IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

LINDA FESSLER, Appellant	:	NO. 14 – 00,346
	:	CIVIL ACTION - LAW
vs.	:	
ZONING HEARING BOARD OF ARMSTRONG TOWNSHIP, Appellee	:	
ARMSTRONG TOWNSHIP, Intervenor	:	Land Use Appeal

OPINION AND ORDER

Before the court is Appellant's appeal of the decision of the Zoning Hearing Board of Armstrong Township, which upheld the Zoning Officer's denial of Appellant's application for a zoning permit. The certified record of proceedings before the Board was filed March 26, 2014. The parties agreed that no further evidence was necessary and that the matter could be decided on the record below. Briefs were filed September 12 and October 14, 2014, and argument was heard November 3, 2014.

Appellant owns a parcel of real estate in Armstrong Township in the Residential (R-2) Zone, which, because of prior conveyances out of the original parcel, consists of two separated tracts of land. There are two homes on the larger tract of land and Appellant proposes to move one of the homes to the smaller tract of land.[1] To that end, she applied for a zoning and building permit but, inasmuch as the smaller tract is approximately 34,000 square feet and thus below the required minimum lot size of 43,560 square feet, the application was denied. The

[1] Currently, this smaller tract consists of vacant woodland.

Zoning Officer determined that the lot "does not meet lot requirements."[2] Before the Zoning Hearing Board, Appellant argued that the lot should be considered a prior, non-conforming lot and thus exempt from the minimum lot size requirement or, in the alternative, that a variance was necessary to enable a reasonable use of the property.[3] The Board determined that the lot was not a prior, non-conforming lot and that a variance was not appropriate as Appellant had failed to meet the ordinance criteria for such. The Zoning Officer's decision was thus upheld.

The appeal presents four issues: (1) whether the lot should be considered a separate lot, apart from the other portion of Appellant's land, rather than as part of a "whole property"; (2) whether the lot may be classified as "prior, non-conforming" such that the minimum lot size requirement does not apply; (3) whether the Board erred in finding the application incomplete based on the lack of engineering plans and other omissions; and (4) whether the Board erred in concluding that Appellant did not show "that the physical character of the property renders impossible the development of residential lots in compliance with lot size requirements or, other reasonable uses." Since no additional evidence was taken before this court, the decision will be upheld unless the court finds the Board abused its discretion, that is, the Board's findings are not supported by substantial evidence, or the Board committed an error of law. Limley v. Zoning Hearing Board of Port Vue Borough, 625 A.2d 54 (Pa. 1993).

In several of its findings, the Board appears to have considered not the separated tract of land but the entire property owned by Appellant. For example,

[2] Zoning Hearing Board Exhibit 3.
[3] Appellant also argued that the deviation in size was "de minimus", but the Board rejected that argument and Appellant has not pursued the argument before this court.

in Finding number 13, the Board found that "the Applicant has an existing use of the subject property as a whole which is consistent with Ordinance requirements", and, in Finding number 14, that "the Applicant has not shown that the zoning ordinance has created a hardship for the Applicant which prevents a reasonable use of the property as a whole." These considerations appear to be based on Finding number 9, that "the parcel identified by Fessler was not, itself, a deeded conveyance, did not have municipal subdivision approval, or predate zoning and subdivision regulations. The lot Fessler now intends to develop is not a parcel of land previously separated from the parent tract which Fessler purchased in 2007." To the extent these findings are based on a conclusion that the tract of land at issue is not a separate lot, to be considered alone, the court believes such to be in error. In In re Martin, 723 A.2d 1064, 1066 (Pa. Commw. 1998), the Commonwealth Court noted that a property which had been severed by the construction of a road

> was not legally created, and hence separated from the parent tract, until 1995, when the deed conveying the property described the lot by a legal description of the property. However, the property has been in its present physical shape and constricted configuration since 1907 when New Holland Road was built, and *has existed in fact as a separate "lot" since then,* albeit devoid of all practical use by the owner of the larger parent tract because of its separation by New Holland Road.

The court then went on to analyze the situation presented by the "lot" without reference to the remainder of the property. In the instant case, the tract at issue has been completely separated from the other tract by conveyances to others of two parcels carved out of the whole. Thus, the Board should have considered

only the smaller tract of land. This court will therefore focus on those findings and conclusions which apply in that context.

The Board concluded that Appellant's property did not include a "pre-existing, non-conforming lot" which would be exempt from the minimum lot size requirements of the zoning ordinance. The court agrees with this conclusion. The conveyance which created the smaller, separated tract was made in 1981 and at that time, the zoning ordinance[4] provided for a minimum lot size of one acre per dwelling or structure.[5] The creation of the lot thus did not pre-date the ordinance such that it would be exempt from application thereof.

Next, the court considers whether the Board erred in finding the application incomplete. The Board stated that the application was incomplete and "prevents a review by the Board for compliance with the terms and standards of the zoning ordinance." The Board also noted that "no building plan was submitted to show the location of the structure on the lot", and that "[n]o specific structure or use is proposed. No drawings or engineering plans have been submitted." They also found that "the Applicant has not submitted credible evidence to meet ordinance variance criteria. Among other things, the Applicant has not shown that the physical character of the property renders impossible the development of residential lots in compliance with lot size requirements or, other reasonable uses." Initially, the court wishes to note that the written decision of the Board is somewhat vague and confusing. The Board's brief clarifies that the basis for the denial of a variance was that Appellant had not presented sufficient evidence that

[4] The original zoning ordinance, enacted in 1965, was revised in 1979, and again in 1994. The 1979 revision increased the minimum lot size requirement; the 1994 revision did not change that provision.
[5] Although a previous conveyance (the first of the two) was made in 1973, prior to the 1979 ordinance, that conveyance, while separating the remaining land into two tracts, did not create an "undersize" lot. It was not until the second conveyance that the remaining land became "undersized".

the public sewer could be made to service the property, thus bringing it within the lower minimum lot requirement of 10,000 square feet where public sewage systems are available.

The court does not believe that an engineering drawing is necessary in this instance. Further, the application does propose a specific use – to move an existing dwelling to the lot from the other portion of Appellant's property, which contains two dwellings. Appellant is correct that setback requirements, driveway issues, etc. are to be addressed separately from the zoning issue of whether a house may be placed there at all. To the extent the Board denied the application for lack of such items, error was committed.

The court does not find an abuse of discretion, however, in the Board's determination that Appellant presented insufficient evidence of the availability of public sewer, and that without such, she had failed to show that "the physical character of the property renders impossible the development of residential lots in compliance with lot size requirements or, other reasonable uses." Such a consideration is appropriate under the ordinance which, at Section 802(B), provides, in relevant part, as follows:

> No variance in the strict application of any provision of this Ordinance shall be granted by the Board unless it finds:
> …
> 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 the reasonable use of the property;
> ….

Armstrong Township Zoning Ordinance, adopted March 14, 1979, Section 802(B). If public sewage is available, the minimum lot area is only 10,000 square

feet per dwelling. Id., Section 303.[6] Therefore, the Board was correct in seeking to establish at least whether public sewer is available because, if it is, the property could be developed in strict conformity with the provisions of the Ordinance and a variance would not be necessary to enable reasonable use of the property. Appellant's evidence on this point was sketchy at best. She testified that she would "need an easement from Mr. Patel or Little League, and Mr. and Mrs. Person to cross their property," N.T. October 28, 2013, at 20, that she "believe[s] Mr. and Mrs. Person are agreeable to allow us to go across", that "Little League is not allowing us to use the one, but I have not contacted them in regards to the upper one that is back, across the back of their property", Id. at 21, and that "if we were to purchase [the bottom portion of Mr. Patel's property], we would be able to connect right to sewer without an easement." Id. At the hearing on December 9, 2013, Appellant still did not have any concrete plans for the sewer connection, nor did she have evidence that it was *not* possible. The court agrees with the Board that Appellant's testimony was not sufficient to support the requisite finding.

Accordingly, although the decision may include some errors of law, as it does rest on one ground which the court finds appropriate, it will be upheld.

[6] Although the Board appears to be including the availability of public water in its consideration, and the 1994 Ordinance does reference "central/package *water and sewage* systems" in setting forth lower minimum lot requirements, Armstrong Township Zoning Ordinance, adopted October 11, 1994, Section 306 (emphasis added), the lot size requirements of the 1994 Ordinance would not apply to the lot in question as it was created in 1981.

ORDER

AND NOW, this 4th day of December 2014, for the foregoing reasons, the decision of the Armstrong Township Zoning Hearing Board is hereby AFFIRMED.

BY THE COURT,

Dudley N. Anderson, Judge

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Hon. Dudley Anderson