

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

SOUTHSIDE DEVELOPERS, INC.,	:	CIVIL ACTION - LAW
Appellant	:	
	:	
vs.	:	NO. 08-00292
	:	
ZONING HEARING BOARD OF	:	LAND USE APPEAL
ARMSTRONG TOWNSHIP,	:	
Appellee	:	
	:	
vs.	:	
	:	
ARMSTRONG TOWNSHIP,	:	
Intervenor	:	

**OPINION AND ORDER**

This matter comes before the court upon Southside Developer Inc.’s appeal from a decision issued by the Armstrong Township Zoning Hearing Board on January 16, 2008. Southside Developers, Inc. (hereinafter “Southside”), filed an Application for Zoning Permit with the Armstrong Township Zoning Officer on November 20, 2007. The Application was denied by the Zoning Officer on November 20, 2007 and the Applicant filed an Appeal. A hearing was scheduled before the Hearing Board on December 17, 2007. The Board issued its decision on January 16, 2008 and Southside subsequently filed an appeal. On March 11, 2008, Armstrong Township filed a Notice of Intervention. On June 4, 2008, this Court entered an Order, denying Southside’s request to take additional testimony or re-open the record on the zoning appeal. A hearing in this matter was held on July 28, 2008.

The crux of the issue before this Court involves 3 acres of land. Southside Developer’s, Inc. owns an 8.4 parcel of land, which is located both in Duboistown Borough and Armstrong Township. Although the area located in Duboistown Borough

is zoned residential, approximately 3 acres is located in an area of Armstrong Township which is zoned Conservation Open Space. In its decision of January 16, 2008 the Armstrong Township Zoning Hearing Board denied Southside's variance request.

In an appeal to a Common Pleas Court from a Decision of a Zoning Hearing Board, where no additional evidence is taken by the Court, the scope of review is whether or not the Board abused its discretion or committed an error of law. Smith v. Zoning Hearing Board of the Borough of Bellevue, 619 A.2d 399, 401 (Pa.Cmwlth. 1992). A Zoning Hearing Board's interpretation of its own ordinance is entitled to great weight and deference from a reviewing court. Smith v. Zoning Hearing Board of Huntingdon Borough, 734 A.2d 55 (Pa.Cmwlth. 1999).

In requesting a variance, Southside sought to build a residential housing development on land zoned Conservation Open Space. In reaching its decision to deny the requested variance, the Board relied heavily upon the statement of purpose set forth in their Ordinance regarding the Conservation Open Space district. A portion of this stated purpose as set forth in the Zoning Hearing Board's Decision of January 16, 2008 was as follows:

...the conservation open space district is intended to include...woodland and steep slope areas within the Township...this District recognizes the value of conserving land as a natural resource and the severe problems that can be created by over utilization and development of these areas of the Township.

In keeping with its purpose, the Township established minimum lot requirements for areas designated Conservation Open Space. Armstrong Township's Ordinance 308 requires a minimum lot size of ten (10) acres.

In its Permit Application, Southside requested a variance of the minimum lot size for up to six building lots. Southside estimated the size of these lots to range from

.37 acre to .66 acre.<sup>1</sup> In its decision dated January 16, 2008, the Board denied the Appeal/Variance request noting that the proposed lots did not meet the minimum lot size requirement for a Conservation Open Space zone. The Board further determined that Southside failed to prove four of the five necessary elements which would allow for the grant of a variance.

Following a review of the parties' briefs, the Zoning Hearing Board Transcript of December 17, 2007, and following a hearing on this matter, this Court finds that the Armstrong Township Zoning Hearing Board did not abuse its discretion or commit an error of law in issuing its decision of January 16, 2008.

As the requirements of the Ordinance at issue were very clear, Southside's proposed development could only be permitted if the Zoning Hearing Board granted a variance. Pennsylvania courts have held, "[a]n applicant's burden is a heavy one, and a variance should be granted sparingly and only under exceptional circumstances." Rittenhouse Row v. Aspite, 917 A.2d 880, 885 (Pa.Cmwlt. 2006). In order to establish one's right to a variance, one must show:

1. That there are **unique physical circumstances or conditions**, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the Zoning Ordinance in the neighborhood or district in which the property is located;
2. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the Zoning Ordinance and that the authorization of a variance is therefore necessary to enable a **reasonable use** of the property;

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<sup>1</sup> It is this Court's understanding that the parties stipulated to the exact location of the municipal boundary line between Duboistown Borough and Armstrong Township for purposes of the Zoning Hearing Board's Determination. Additionally, for purposes of the Appeal/Variance request, the parties agreed that the Board should assume that the six building lots, or portions of lots, were located in Armstrong Township.

3. That such unnecessary hardship has not been created by the appellant<sup>2</sup>;
4. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the **public welfare**; and
5. That the variance, if authorized, would represent the **minimum variance** that will afford relief and will represent the least modification possible of the regulation in issue.

(See Municipalities Planning Code, 53 P.S. 10910.2 and Armstrong Township Zoning Ordinance Section 1001(C))(Emphasis added).

**Unique Physical Circumstances or Conditions:**

Southside's first argument relates to the Board's conclusion that the lot at issue was not shown to have a unique physical circumstance or condition. Southside asserts that this 3 acre portion of land is most certainly unique as it is a "triangular, severely undersized lot" located within a "recorded, approved and partially developed multi-lot subdivision." (Appellant's Brief, 3-4). As set forth above, Southside must show that unnecessary hardship is due to these unique, physical characteristics. As noted above, the purpose for Conservation Open Space zoning within Armstrong Township is conserving land as a natural resource. Reduction of income or profit because of a regulation is not by itself, sufficient unnecessary hardship. Rittenhouse Row v. Aspite, 917 A.2d 880 (Pa.Cmwlth. 2006). A property owner does not have an absolute right to use property for its highest and best financial gain. Twp. of East Caln v. Zoning Hearing Board of East Caln Twp., 915 A.2d 1249 (Pa.Cmwlth. 2007). Moreover, the question is whether the land, not the owner, is subject to hardship. Yeager v. Zoning Hearing Board of City of Allentown, 779 A.2d 595 (Pa.Cmwlth. 2001). During the

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<sup>2</sup> As the Zoning Hearing Board concluded that Southside failed to prove only #1,2, 4 and 5 of the variance requirements, this Court will similarly not address #3.

Zoning Board Hearing, the following question was asked by Armstrong Township's Attorney, J. Michael Wiley:

Mr. Wiley: One of the things that's permitted in a conservation open space district is a one-family detached dwelling. If you receive a variance to permit a three-acre lot, single three-acre lot, is there anything that would prevent you, other than the financial considerations you've stated this evening, from building a single family detached dwelling on a three-acre lot?

Mr. Andrus: Nothing holding us back from doing that except the financial burdens.

(Tr. 44:17 – 45:2).

Following a review of the Zoning Hearing Board Transcript, this Court finds that although Southside Developers may have suffered hardship, Southside has failed to meet its burden of proving unnecessary hardship due to some unique, physical characteristics of the land itself. Accordingly, this Court finds that the Zoning Hearing Board did not abuse its discretion or commit an error of law in denying Southside's variance request.

### **Reasonable Use**

Southside was required to show that it is impossible to use the land in conformity with the ordinance and that compliance with the ordinance would render the property practically useless. Smith v. Zoning Hearing Board of Bellvue, 619 A.2d 399 (Pa.Cmwlt. 1992). In Smith, the Commonwealth Court evaluated a zoning board's grant of a variance to appellant to construct parking lots. In affirming the lower court's reversal of the zoning board's decision, the Commonwealth Court held:

Specifically, with regard to the two after acquired lots, the variance should not have been granted for at least two reasons. First, there is not one shred of evidence in this voluminous record to show that the two lots could not be used as zoned, i.e., for residential purposes. This failure of proof is along sufficient to deny the request for a variance. Id. at 402.

Similarly, Southside has failed to demonstrate why the land at issue cannot be used as zoned.

### **Public Welfare Issues**

The party seeking the variance must prove that the variance is not detrimental to the public interest. Southside proposed a residential use in a Conservation Open Space Zone consisting of six building sites, each of a size well below the minimum 10 acre lot size required in the Zone. This Court finds that insufficient evidence was presented to show that this dense residential development would not adversely affect the public welfare. Moreover, mere argument that it is in the public's best interest does not refute the presumptive validity of the zoning determination to preclude this development in this zone. See Twp. of East Caln v. Zoning Hearing Board of East Caln Twp., *supra*.

### **Minimum Variance Requirement**

Southside was required to show that it was requesting the minimum variance which would afford relief. Solow v. Zoning Hearing Board of Borough of Whitehall, 440 A.2d 683 (Pa.Cmwlth. 1982). Southside's request was for a division of their acreage into six lots pursuant to a plan developed by Southside. Granting such a variance would amount to a total disregard for the Ordinance which clearly precludes dense residential developments such as the one proposed.

**ORDER**

Pursuant to the reasons set forth above, this Court finds in favor of the Appellee and AFFIRMS the decision of the Armstrong Township Hearing Board.

BY THE COURT,

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Richard A. Gray, J.

cc: Karl K. Baldys, Esq.  
Marc Drier, Esq.  
J. Michael Wiley, Esq.