BOARD OF SUPERVISORS OF EAST FALLOWFIELD TOWNSHIP Appellant	:	IN THE COURT OF COMMON PLEAS CHESTER COUNTY, PENNSYLVANIA
VS.	:	NO. 2009-14025-LU
ZONING HEARING BOARD OF EAST FALLOWFIELD TOWNSHIP Appellee	:	
and	:	
ANDREW F. JEREMIAS and KEIGHLEY C. JEREMIAS Intervenor/Appellee	:	LAND USE APPEAL

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OFFICE OF THE PROTHONOTARY CHESTER CO. PA.

Vincent M. Pompo, Esquire, Mark P. Thompson, Esquire, Attorneys for East Fallowfield Township Board of Supervisors, Appellant
Jeffrey R. Sommer, Esquire, Attorney for East Fallowfield Township Zoning Hearing Board, Appellee
Mary Ann Rossi, Esquire, Attorney for Andrew F. Jeremias and Keighley C. Jeremias, Intervenor/Appellee

OPINION and ORDER

BY: NAGLE, J. August 2, 2010

The Board of Supervisors of East Fallowfield Township ("Township") timely appeals from the February 4, 2010 Decision and Order of the Zoning Hearing Board of East Fallowfield Township (the "Board") granting Andrew and Keighley Jeremias (the "Applicants") a special exception and parking variance to permit them to operate a single-chair hair salon at their residence as a home occupation. The Township contends that Applicants failed to satisfy one of the objective requirements of the Township's Zoning Ordinance ("zoning ordinance") which requires a home

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occupation to be provided with 2 additional off-street parking spaces to serve the home occupation in addition to the required number of parking spaces mandated for the residential use, and that the Board erred in granting a variance from the off-street parking regulation absent proof of hardship. The Applicants' zoning application requested a special exception, but not a variance, although one was *sua sponte* granted by the Board when confronted with a need to do so in acting favorably on the application. The hearing was advertised by the Board as a special exception request only, thereby not putting neighbors on notice of or giving them an opportunity to object to a parking variance. This issue has not been raised by the Township and, therefore, will not be considered. See *Appeal of Booz,* 330, 533 A.2d 1096 (Pa. Cmwlth. 1987); *Holmes v. Board of Zoning Appeals City of Scranton*, 568 A.2d 301 (Pa. Cmwlth. 1990); *Keebler v. Zoning Bd. of Adjustment of City of Pittsburgh,* --- A.2d ----, 2010 WL 2572863 (Pa. Cmwlth. 2010). Initially, the Applicants intervened in the Township's appeal through counsel on March 9, 2010, but withdrew their intervention on June 11, 2010. Both the Township and Board have filed briefs, but neither requested oral argument, and no additional evidence was taken by the court.

Standard of Review. Where the Court does not take additional evidence, the standard of review in a land use appeal is whether the zoning board or

board of supervisors committed an error of law or abused its discretion. *Larsen v. Zoning Board of Adjustment of the City of Pittsburgh*, 672 A.2d 286 (Pa. 1996); *Cottone v. Zoning Hearing Board of Polk Township*, 954 A.2d 1271 (Pa. Cmwlth. 2008). The Court may not substitute its judgment for that of the board unless it has manifestly abused its discretion or committed an error of law. *Valley View Civic Ass'n v. Zoning Bd. of Adjustment*, 462 A.2d 637, 639 (Pa. 1983) (citations omitted); *Noah's Ark Christian Child Care Center, Inc. v. Zoning Hearing Board of West Mifflin Township*, 831 A.2d 756 (Pa. Cmwlth. 2003). An abuse of discretion will be found only where the board's decision is not supported by substantial evidence. *Petition of Dolington Land Group*, 839 A.2d 1021 (Pa. 2003); *C & M Developers v. Bedminster Township Zoning Hearing Board*, 820 A.2d 143 (Pa. 2002). The court must accept the credibility determinations of the municipal body which hears testimony, evaluates the credibility of witnesses, and serves as fact-finder. *In re Thompson*, 896 A.2d 659, 668 (Pa. Cmwlth. 2006) (citing *Young v. Pistorio*, 715 A.2d 1230 (Pa. Cmwlth. 1998); *Taliaferro v. Darby Township Zoning Hearing Board*, 873 A.2d 807 (Pa. Cmwlth. 2005).

Discussion. A review of the record reveals the following pertinent facts. Applicants, husband and wife, own a single family 2,500 square foot colonial dwelling, with attached two car garage and a driveway

stretching 36 feet in length and 18 feet in width located at 125 Watch Hill Road, East Fallowfield, Chester County, Pa. in a development known as Providence Hill, zoned R-3 High Density Residential District. Return of Record 3(a). On August 17, 2009, they applied for a special exception for a home occupation to continue to operate the previously established Kiki's Hair Salon, a 283.5 square foot, single chair, single stylist salon, located in the finished basement of their home, apparently operated without Township approval. Mrs. Jeremias was licensed as a cosmetologist in 2001 by the Pennsylvania Department of State, Bureau of Professional and Occupational Affairs and is employed full-time as a hair stylist at Antoinette's Salon in Paoli. The salon would operate during the hours of 10 a.m. to 5 p.m. on Mondays and Tuesdays, and, possibly, Thursdays from 8:00 a.m. to 10:00 a.m. N.T. 9/23/09, p.6. Approximately 20 neighbors from the Providence Hill development are currently regular clients of and walk to the salon. Mrs. Jeremias would operate the salon alone, without employees, would post no signage, and service only one customer at a time by scheduled appointment. No exterior alterations would be made to the house. The foregoing facts were adduced by Andrew Jeremias, who appeared before the Board pro se and was the only witness. He was kindly assisted by the Board's solicitor in presenting his special exception application in an effort to establish compliance with

the required standards of the zoning ordinance and with the regulations applicable to home occupations. Section 1712.B. His testimony disclosed non-compliance with the off-street parking regulation. Section 1712.B.7. The Applicants are unable to comply with the off-street parking regulation because their driveway will not accommodate more than the 2 required off-street parking spaces required for residential dwellings. Section 1806.B. Mr. Jeremias testified he and Mrs. Jeremias would satisfy this regulation by parking in their garage to free-up the driveway for customer parking. This solution is prohibited by Section 1806.B. No evidence was proffered supporting the granting of a variance from the off-street parking regulation; however, the neighbors did not object to the application, and the Board was presented with a letter from the Providence Hill Home Owners Association approving the business, subject to local permit approvals.

The following sections of the zoning ordinance are pertinent to our decision.

Section 702.3.A permits Home Occupations as a use by special exception in the R-3 district.

Section 201 defines a "Home Occupation" as "[t]he use of a dwelling and/or accessory structure, or part thereof, incidental and accessory to the residential use of the premises and customarily carried on by one (1) or more occupants of the dwelling unit. Home occupations include, but are not limited to medicine, dentistry, architecture, beauty care, law, art, brokerage, veterinary practice and sales."

Section 1712.B describes the standards for Home Occupations, pertinently including: "A minimum of two (2) off-street parking spaces shall be provided in addition to the required number for a residence." Section 1712.B(7).

Section 1806.B establishes "Common Regulations" applicable to residential off-street parking requirements. "Dwelling units in residential and nonresidential zoning districts shall have a minimum of two off-street parking spaces per dwelling unit, *in addition to any parking utilizing a garage or carport.* Driveways utilized for single-family and two-family dwellings may be used to satisfy this requirement." (emphasis added).

Section 2207.2 governing standards applicable to special exceptions required to be considered by the Board includes subparagraph "K". Entitled "Special Conditions", it reads: "In addition to conforming with the general standards above, and all other applicable regulations contained in this Ordinance, the proposed special exception shall conform with all conditions for that use as given in Article 1700."

Special Exception.

The Township advances two arguments, first that the Board erred in granting a special exception because the Applicants were unable to comply with Section 1712.B(7); and, second, that the Board impermissibly re-wrote the zoning ordinance by disregarding its express requirements, thereby usurping the supervisors' legislative discretion. We agree.

While the allowance of a use by special exception indicates legislative acceptance that the use is consistent with the municipality's zoning plan, an applicant is nonetheless required to meet the ordinance's objective standards pertaining to such use before the use will be allowed. *Union Twp. v. Ethan Michael, Inc.*, 979 A.2d 431, 437 (Pa. Cmwlth. 2009)

(citing *Broussard v. Zoning Hearing Board of Adjustment of the City of Pittsburgh,* 831 A.2d 764, 772 (Pa. Cmwlth. 2003), *aff'd*, 907 A.2d 494 (Pa. 2006)); *Bray v. Zoning Bd. of Adjustment*, 410 A.2d 909 (Pa. Cmwlth. 1980). The applicant retains the burden to prove that the proposed use complies with the ordinance's standards and requirements for special exceptions. *Pennsy Supply, Inc. v. Zoning Hearing Bd. of Dorance Twp*, 987 A.2d 1243 (Pa. Cmwlth. 2009) (citing *Agnew v. Bushkill Twp. Zoning Hearing Bd.*, 837 A.2d 634 (Pa. Cmwlth. 2003)). The zoning hearing board's obligation is to "hear and decide such special exceptions in *accordance with such standards and criteria. . . .*". Municipalities Planning Code ("MPC"), Act of July 31, 1968, P.L. 805, as amended, Section 912.1, 53 P.S. § 10912.1. (emphasis added). Clearly, the Applicant's proposed use did not comply with Section 1712.B(7)'s explicit parking requirement, which could not be satisfied by parking their personal vehicles in the garage, expressly precluded by Section 1806.B., thereby not meeting the standards necessary for its allowance. *In re Zambrano Corporation*, 410 A.2d 1293 (Pa. Cmwlth. 1980) (application to establish beauty salon in residential district where permitted only by special exception that does not comply with ordinance's parking space requirements properly refused); *Ralph & Joanne's, Inc. v. Neshannock Township Zoning Hearing Board*, 550 A.2d 586, 589, (Pa. Cmwlth. 1988); *Lafayette College v. Zoning*

Hearing Board of City Easton, 588 A.2d 1323 (Pa. Cmwlth. 1991) (failure to provide parking as required by ordinance provides sufficient basis for denial of special exception).

Variance Relief.

The Board justified its grant of a parking variance by reasoning that the parking regulation was premised on a legislative presumption that additional parking would be required to accommodate a home occupation, contrary to its alleged lack of necessity in this case. Finding that presumption did not apply in this case, the Board concluded that the findings required by MPC Section 910.2 and by ordinance Section 2207.1 to be made before a variance is authorized were not relevant to its decision.[1] However, a zoning hearing board is clearly required to make

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[1] Section 910.2 of the MPC, 53 P.S. § 10910.2, provides:

"(a) The board shall hear requests for variances where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant. The board may by rule prescribe the form of application and may require preliminary application to the zoning officer. The board may grant a variance, provided that all of the following findings are made where relevant in a given case:

(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 the reasonable use of the property.

(3) That such unnecessary hardship has not been created by the appellant.

findings pertinent to the five criteria imposed by these sections, where they are relevant in a given case. *Vaughn v. Zoning Hearing Bd. of Shaler*, 947 A.2d 218 (Pa. Cmwlth. 2008); *Sombers v. Stroud Twp. Zoning Hearing Bd.*, 913 A.2d 306, 311-12 (Pa. Cmwlth. 2006). In this task, the Board failed, as the Township argues, as did the Applicants in failing to adduce evidence proving their right to a variance. *Gateside-Queensgate Co. v. Delaware Petroleum Co.*, 580 A.2d 443, 447 (Pa. Cmwlth. 1990); *Kernick v. Zoning Hearing Bd. of Penn Hills*, 425 A.2d 1176, 1178 (Pa. Cmwlth. 1981) (where the applicant fails to prove that the statutory prerequisites for the granting of a variance are satisfied, the board commits an error of law and abuses its discretion in granting a variance); *Township of Northampton v. Zoning Hearing Bd. of Northampton*, 969 A.2d 24 (Pa. Cmwlth. 2009) (applicant for a dimensional variance not

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(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.

(5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

(b) In granting any variance, the board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this act and the zoning ordinance."

Section 2207.1 of the Zoning Ordinance lists the requirements for the grant of a variance, and largely mirrors the provisions contained in the foregoing Section 910.2 of the MPC.

entitled to variance from the ordinance's parking requirements absent proof of hardship if required to comply with ordinance).

Although we agree with the Township's argument, we are nonetheless sympathetic to the conundrum faced by the Board considering the size of Applicant's lot in relation to the zoning ordinance's allowance of home occupations in the R-3 district. From the sparse evidence in this record, consisting primarily of photographs of the lot, an excerpt from a plan of lots for the development, and a sketch plan of the development, we infer Providence Hill was developed under an open space design option provided for in the zoning ordinance. Applicants' lot is depicted as 8,860 square feet in area, whereas the normal R-3 district regulations mandate a minimum lot area of 29,000 square feet for single-family detached dwellings. It therefore appears there is no accessible area on the lot to accommodate the required additional parking spaces, an assumption the Board appears to have made. The Township does not dispute the zoning ordinance's allowance of a home occupation on Applicants' property, subject to zoning compliance. Regardless, because the Applicants did not challenge the validity of the Township's parking regulation, they were required to comply with it, unless they proved their right to the variance. And, the Board was required to apply the zoning ordinance, as written. *Greth Development Group, Inc. v. Zoning Hearing*

Bd. of Lower Heidelberg Twp., 918 A.2d 181 (Pa. Cmwlth. 2007) (zoning board "lacks the authority to modify or amend the terms of a zoning ordinance", must apply the terms of the ordinance as written, and "must not impose their concept of what the zoning ordinance should be") (citing *Hill v. Zoning Hearing Bd. of Maxatawny Twp.*, 597 A.2d 1245 (Pa. Cmwlth. 1991); *Ludwig v. Zoning Hearing Bd. of Earl Twp.*, 658 A.2d 836 (Pa. Cmwlth. 1995)).

Off-street parking regulations are considered dimensional in nature, warranting application of the relaxed *Hertzberg* standard in determining unnecessary hardship for a variance. *Mitchell v. Zoning Hearing Bd. of the Borough of Mount Penn*, 838 A.2d 819, 828 (Pa. Cmwlth. 2003) (citations omitted). While the Township takes the precaution to vigorously argue the inapplicability of the *Hertzberg* standard to the instant facts, the evidence does not support our need to consider its applicability. *Hertzberg v. Zoning Bd. of Adjustment of City of Pittsburgh*, 721 A.2d 43, 47 (Pa. 1998) (courts may relax the standards for granting a variance from dimensional regulations and consider multiple factors including the cost of strict compliance, economic hardship resulting from denial of a variance, and the characteristics and conditions of the neighborhood). *Hertzberg* does not relieve applicants of their need to prove hardship.

Had the Board made the required hardship analysis, it would have had to consider that the Applicants' lot is not constrained by any proven exceptional topographical or other physical conditions peculiar to it, and that the alleged unnecessary hardship posed by the lack of adequate space for the additional parking is wholly due, not to any such conditions, but to the circumstances or conditions generally created by the provisions of the zoning ordinance applicable in the Providence Hill development in which the lot is located. *Van Horen v. Zoning Hearing Bd. of Warwick Twp.*; 431 A.2d 1169 (Pa. Cmwlth. 1981) (a hardship variance may not be granted to provide relief from a regulation which affects the property in question no differently than other property in the zoning district); Accord, *Melwood Corporation v. Zoning Bd. of Adjustment of City of Pittsburgh*, 528 A.2d 668 (Pa. Cmwlth. 1987). The Board was also required to consider whether authorization of a parking variance in conjunction with the proposed home occupation is necessary to enable the reasonable use of the Applicants' property. *Carman v. Zoning Board of Adjustment*, 638 A.2d 365 (Pa. Cmwlth. 1994); *Curtis Investment Co. v. Zoning Hearing Bd. of West Mifflin Twp.*, 592 A.2d 813 (Pa. Cmwlth. 1991); *Kernick v. Zoning Hearing Bd. of Penn Hills*, 425 A.2d 1176 (Pa. Cmwlth. 1981). Where, as here, property is being put to a permitted use, the owner suffers no unnecessary hardship. *Ignelzi v. Zoning Bd. of Adjustment of*

City of Pittsburgh, 433 A.2d 158 (Pa. Cmwlth. 1981); *Miller v. Zoning Hearing Bd. of Ross Township*, 647 A.2d 966 (Pa. Cmwlth. 1994)).

Accordingly, we find that the Board acted contrary to law by ignoring the established legal criteria by which variances and special exceptions are required to be judged, and impermissibly excused the Applicants from satisfying their burden of proof. We enter the attached Order.

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ORDER of COURT

AND NOW, this 2ND day of August, 2010, it is ORDERED and DIRECTED that the Appeal of the Board of Supervisors of East Fallowfield Township is SUSTAINED, and the Decision and Order of the Zoning Hearing Board of East Fallowfield Township dated February 4, 2010 is REVERSED.

BY THE COURT:

Ronald C. Nagle J.