

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA**

VIRGINIA A. HILL,	:	
Appellant	:	
	:	
v.	:	No. 00-01,260
	:	
WATSON TOWNSHIP ZONING	:	Appeal from Zoning
HEARING BOARD,	:	Hearing Board
Appellee	:	

*Opinion issued June 7, 2001*

**OPINION and ORDER**

In this case, Virginia Hill has asked the court to overturn the decision of the Watson Township Zoning Hearing Board, which refused to permit her to operate an antique shop out of her barn. Ms. Hill claims she should be allowed to operate the shop because it is a “home occupation,” which is permitted as a special exception by the Watson Township Zoning and Land Ordinance.

The Zoning Board considered Ms. Hill’s proposed antique shop to be a home occupation, but denied her application because it found the shop would be detrimental to the health, safety, and welfare of the residents of the neighborhood. The Board also found the Ordinance requires her to provide rest room facilities in the barn and refused to grant a variance to excuse her from that requirement. Ms. Hill appealed the Zoning Board’s decision. The Township Supervisors then weighed in on the issue, advancing various arguments in support of the Zoning Board.

After a thorough review of the matter this court is compelled to affirm the Zoning Board’s denial, but not for any of the reasons provided to us by any

of the parties during the argument or in their briefs. Our decision is based on a consideration much more basic and fundamental, which everyone involved seems to have overlooked: Ms. Hill failed to show that an antique shop is a “home occupation” under the Ordinance.

### **Factual Background**

The facts are not in dispute. Virginia Hill owns property at 174 Becca’s Path in Watson Township, Lycoming County, which includes a home and a barn. The property is zoned Open Space/Agricultural (O/A). Ms. Hill would like to sell antiques out of her barn. At a hearing held on June 28, 2000, the Watson Township Zoning Hearing Board denied her request to operate the shop as a special exception under §322(B)(3) of the Ordinance. Ms. Hill also requested a variance from the §411(C) requirement that she provide bathroom facilities in the barn, which the Board also denied.

### **DISCUSSION**

#### **I. Is an Antique Shop a “Home Occupation?”**

The Zoning Ordinance permits “home occupations” in the Open Space/Agricultural District. §322(B)(3). After giving various examples of home occupations, the Ordinance states, “Other home occupations not specified above may be performed as a special exception . . . .” §402(B).

The Zoning Board discussed whether operating an antique shop was a home occupation, and concluded that it was. In doing so, the Board examined

§402(A), which states,

A home occupation is a use conducted entirely within a dwelling or accessory building that is clearly incidental and secondary to the principal residential use provided the following are met: (1) no external alterations or structural changes are necessary; (2) the occupation does not produce offensive noise, vibrations, heat, dust, or other objectionable conditions; (3) no outside storage is required; (4) no more than 25% of the gross area of a dwelling unit is used for such purpose; and (5) not more than one non-occupant is employed, and (6) adequate off-street parking provided.

The Board correctly concluded that Ms. Hill’s proposed antique shop passes muster under this section alone.<sup>1</sup> Unfortunately, however, the Board was apparently not aware of the definition of “home occupation” which appears in Article IX of the Ordinance, entitled “Definitions.”<sup>2</sup> We find this to be an error of law, as §900, which is found immediately after the Definition heading, states, “Unless the context otherwise requires, the following definitions shall be used in the interpretations and construction of the Ordinance.”

Given this oversight, it is easy to understand why the Zoning Board went astray. The definition of home occupation found at §943 adds one very

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<sup>1</sup> The Township Supervisors claim the proposed use would produce objectionable conditions. However, the vague testimony regarding dust on the road is sorely inadequate to establish an adverse impact greater than that which normally would be expected from the use. *See Pennypack Manor Nursing Home, Inc. v. Petrella*, 387 A.2d 139 (Pa. Commw. 1978).

<sup>2</sup> Section 943 makes a brief cameo appearance in the Board’s written decision, p. 3, which states that the Board considered the definition. However, nowhere on record does any member of the Board nor its counsel ever mention §943, nor does the Board discuss its provisions in its opinion or brief. If any of the other parties to this suit were aware of §943, they certainly did not consider it important enough to address in their briefs or during argument.

important element not contained in §402: the use must be “customarily conducted within a dwelling and carried on by the inhabitants thereof . . . .”<sup>3</sup>

Although it is curious §402 does not mention that the proposed use must be customarily conducted in a dwelling, that absence in no way eliminates this requirement. Moreover, a review of the case law addressing home occupations reveals that the §943 language is standard in zoning ordinances, and the phrase “customarily associated with dwellings” is crucial to the meaning of the term “home occupation.”

Not surprisingly, this phrase has been the subject of much interpretation by the appellate courts, which have consistently used a “practical and sensible approach” to the issue, and have permitted zoning boards and courts to take note of general experience in determining what business occupations are customarily carried on within a dwelling. *See Allegheny West Civic Council, Inc., v. Zoning Board of Pittsburgh*, 552 Pa. 541, 716 A.2d 600 (1998) for a summary of relevant appellate cases.

A general review of the case law reveals that a home occupation is not simply a business operated from one’s home. It must be the type of business *customarily operated within* a home or an accessory building. In *Platts v. Zoning Board of the Borough of Bradford Woods*, 654 A.2d 149 (Pa. Commw. 1995), for instance, the Commonwealth Court held that the in-home business offices

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<sup>3</sup> The full definition is as follows: “An accessory use customarily conducted entirely within a dwelling and carried on by the inhabitants thereof, which use is clearly incidental and secondary to the use of the dwelling purposes and does not change the character thereof.”

of a construction firm and real estate development and consulting business was not a use customarily carried on within a residence, and the Supreme Court in Allegheny, supra, held that an engineering business on the first floor of a residence was not a home occupation. The numerous Commonwealth Court decisions follow suit, holding that the following businesses are not customarily conducted within a dwelling or accessory building: a part-time printing business in a home basement, Szmigiel v. Kranker, 6 Pa. Commw. 632, 298 A.2d 629 (1972); repair and inspection of motor vehicles in a detached garage, Page v. Zoning Hearing Board of Walker Township, 80 Pa. Commw. 589, 471 A.2d 1348 (1984); auto repair business in basement of garage of residence, Perez v. Borough of Kennett Square, 18 Pa. Commw. 425, 336 A.2d 437 (1975); real estate office in a home, Good v. Zoning Hearing Board of haverford Township, 35 Pa. Commw. 155, 384 A.2d 1374 (1978); bed and breakfast, Reynolds v. Zoning Hearing Board of Abington Township, 134 Pa. Commw. 382, 578 A.2d 629 (1990); and operation of a ceramics factory within a home, Draving v. Lower Southampton Township Zoning Hearing Board, 40 Pa. Commw. 243, 397 A.2d 54 (1979).

Ms. Hill has the burden of showing that the proposed antique shop is a home occupation, and she has not done so. Page, supra, at 1349. The record contains no evidence whatsoever that antique businesses are customarily associated with residences in Watson Township or generally, and the answer to this question is not a matter of general knowledge and experience. Therefore,

there is no factual or legal basis from which to conclude that the proposed antique business is a home occupation under the Ordinance. *See* Platts, supra, at 153; Page, supra, at 1350. Nor can we remand it back to the Board to address this issue, for the record is not incomplete merely because Ms. Hill did not present evidence on the matter. As the Commonwealth Court has stated, trial courts may not remand the matter “to give the applicant another opportunity to prove what he or she should have proved in the first place.” Monaghan v. Board of School Directors of Reading School District, 618 A.2d 1239 (Pa. Commw. 1992). *See also* Hager v. Zoning Hearing Board of Manheim Township, 23 Pa. Commw. 361, 352 A.2d 248 (1976) (No remand to Zoning Board for lack of evidence when applicant clearly failed to sustain his burden of proof.)

Ms. Hill has argued that her use could be considered “fine arts and crafts,” which is specifically permitted as a home occupation under §402(B) of the Ordinance. However, there is no evidence indicating that Ms. Hill’s business involves the fine arts in any way, nor that it involves work that could be considered a craft. Instead, Ms. Hill’s proposal appears to be strictly mercantile. At the hearing she stated she wants to “sell out of” her barn, and never mentioned restoring or otherwise working on the merchandise. Indeed, she described herself as an “antique dealer,” and spoke like a merchant when describing her business to the Zoning Board. Transcript, pp. 5-7.

Moreover, even if much of Ms. Hill’s work involved restoration, it is not clear her business would be considered a home occupation, since her proposal

seems to rise above the level of a hobby. A similar issue was considered in Draving, supra, where the applicants argued that their ceramics factory should be considered a home occupation. The Commonwealth Court did not buy that argument, stating:

Although a home hobby or ceramics or an artist's studio in residence would seem to be within the concept of permitted accessory uses, an operation to the extent of the Dravings' ceramics factory is not customarily incidental to a dwelling house.

Obviously, some people restore antiques in their homes or garages, and perhaps some even advertise them and sell them afterwards from their homes. That, however, is quite different from establishing an antique *shop*. The Commonwealth Court considered and rejected this argument in Page, supra:

The fact that some residents personally perform work on their own vehicles does not prove any pattern of residentially-based repair businesses, doing work for customers, any more than the preparation of meals in private households could be said to prove the existence of a pattern of small restaurants. The decisive point here is that the record contains no evidence that small vehicle repair *businesses* are customarily associated with residences either in Walker Township or generally.

We acknowledge that the general concept of a home occupation can be enlarged or restricted by the examples of home occupations given in the Ordinance. See Page, supra, at 1350 and Cassidy v. Zoning Board of Adjustment of the City of Pittsburgh, 126 Pa. Commw. 301, 559 A.2d 610, 612 (1989).

However, the examples listed in §402(B) of the Ordinance—fine arts and crafts, studios, dressmaking, tutoring, barber shops, beauty shops, insurance offices, and professional offices—do not in any way indicate that an antique shop should

be considered a home occupation. All of the examples involve a service performed, a *doing* or a *making*, rather than a mere *selling*.

It is also noteworthy that none of the examples listed involve selling items not made by the occupant—except, perhaps, for beauty shops, which sometimes sell a limited number of products for shorn customers to preen themselves with.

It would have been nice if Ms. Hill had given more details regarding the nature and extent of her proposed shop, but unfortunately she did not, nor did the Zoning Board question her on the details. The picture Ms. Hill presented is one of a retail antique shop, out of which she would buy and sell antiques. That is not a use in line with the home occupation examples given in the Ordinance, nor does general experience and knowledge lead one to conclude that type of business is customarily performed in homes or accessory buildings. Therefore, given the existing record, we must hold that her proposed antique shop is not a home occupation, as a matter of law.

It is the commercial and retail nature of Ms. Hill's business that concerns us. We understand why she would find it attractive and convenient to sell antiques out of her barn rather than renting a store. However, the people of Watson Township, through their zoning ordinance, have the right to restrict such businesses, and they have done so through their Ordinance. It is this court's job to honor and protect that decision.



## **II. Is the Antique Shop Detrimental to the Health, Safety, and Welfare of the Residents of the Neighborhood?**

The first reason the Zoning Board gave for denying Ms. Hill's request to operate the antique shop as a special exception was that it would be detrimental to the health, safety, and welfare of the residents of the neighborhood. This finding is based on insufficient evidence. To understand the Board's error in this regard it is first necessary to understand the burdens of proof, and unfortunately, it appears the Board itself had no knowledge of the law in this area.

In conditional use cases, the applicant has the burden of persuasion, as well as the burden of production on any specific criteria stated in the ordinance.<sup>4</sup> Bray v. Zoning Board of Adjustment, 48 Pa. Commw. 523, 525-30, 410 A.2d 909 (1980). The objectors, however, always bear the burden of production as to general matters of health, safety, and general welfare. Id. The reason for this rule is twofold. First, the mere fact that a use is permitted as a conditional use evidences a decision by the legislative body that the particular type of use is not in itself averse to the public interest. Second, it is unfair to require the applicant to prove what is essentially compliance with a policy statement. Only reasonably specific requirements may be imposed. Id. at 527-28.

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<sup>4</sup> The burden of persuasion is the responsibility of establishing a fact by a preponderance of the evidence, once the entire case has been tried. The burden of production is the responsibility of a party to present evidence regarding a particular fact.

However, if the opponents introduce substantial evidence on specific concerns in the area of safety or welfare, then the applicant has the responsibility of introducing evidence to alleviate those particular concerns in order to meet his or her general burden of persuasion. Stated in another manner, there is a presumption that a proposed use which complies with all specific standards is not averse to the public health, safety, and welfare. To rebut that presumption, the objectors must establish “a high degree of probability that the proposed use will adversely impact on the public interests in a way not normally expected for the type of the proposed use. . . . The mere speculation of possible harms resulting from the proposed use fails to satisfy the objectors’ burden.” Mehring v. Zoning Hearing Board of Manchester Township, 762 A.2d 1137, 1141 (Pa. Commw. 2000) (citing cases).

The objectors in this case failed to meet their burden. Three people testified, raising concerns about the township road not being “extremely passable,” lacking a guardrail, and being prone to mudslides and falling trees. These fears were highly speculative and highly unconvincing. There is no evidence in the record showing a high probability the use will be averse to the safety or welfare of the residents. In short, if the proposed antique shop is a home occupation, the application cannot be denied based upon §402(B).

### **III. Is an Antique Shop Compatible with Adjoining Development and the Proposed Character of the Zone District?**

The Ordinance, at §708(E), sets forth specific requirements to take into account when considering a special exception request. The Zoning Board did not acknowledge the existence of this section, but the Township Supervisors have pointed to it to justify the Board's decision. That section states that the use must be "compatible with adjoining development and the proposed character of the zone district where it is to be located."

Once again, the objectors have the burden of proof on this issue, because of the vague language of this provision. See Bray, supra, at 912, Cherbel Realty Corp. v. Zoning Hearing Board, 4 Pa. Commw. 137, 285 A.2d 905 (1972).

The Zoning Board hung its hat on its conviction that the proposed antique shop was in conflict with the purpose of the area.<sup>5</sup> That purpose appears at §321:

This district is intended to encourage the preservation of agricultural lands and to encourage conservation of other lands where building or development might not be in the public's best interest. The district discourages development in areas having excessive slope, and recognizes the need to preserve natural drainageways, open spaces, and the rural farming characteristics of the township.

The problem with denying the permit based on §708(E) is that the proposed antique shop does not promote any development; it is to be operated out of an existing barn. Nor would it require any external alterations or structural

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<sup>5</sup> Although the Board made this finding to support its holding that the use was detrimental to the welfare of the residents of the neighborhood, the court will consider this a holding under §708(E).

changes. Furthermore, there is no evidence it would have a detrimental impact on the preservation of natural drainageways or open spaces, or that it might affect the rural farming characteristics of the township. Although objectors raised a concern about traffic on the road, there was no evidence showing traffic would be any different than normally expected for a home occupation. Moreover, although mention was made of a wildlife conservation field near the property in question, there was little discussion of how the proposed antique shop would affect that area.

Also problematic is the fact that the other home occupations specifically permitted, such as barber shops and beauty shops, could be expected to have an impact not dramatically different from the proposed antique shop, and yet they are permitted. But most importantly, since the Ordinance specifically permits home occupations in the O/A District, the “essential character” of the O/A District automatically includes home occupations. Therefore, we cannot say that antique shops, if they are proper home occupations, are per se contrary to the purpose of the O/A District.

Had the Zoning Board discussed §708(E) and made specific findings about the proposed antique shop in relation to this provision, based upon concrete evidence rather than speculation, we might have been able to affirm the Board on that basis. As it is, given the existing record we must conclude that the objectors have failed to meet their burden of proof on this issue.

**IV. Does the Ordinance Prohibit Antique Shops from being Operated in the O/A District?**

Although we find the antique shop is not a home occupation, for the sake of a reviewing appellate court we will address the issue of a variance from the requirement that she have sewage facilities in the barn.

We must first address Ms. Hill's argument that §411, which contains this specification, does not apply to antique shops located in the O/A District.

Section 411(A) states: "The rural village character of the R-1 Residential District is an important aspect of the quality of life of the residents of Watson Township. A proposal for any use outlined above shall indicate how this character will be kept." Ms. Hill claims that because of this provision, §411 applies only to antique shops located in the Residential district.

This argument would make sense if paragraph §411(D) was a subsection of paragraph §411(A). Since it is not, the most logical interpretation is that paragraph (A) imposes an additional requirement for antique shops located in the Residential District. Also significant is the title of §411, "General Store, Variety and Antique Shops, Drug Stores and Restaurants." This title seems to indicate that it applies to all such business, and not only to those in the Residential District.

Of course, it is hard to envision many businesses under this category being considered home occupations. Nonetheless, if any such business were to pass the home exception test, they should also be subject to the provisions of §411, or at least to those provisions which appear to be relevant to the

particular proposal.<sup>6</sup>

We also reject the Township Supervisors' related argument that paragraph §411(A) implies antique shops are permitted only in the Residential District. In support of our conclusion, we note that according to §412, barber and beauty shops are also subject to the requirements of §411, yet these uses are specifically permitted as home occupations.

We acknowledge similar problems with other paragraphs of §411, such as (F), which states that where a proposal abuts a residential property, screening of natural plantings or fencing must be provided. Obviously, this provision would not apply to home occupations where the use is within the home or an attached garage. That, however, is no reason to assume that §411, in itself, automatically excludes antique shops from the O/A District. The most reasonable interpretation of the paragraphs under §411, it seems to us, is that they apply when applicable to a proposed home occupation, and do not apply when they are clearly not applicable.

And finally, we reject the Township Supervisors' argument that an antique shop can never be permitted in the O/A District because the Ordinance specifically permits them in the Residential District, §312(C)(2), but does not specifically list them under the O/A District's counterpart provision, §322(B). Home Occupations are permitted under §322(B)(3), and §402(B) states that other home occupations not specified above may be performed as a special

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<sup>6</sup> See our upcoming discussion regarding the applicability of §411(A) and §411(F).

exception. That language is general enough to convince us that if an antique shop is found to be a home occupation and meets all the requirements, it is permitted in the O/A District. We must also keep in mind that in interpreting zoning ordinances, where doubt exists as to the intended meaning, we must rule in favor of the property owner and against any implied extension of the restriction. 53 P.S. §10603.1.

**V. Is a Variance Necessary and if so, are the Criteria Met?**

Having found that Ms. Hill’s proposed antique shop must comply with §411(C), we must now address the question of whether she needs to have separate sewage facilities installed in her barn, as the Zoning Board and the Township Supervisors claim.<sup>7</sup> Such an interpretation makes no sense to this court. Although we can see the need for on-site sewage facilities when a business is the principle use for a lot, businesses operated as home occupations would surely be permitted to use the facilities of the home to which they are associated. Requiring individuals to install separate facilities in their garages, basements, and other areas where they are conducting legitimate home businesses would be onerous and ridiculous, since by their very nature, home occupations are limited and will not attract large numbers of people. Moreover, not more than one non-resident employee is permitted. §402(A).

Supposing, however, that Ms. Hill was required to construct bathroom

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<sup>7</sup> §411C states, “Sewage disposal facilities shall be provided in accordance with the standards of the Department of Environmental Resources.”

facilities in her barn, she unquestionably would not be entitled to a variance, for Ms. Hill has presented no evidence nor any meritorious argument that she meets any of the criteria set forth in §706(A), (B), or (C) of the Ordinance.<sup>8</sup>

### **Conclusion**

The Watson Township Zoning Hearing Board was obviously hopelessly confused about the various provisions of the Ordinance, and with good reason, for it is not the most clearly written ordinance, to say the least. Nonetheless, the Board arrived at the correct decision, albeit for the wrong reasons.

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<sup>8</sup> These sections set forth the standard requirements that the applicant will suffer hardship without a variance, that the hardship is due to the property's unique physical circumstances and not due to the conditions created by the Ordinance or the applicant, that there is no possibility the property can be developed in strict conformity with the Ordinance, and that the variance is necessary to enable reasonable use of the property.



**ORDER**

AND NOW, this \_\_\_\_\_ day of June, 2001, for the reasons stated in the foregoing opinion, the appeal of Virginia A. Hill from the 28 June 2000 decision of the Watson Township Zoning Hearing Board is dismissed.

BY THE COURT,

Clinton W. Smith, P.J.

cc: Dana Stuchell Jacques, Esq., Law Clerk  
Hon. Clinton W. Smith  
Matthew Ziegler, Esq.  
Martin Flayhart, Esq.  
Marc Drier, Esq.  
Gary Weber, Esq.