, Professor Ryan further states that "[w]here a zoning hearing board determines that a structure or use is permitted of right, it may not impose conditions on the permit". *Id* at §9.4.18, at p. 147 (citing *Burkholder v. Clay Twp. Zoning Hearing Board*, 67 Lane L. Rev. 15 (1979)). Thus, while it is clear that reasonable limitations and/or conditions can be placed upon special exceptions, variances and conditional uses, nowhere can it be inferred that the MPC allows any conditions or limitations on

interpretations. Moreover, waiting up to almost one year, as is our case, or even going beyond one year from a determination with respect to gradient slope, certainly does not qualify as "sitting" upon an express permission to use the land in a particular fashion. In fact, as this Board recognizes, there is no particular plan of record before this Board.

That the MPC provides that there can only be time limitations on variances, special exceptions, and conditional uses, is also logically consistent with Code Section 1325.05 which allows this Board to render Interpretations. A complete reading of Section 1325.05 goes on to specifically allow the Board to determine the location of any [zoning] district boundary line. Clearly, once the Board reaches a decision on the interpretation of the location of same, the landowner should not be required to either seek a permit for any otherwise allowed use of the land, and actually begin such erection within a one (1) year period. Absent a legislative change in the location of the zoning district boundary line, for example, where a zoning district line is changed to either increase or decrease the size of the particular zoning district, no further action should be required by the landowner. Further absent a change in the law, what purpose would be served by requiring a landowner to seek a reconfirmation of what the Board had already decided and moreover, in that regard, had the Zoning Officer made a correct conclusion as to the location of a zoning

boundary, it too would stand the test of time, changeable only due to a legislative change in the zoning district boundaries.

Even if the Zoning Board determines that one (1) year limitation contained in Code Section 1325.09 applies, wouldn't the concept of res judicata also come into play, namely, hasn't the res, the "thing", already been adjudicated. At the hearing that resulted in the Decision of the Board dated June 7, 2008, the City appeared through Matt Dorner, City Engineer, and multiple neighbor-objectors were present, all having been allowed an opportunity to present evidence in contradiction to that presented by the Applicant in support of its requested Interpretation. As indicated by the Board's prior Decision, it is apparent that they failed to produce any sufficient evidence to prove a gradient slope in excess of fifteen (15%) percent.

Finally, isn't it further apparent that if the Applicant is forced to relitigate the underlying slope issue, we would clearly have a situation where the elements of res judicata would be present. As summarized by Professor Ryan in his treatise at Section 9.4.17, citing The City of Pittsburgh v. Zoning Board of Adjustment for the City of Pittsburgh, 522 Pa. 44, 559 A.2d 896 (1989), Ryan states that res judicata applies when the following occurs:

- "1. Identity of the thing sued for;
2. Identity of the cause of action;

3. Identity of the persons and parties to the action; and

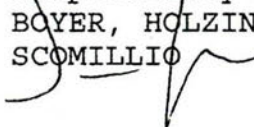
4. Identity of the quality in the persons for or against whom the claim is made." Id.

Thus, absent a showing that the Zoning Ordinance changed prior to the Applicant's filing of subject development plan, or a change in the nature of the subject property (other than a man-made change), wouldn't the result be the same.

IV. CONCLUSION

For the foregoing reasons, the Applicant requests that the Zoning Board grant an Interpretation that the one (1) year limitation set out in Code Section 1325.09 does not apply to the prior Interpretation of the Board because that Interpretation does not act to allow the use of a building or land.

Respectfully submitted,
By: BOYER, HOLZINGER, HARAK &
SCOMILLIO

By: 
James J. Holzinger, Esquire
Attorneys for the Applicant
Elliott Avenue LLC



CITY OF BETHLEHEM

OFFICE OF THE CITY SOLICITOR

10 East Church Street, Bethlehem, Pennsylvania 18018-6025

Phone: 610-865-7011

Fax: 610-865-7205

TDD: 610-865-7015

www.bethlehem-pa.gov

December 15, 2009

Zoning Hearing Board
10 East Church Street
Bethlehem, PA 18018

RE: 1801 Elliott Avenue Appeal
Hearing: 11/18/09

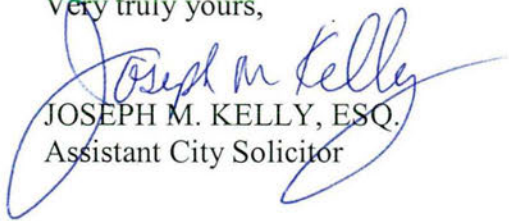
To Members of the Board:

On behalf of the Solicitors' Office I sent a letter to James Holzinger, Esquire dated August 24, 2009 explaining our position on the applicability of the one year deadline set forth in Section 1325.09. Specifically, the Solicitor's Office concluded that the decision granted to 1801 Elliott Avenue, LLC involving an interpretation of the Steep Slope section of the Zoning Ordinance required the landowner to establish the use or take some substantial steps to establish the use otherwise the decision expired within one year. As the facts were relayed to our office, the property owner had not taken any steps within the one year period to establish the use.

The property owner believed then and asserts now that the aforementioned limitation does not apply to issues of interpretation. My research revealed no determinative case on the issue. Moreover, the plain reading of the ordinance seemed to indicate otherwise. Consequently, this office informed the City Zoning Officer that the plan was subject to the one year expiration and that any potential land development plan would be denied because it did not have necessary zoning approvals.

Attached hereto is the letter sent to the attorney for the property owner, which this office is submitting to the Zoning Hearing Board for its consideration during its deliberations on the issue.

Very truly yours,


JOSEPH M. KELLY, ESQ.
Assistant City Solicitor

JMK:csb
Enclosure

Cc: Michael P. Shay, Esq.
James J. Holzinger, Esq.



CITY OF BETHLEHEM

OFFICE OF THE CITY SOLICITOR

10 East Church Street, Bethlehem, Pennsylvania 18018-6025

Phone: 610-865-7011

Fax: 610-865-7205

TDD: 610-865-7015

www.bethlehem-pa.gov

August 24, 2009

James J. Holzinger, Esq.
Boyer, Holzinger, Harak & Scomillio



RE: 1801 Elliott Avenue

Dear Jim:

Following our recent conversation concerning the above-referenced matter, I took the opportunity to review the City Zoning Ordinance and specifically Section 1325.09 and Section 1324.06 bearing in mind your analysis. In the end, I cannot totally agree with your analysis and therefore recommend that the Zoning Hearing Board be the final arbiter to resolve the matter.

I concur that Section 1324.06 of the City Zoning Ordinance is not applicable to the issue at hand. Section 1324.06 clearly applies to decisions rendered under the 1955 City Zoning Ordinance and provided those individuals one year's protection to initiate any previously approved plans.

The provision of the Zoning Ordinance that is dispositive to the issue is Section 1325.09. However, this section must be read in concert with all of Article 1325. Section 1325.09 states the following:

Actions of the Board on Exercising Powers

In exercising the above-mentioned powers, the Board may reverse or affirm, wholly or partly, or may modify the order, requirements, decision or determination appealed from and may make such order, requirement, decision or determination as ought to be made and, to that end, shall have all the powers of the officer from whom the appeal is taken.

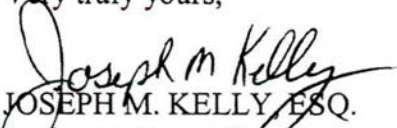
No decision of the Board permitting the use of a building or land shall be valid for more than one (1) year unless such use is established within this period. Where such use is dependent upon the erection or alteration of a building, the Board's decision shall continue in force and effect if a building permit for such work is obtained within such period, and such erection or alteration is started and proceeds to completion in accordance with the terms of the decision.

James J. Holzinger, Esq.
August 24, 2009
Page 2

The "above-mentioned powers" requires one to look at the list of enumerated powers preceding Section 1325.09 to determine whether the Board's power of interpretation falls under Section 1325.09. Section 1325.05 specifically lists Interpretation as a "Power and Duty" of the Zoning Hearing Board. Accordingly, it would be prudent for your client to receive an interpretation from the Zoning Hearing Board that indicates that Section 1325.09 was not meant to limit to one year an Interpretation rendered by the Zoning Hearing Board, or alternatively seek an extension of time in which to implement his plan. This is not something a Zoning Officer could and should pass judgment on absent some input from the Zoning Hearing Board.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,


JOSEPH M. KELLY, ESQ.
Assistant City Solicitor

JMK:csb

cc: Tony Hanna
Darlene Heller
John Lezoche

SHAY, SANTEE & KELHART
ATTORNEYS AT LAW

RICHARD E. SANTEE, JR.
MICHAEL P. SHAY
JOANNE KELHART

December 8, 2009

Zoning Hearing Board City of Bethlehem
10 E. Church Street
Bethlehem, PA 18018

**RE: 1801 Elliot Avenue Appeal
Hearing: 11/18/2009**

**Letter Brief on Behalf of Objectors William Christine and
Martha Christine**

To the Members of the Zoning Hearing Board:

I am counsel for William Christine and Martha Christine, who reside at 107 Mount Airy Avenue, Bethlehem, Pennsylvania 18018. Mr. and Mrs. Christine are objectors with regard to the appeal of 1801 Elliot Avenue which was addressed at the Zoning Hearing Board hearing held on November 18, 2009. Mr. and Mrs. Christine advised me after the hearing that the Zoning Hearing Board gave authorization to the applicant, and to interested parties, to submit briefs in support of their respective positions with regard to the appeal of Elliot Avenue, LLC requesting an interpretation of the one year time period set forth in section 1325.09 of the Zoning Ordinance of the City of Bethlehem. On behalf of my clients, I am submitting this letter brief, in opposition to the application and appeal of Elliot Avenue, LLC, with regard to the property located at 1801 Elliot Avenue in the City of Bethlehem.

On June 7, 2008, with regard to a prior application of Elliot Avenue, LLC concerning 1801 Elliot Avenue, the Zoning Hearing Board of the City of Bethlehem, issued a decision involving the development standards for steep slopes under Section 1318.29 of the Zoning Ordinance. In that decision, the Zoning Hearing Board found that an exception applied to the Appellant's development and use of the property with regard to the application of the standards for properties with steep slopes. Specifically, the Zoning Hearing Board found that the gradient of the slopes of the Appellant's land exceeding fifteen percent was man-made and not naturally occurring slopes, and accordingly, the exception for man-made slopes under Section 1318.29(b)3, applied.

The Zoning Ordinance of the City of Bethlehem imposes a time limitation concerning the use of a building or land permitted by a decision of the Zoning Hearing Board. Section 1325.09 of the Zoning Ordinance for the City of Bethlehem provides as follows:

No decision of the Board permitting the use of a building or land shall be valid for more than one (1) year unless such use is established within this period. Where such use is dependent upon the erection or alteration of a building, the Board's decision shall continue in force and effect if a building permit for such work is obtained within such period, and such erection or alteration is started and proceeds to completion in accordance with the terms of the decision.

Elliot Avenue, LLC, did not establish a use on the property located at 1801 Elliot Avenue within one year of the decision of the Zoning Hearing Board dated June 7, 2008.

Since a use of the property in conformity with the prior decision of the Zoning Hearing Board did not occur within the required one year period, the Appellant submitted a subsequent application to the Zoning Hearing Board for an interpretation of the one year limitation set forth under Section 1325.09. At issue in the application, and at the hearing on November 18, 2009, was whether the one year limitation applied to the prior decision, and whether the applicant should be required to resubmit the matter to the Zoning Hearing Board for a determination on the merits of whether relief should be granted from the development standards for steep slopes at this time. Clearly, the one year limitation set forth under Section 1325.09 does apply here, and the Appellant should be required to address again the issue, on the merits, whether the exception to the development standards for steep slopes for man-made slopes applies.

Under the Pennsylvania Municipalities Planning Code, 53 P.S. § 10603.1, where doubt exists as to the interpretation and construction of the language of a zoning ordinance, the language is to be interpreted in favor of the property owner and against any implied extension of a restriction. However, this principle of interpretation and construction in favor of the property owner only applies where the language is ambiguous and unclear. As stated by the Commonwealth Court in City of Hope v. Sadsbury Township Zoning Hearing Board, 890 A 2d. 1137 (Pa. Cmwlth. 2006):

While it is undeniable that we are to interpret ambiguous language in an ordinance in favor of the property owner and

against any implied extension of the restriction, such a restrictive reading of an ordinance is unwarranted where "the words of the zoning ordinance are clear and free from ambiguity." Isaacs v. Wilkes-Barre City Zoning Hearing Bd., 148 Cmwh. 578, 612 A. 2d 559, 561 (1992) citing Section 603.1 of the Municipalities Planning Code. (MPC). ^{FN6} When interpreting zoning ordinances, this Court relies on the common usage of words and phrases and construes language in a sensible manner. Steeley v. Richland Twp., 875 A. 2d 409, 414 (Pa. Cmwlth. 2005). Id at 898 A 2d. 1143-1144

This principle that when interpreting and construing a zoning ordinance, a Court must rely upon the common usage of words and phrases and construe language in a sensible and reasonable manner, is well established. See Hafner v. Zoning Hearing Board of Allen Township 974 A. 2d 1204 (Pa. Cmwlth 2009), and In re: Appeal of McGlynn 974 A. 2d 525 (Pa. Cmwlth. 2009).

The specific issue involving a construction and interpretation of the Zoning Ordinance in this appeal, is whether the prior decision of the Zoning Hearing Board involves a use of the Appellant's land, which would trigger the one year limitation under Section 1325.09. The word "use" is not an ambiguous or imprecise word. A common sense and sensible interpretation of the term "use" as it appears in Section 1325.09 make it abundantly clear that the limitation in that Section does apply to the prior relief granted by the Zoning Hearing Board. The Appellant sought an interpretation of the Zoning Ordinance to permit the use of the property without strict

compliance with the development standards for steep slopes under Section 1318.29. Although the Zoning Hearing Board, with its prior decision, gave the Appellant the opportunity to develop and use the property at 1801 Elliot Avenue without strict compliance with the development standards for steep slopes otherwise applicable to the property, the Appellant did not proceed expeditiously to use the land in accord with that decision. Under Section 1325.09, the failure of the Appellant to establish a use of the property within one year of the date of the decision, resulted in a termination of that right. There is no ambiguity or lack of clarity here. The Appellant lost the opportunity to use the land in accord with the Zoning Hearing Board's Decision dated June 7, 2008 concerning an exception to the development standards for steep slopes, when the use of that property was not established within one year.

The one year limitation under Section 1325.09 is proper and valid. The failure of the Appellant to comply with the one year limitation requires the Appellant to proceed anew with an application on the merits, with no res judicata effect of the prior decision.

In Omnivest v. Stewartstown Borough Zoning Hearing Board, 163 Pa. Cmwlth. 415, 641 A. 2d 648 (1994), a copy of which is attached, an owner of land had obtained a special permit and a variance from a Zoning Hearing Board for the construction of multi-family dwelling units on property, without strict compliance with a frontage requirement at the set-back line. The Borough's Zoning Ordinance required an

applicant to obtain a building permit or use certificate within six months from the date of authorization of a variance. Since the proposed multi-family dwellings were not constructed within six months of the date of the grant of the variance by the Borough Zoning Hearing Board, the Court stated that the variance expired. The Commonwealth Court held that a Zoning Hearing Board does not abuse its discretion if it denies a second variance request, after expiration of an earlier variance. The Commonwealth Court held that the principle of res judicata did not require the Zoning Hearing Board to grant the second variance request, after the first variance had expired. With regard to this issue the Commonwealth Court stated: "Therefore, any subsequent variance application, even one seeking the same variance for the same parcel of land, is a new application and the applicant must prove all elements necessary to the variance. To hold otherwise would negate the ordinance provisions limiting the duration of the variance authorization and would create confusion in zoning matters involving expired variances." Id at 641 A. 2d 652.

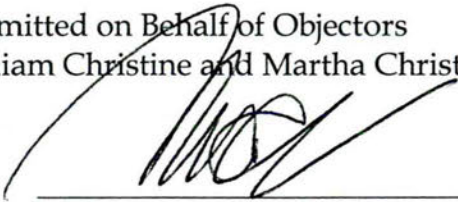
Although the present case does not involve a prior decision granting a variance, the principles of law set forth in Omnivest clearly apply here. The one year limitation on the effect of the decision of the Zoning Hearing Board permitting the use of a building or land is valid and applies here. The failure of the Appellant Elliot Avenue LLC to establish the use of the land under the exception for man-made slopes under

Section 1318.29b(3) within one year of the prior decision, now requires the Appellant to present its case on the merits again, with no binding or res judicata effect of the prior zoning decision.

Accordingly, the appeal of Elliot Avenue LLC for an interpretation under Section 1325.09, which would permit the Appellant to use the property in conformity with the prior zoning decision, should be denied. The Appellant should be required to proceed with the alternative relief the Appellant seeks concerning an interpretation of the development standards for steep slopes under Section 1318.29.

Submitted on Behalf of Objectors
William Christine and Martha Christine

By:



Michael P. Shay, Esq.
Attorney for Objectors
Attorney ID No. 22555

cc: Mickey K. Thompson, Esq.
James J. Holzinger, Esq.
Mr. and Mrs. William Christine

 West Reporter Image (PDF)

163 Pa.Cmwlt. 415, 641 A.2d 648

Commonwealth Court of Pennsylvania.
OMNIVEST

v.

STEWARTSTOWN BOROUGH ZONING HEARING BOARD
Appeal of STEWARTSTOWN BOROUGH, Appellant.

Submitted April 13, 1994.

Decided April 15, 1994.

Petition for Allowance of Appeal Denied Aug. 29, 1994.

Property owners sought review of decision of town zoning board denying request for variance. The Common Pleas Court, York County, No. 92-SU-01747-08, Chronister, J., reversed decision, and appeal was taken. The Commonwealth Court, No. 2775 C.D. 1992, Friedman, J., held that the zoning board did not abuse its discretion by denying second variance after earlier variance expired.

Reversed.

West Headnotes

[1]  KeyCite Citing References for this Headnote

◉ 414 Zoning and Planning

◉ 414IX Variances or Exceptions

◉ 414IX(B) Proceedings and Determination

◉ 414k549 k. Duration and Revocation. Most Cited Cases

Vested rights analysis was not applicable to determination of whether grant of variance which later expired was binding on town zoning board.

[2]  KeyCite Citing References for this Headnote

◉ 414 Zoning and Planning

◉ 414VIII Permits, Certificates and Approvals

◉ 414VIII(D) Effect of Determination; Revocation

◉ 414k465 k. Vested or Property Rights. Most Cited Cases

"Vested rights" is judicial construct designed to provide individual relief in zoning cases involving egregious statutory or bureaucratic inequities and, in part, involves equitable concept of detrimental reliance.

[3]  KeyCite Citing References for this Headnote

◉ 414 Zoning and Planning

◉ 414IX Variances or Exceptions

◉ 414IX(B) Proceedings and Determination

◉ 414k549 k. Duration and Revocation. Most Cited Cases

Zoning ordinance was clear that variance would expire if not acted on in specified manner within specified period of time, and, thus, zoning board was not bound by grant of variance which had

expired.

[4] ☒ KeyCite Citing References for this Headnote

414 Zoning and Planning

414IX Variances or Exceptions

414IX(A) In General

414k490 k. Public Interest and Welfare, and Harmony With, or Impairment Of, Regulation.

Most Cited Cases

414 Zoning and Planning ☒ KeyCite Citing References for this Headnote

414IX Variances or Exceptions

414IX(A) In General

414k492 Hardship, Loss, or Injury

414k494 k. Necessity of Showing. Most Cited Cases

Applicant for variance has burden of proving that unnecessary hardship will result if variance is denied and that variance will not be contrary to public interest, even if variance had previously been granted for property but has since expired; overruling *Grace Building Co.*, 16 Pa. Commonwealth Ct. 530, 329 A.2d 925.

[5] ☒ KeyCite Citing References for this Headnote

414 Zoning and Planning

414IX Variances or Exceptions

414IX(B) Proceedings and Determination

414k546 k. Effect of Determination. Most Cited Cases

Application of res judicata in expired variance cases would run contrary to rule that res judicata be applied sparingly in zoning matters, particularly as each variance application and case is to be dealt with anew and apart.

[6] ☒ KeyCite Citing References for this Headnote

414 Zoning and Planning

414IX Variances or Exceptions

414IX(B) Proceedings and Determination

414k549 k. Duration and Revocation. Most Cited Cases

Zoning board does not abuse its discretion if it denies second variance after expiration of earlier variance.

****648 *416** Barbara Orsburn Stump, for appellant.

Timothy P. Ruth, for appellee.

Before CRAIG, President Judge, and DOYLE, McGINLEY, PELLEGRINI, FRIEDMAN, KELLEY and NEWMAN, JJ.

FRIEDMAN, Judge.

Stewartstown Borough (Borough) appeals from an order of the Court of Common Pleas of York County which reversed a decision of the Stewartstown Borough Zoning Hearing Board (Board) denying Omnivest's request for a variance.

Omnivest is the equitable owner of a 1.564 acre parcel of land which does not conform to the zoning requirements for the apartment use which Omnivest seeks to build on the site. Apartment use is permitted by special exception in the Residential Town zone where this property is located provided the ***417** property is at least 100 feet in width at the ****649** right-of-way line ^{FN1} and 150 feet in width at the front setback line.^{FN2} The Omnivest parcel is only 55 feet wide at the right-of-way line, although it later widens so that the buildable portion of the property is approximately 200 feet wide.^{FN3}

^{FN1}. For single family residential uses with public water and public sewer facilities, the zoning ordinance requires a minimum width of 60 feet at the right-of-way line, less than that required for multi-family dwellings with public water and public sewer facilities.

^{FN2}. The zoning ordinance requires a building setback of at least 30 feet from the street on which the property fronts. R.R. at 30a. The parcel in question is only 55 feet wide at this point. However, in an opinion dated December 8, 1989, the trial court ruled that the setback width requirement applies at the actual building line, rather than at the minimum setback line. R.R. at 46a. This interpretation of the zoning ordinance is not appealed and is not before us.

^{FN3}. A 55 foot wide rectangular corridor, or panhandle, extends from the street to the rear of the neighboring properties at which point the Omnivest parcel widens.

The history of this case follows. On February 26, 1980, the zoning hearing board had granted both a special permit for the construction of 8 multi-family dwelling units and a variance from the 150 foot frontage requirement at the setback line.^{FN4} On April 7, 1980, the Stewartstown Borough Council approved the subdivision plan creating the Omnivest parcel and the subdivision plan was recorded on April 18, 1980.^{FN5}

^{FN4}. In the application for the variance and special permit, applicant did not seek a variance from the 100 foot minimum width requirement at the right-of-way line.

^{FN5}. Stipulation of Counsel, approved and made a part of Record by Order dated December 14, 1993. It appears that the subdivision, special permit and variance were part of a package permitting the owner to develop apartment units on part of the property by creating two lots, one retaining the original single family house and the other to contain the apartment units.

After subdivision, Lot # 1, which contained an existing house, was to have a frontage of 60 feet, and Lot # 2, which is the subject of the present proceeding, a frontage of 55 feet. The proposed multi-family dwellings were not constructed, and the variance expired because the applicant failed to obtain a building permit or use certificate within six (6) months from ***418** the date of authorization of the variance as required by section 802a of the Zoning Ordinance of Stewartstown Borough.

In December 1988, Omnivest entered into a sales agreement with the legal owner of this property. Thus begins a long history of applications and appeals. First, Omnivest apparently applied for a special permit to build apartments on the site. The Board's denial of a special permit was reversed by the trial court in 1989, when the trial court ruled that the width requirement at the setback line ^{FN6} could be met by building where the property was wide enough. Then, in 1991, Omnivest sought a variance from the right-of-way frontage requirement of 100 feet at the right-of-way line, which the Board denied on the basis that the problem was self-created, was not the minimum variance that

would afford relief and that the hardship was financial in nature. The Board also concluded that the earlier variance was from the ordinance provision requiring a 150 foot width at the building setback line and not from the provision requiring a minimum frontage of 100 feet at the right-of-way line. The trial court determined that, absent change of circumstances, the Board was bound by its 1980 decision granting the variance and dismissed the Board's conclusion that the 1980 variance did not pertain to the frontage at the right-of-way line stating, "the clear import of the prior decision is that it was permissible to build the apartment units under *all* of the provisions of the Ordinance." (R.R. at 26a.) The trial court remanded to the Board for a determination of whether a change of circumstances had occurred since the grant of the 1980 variance.

FN6. The Board had denied the special exception because the property was not sufficiently wide at the 30' minimum setback line.

On remand, the Board did not find a change of circumstances but stated that, pursuant ****650** to *In re Appeal of Newtown Racquetball Associates from the Newtown Township Zoning Hearing Board*, 76 Pa.Commonwealth Ct. 238, 464 A.2d 576 (1983), the renewed variance could also be denied if the grant of ***419** the first variance was improper or illegal, determined that the first grant was improper FN7 and, therefore, again denied the variance. FN8

FN7. In support of the conclusion that the first variance was improperly granted, the zoning hearing board quoted the trial court's opinion of Nov. 8, 1991: If the prior variance is ignored, it is clear that the board is correct in denying a variance. The problem with the lot is self-created since the owner of the land subdivided it to its present configuration. The proposed variance is also not the minimum necessary to use the lot, and the hardship is primarily financial in nature.

R.R. at 25a; R.R. at 29a.

FN8. This denial was beyond the scope of the remand since the trial court had specifically remanded for the Board to make a finding on whether there had been any change of circumstances since the grant of the 1980 variance.

The trial court reversed distinguishing *Newtown Racquetball* because, there, no changes had been made in reliance on the variance whereas, here, the approval of the variance had resulted in a change of position, vesting

the right to use the land in the manner approved by the Board. The landowner's recording of the approved subdivision plan created a lot that could not be used in any manner in conformance with frontage requirements. Therefore, it is too late for the Board to change its mind, absent any change of circumstances.

(Trial court op. of Nov. 30, 1992 at 6.) The court also stated that because the 1980 variance was never appealed there is no transcript of the proceedings making it impossible to now determine whether the 1980 ruling was improper.

Omnivest relies on what Ryan FN9 has termed an offensive use of res judicata argument. FN10 In ***420** *Grace Building Co. v. Hatfield Township*, 16 Pa.Commonwealth Ct. 530, 329 A.2d 925 (1974) and *Davies v. Zoning Hearing Board of Ross Township*, 61 Pa.Commonwealth Ct. 594, 435 A.2d 276 (1981), we held that a zoning hearing board abuses its discretion if it denies a second variance after expiration of an earlier variance if there is no substantial showing of a change of circumstances, *Grace Building Co.*, or relevant new evidence that the variance is no longer warranted, *Grace Building Co.* and *Davies*. FN11 The Board, on the other hand, relies on our more recent decision in *Newtown Racquetball*. In *Newtown Racquetball* we held that because the applicant failed to prove a legal hardship, FN12 an earlier variance had been improperly granted, and we refused to allow an improperly

granted first variance to compel or validate a second grant.

FN9. Ryan, *Pennsylvania Zoning Law and Practice*, § 9.4.17.

FN10. Omnivest agrees with the trial court that reliance is sufficient to overcome the *Newtown* rule, but also argues that it is entitled to the variance to build the proposed multi-family units because the parcel created by the 1980 subdivision does not meet the zoning ordinance's frontage requirement. This argument is without merit because any variance based upon a new allegation of hardship would be subject to the requirement that the variance be the minimum necessary to afford relief. Section 910.2 of the MPC, 53 P.S. § 10910.2. In this case, a single family residence could be built on the property with only a 5 foot variance from the frontage requirement.

FN11. In *Grace Building Co.* we said: Having once found that a hardship existed and having once granted a variance for the subject parcel, it was an arbitrary and capricious abuse of discretion for the Board to refuse the second application in the absence of new findings based upon relevant new evidence that the variance was no longer warranted.

Id., 16 Pa.Cmwlth. at 532, 329 A.2d at 927.

FN12. An applicant for a variance must prove that the provisions of the zoning ordinance inflict unnecessary hardship on the applicant and that the proposed use is not contrary to the public interest. Unnecessary hardship is demonstrated by showing that the physical characteristics of the property are such that there is no possibility of development in conformance with the zoning ordinance. In addition, the hardship must not be self-inflicted. The variance, if granted, must be the minimum necessary to enable reasonable use of property and the hardship must not be principally financial in nature. Section 910.2 of the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended, (MPC), 53 P.S. § 10910.2.

****651** The question before us on appeal, FN13 is whether the grant of a variance which later expired is binding on the Board. FN14

FN13. Our scope of review on appeal, where the lower court took no additional evidence, is limited to determining whether the zoning hearing board committed a manifest abuse of discretion or an error of law. *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 462 A.2d 637 (1983).

FN14. Because of our resolution of this case we do not reach the issue of whether the variance as originally granted included a variance from the minimum property width at the right-of-way line.

***421** [1] [2] [3] First, we reject the notion that vested rights analysis is applicable. FN15 Vested rights "is a judicial construct designed to provide individual relief in zoning cases involving egregious statutory or bureaucratic inequities. In part it involves the equitable concept of detrimental reliance." *Highland Park Community Club v. Zoning Board of Adjustment*, 509 Pa. 605, 612, 506 A.2d 887, 891 (1986). Here, not only were there no "egregious statutory or bureaucratic inequities," but in addition the zoning ordinance clearly establishes that the variance expired if not acted upon in a specified manner within a specified period of time. FN16

FN15. The vested rights concept is applicable in a number of land use situations. It is found in the "variance by estoppel" cases where a landowner claims reliance on a municipality's long continued acquiescence in a use which does not comply with the zoning code. *See, e.g., In re Appeal of Crawford*, 110 Pa.Commonwealth Ct. 51, 531 A.2d 865 (1987), appeal denied, 518 Pa. 656, 544 A.2d 1343 (1988); it is also used to determine whether a landowner has a right to develop in accordance with a prior zoning classification, *In re Appeal of Langmaid Lane Homeowners Association*, 77 Pa.Commonwealth Ct. 53, 465 A.2d 72, n. 7 (1983), or to determine whether an applicant has acquired a vested right in an improperly issued building permit. *Petrosky v. Zoning Hearing Board of the Township of Upper Chichester*, 485 Pa. 501, 402 A.2d 1385 (1979).

FN16. Section 802a of the ordinance provides, in pertinent part: Unless otherwise specified or extended by the Board, a variance authorized by it expires if the applicant fails to obtain a building or use certificate within six (6) months from the date of authorization of the variance.

R.R. at 32a.

Second, our review of *Grace Building Co., Davies and Newtown Racquetball* convinces us that the present state of the law is inconsistent and confusing. In discussing these cases, Ryan has commented: "It remains to be seen whether the distinction which the Court made between the *Newtown Racquetball* and *Grace Building Co.* cases will prove comfortable." Ryan, *Pennsylvania Zoning Law and Practice*, § 9.4.17 supplement. We now determine that the distinction has not proved comfortable and that *Grace Building Co.* must be overruled.

[4]  In *Newtown Racquetball*, we attempted to distinguish *Grace Building Co.* by saying that in *Grace Building Co.*

*422 there was nothing to show that the *already-demonstrated* legal hardship did not continue to exist [whereas in *Newtown Racquetball*] the only assertion of hardship ever advanced by the Bank, in either of its variance applications, was ... a claim of economic hardship [which] does not constitute an unnecessary or legal hardship as to warrant the granting of a variance.

Newtown Racquetball, 76 Pa.Commonwealth Ct. at 245, 464 A.2d at 580 (emphases in original). An applicant for a variance bears the burden of proving that unnecessary hardship will result if the variance is denied and that the variance will not be contrary to the public interest. *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 462 A.2d 637 (1983). Yet, if a since-expired variance had ever been granted for the property, *Grace Building Co.* would remove the burden of proof from the applicant in all subsequent applications which request the same variance.

[5]  In theory, the concept of res judicata underlies *Grace Building Co.* *See, e.g.,* Ryan § 9.4.17, and *Newtown Racquetball*. However, application of res judicata in expired variance cases is contrary to the rule that res judicata be applied sparingly in zoning matters. *City of Pittsburgh v. Zoning Board of Adjustment*, 522 Pa. 44, 559 A.2d 896 (1989). This is particularly true because each variance application and case is typically "dealt with anew and apart." **652 *Heller v. Zoning Board of Adjustment*, 404 Pa. 8, 11, 171 A.2d 44, 46 (1961). Here, the grant of the 1980 variance was conditioned upon the applicant acquiring a building or use permit within six months. When the applicant failed to exercise its rights by acquiring a building permit, the variance expired. FN17 Therefore, any subsequent *423 variance application, even one seeking the same variance for the same parcel of land, is a new application and the applicant must prove all elements necessary to the variance. To hold otherwise would negate the ordinance provisions limiting the duration of the variance authorization and would create confusion in zoning matters involving expired variances.

FN17. In addition, the record here contains no evidence that the specific variance

requested in 1991 was the same as the variance granted by the Board in 1980, nor does it contain evidence that the issue of unnecessary hardship was actually litigated in 1980. Here, the Board which granted the expired 1980 variance made no findings and reached no conclusions concerning the existence of unnecessary hardship. Yet, applying *Grace Building Co.*, the trial court would bind the Board. We do not believe that the existence of this ambiguous zoning hearing board decision should compel the grant of a subsequent variance more than eight years later.

[6]  Thus, we conclude that *Grace Building Co.* was improperly decided and must be overruled. We now hold that a zoning hearing board *does not* abuse its discretion if it denies a second variance after expiration of an earlier variance. Therefore, Omnivest cannot use the Board's grant of the expired 1980 variance to compel the grant of a new variance.

Accordingly, we overrule *Grace Building Co.*, and we reverse.

ORDER

AND NOW, this 15th day of April, 1994, the order of the Court of Common Pleas of York County, dated November 30, 1992, is reversed.

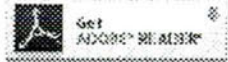
Pa.Cmwlt., 1994.

Omnivest v. Stewartstown Borough Zoning Hearing Bd.
163 Pa.Cmwlt. 415, 641 A.2d 648

END OF DOCUMENT

 West Reporter Image (PDF)

Adobe Reader is required to view PDF images.



(c) 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

Decision

CITY OF BETHLEHEM
ZONING HEARING BOARD

MEETING OF 12-16-09

LOCATION 1801 Elliott Ave

MR Fitzpatrick MADE THE FOLLOWING MOTION:

"I MOVE THAT THE APPLICATION OF Interpretation

☐ BE GRANTED AS SUBMITTED

☐ BE GRANTED AS REVISED

☐ BE GRANTED SUBJECT TO THE FOLLOWING CONDITIONS:

*motion - 1 yr. limitation does not apply
for interpretations*

☐ BE DENIED FOR THE FOLLOWING REASONS:

MR. Kraft SECONDED THE MOTION WHICH

PREVAILED UPON ROLL CALL BY THE VOTES OF THE FOLLOWING MEMBERS:

CONSTANTINE (GUS) LOUPOS ✓

RON LUTES

WILLIAM FITZPATRICK ✓

GLENN TAGGART

KENNETH KRAFT ✓