

the matter on October 2 and November 6, 2014. For the reasons that follow, the Board will grant relief in the nature of variances by estoppel.

A variance by estoppel is one of the several labels that courts in Pennsylvania have assigned to describe what is essentially an equitable remedy that allows a landowner to use his property in a way that violates a zoning ordinance. The courts have granted this kind of equitable remedy where the municipality has issued permits in error or has otherwise acquiesced in a landowner's conduct and the landowner has in good faith relied on the municipality's action. *In re Kreider*, 808 A.2d 340 (Pa. Cmwlth. 2002). The evidence in this case supports the grant of a variance by estoppel for the proposed construction.

Prior to 1983, a car wash operated on the property and the site was nearly 100% impervious surface. [Exhibit A-11, Property Survey] On November 11, 1983, the Township issued the Appellant a building permit to demolish the car wash and to build a restaurant on the site. [Exhibit A-7, 1983 Permit] The Township Zoning Officer, Michael Wylie, testified at the hearings that there is no record in the township files of any Board proceeding for zoning relief. He concluded that the permit must have been issued as a matter of right. [N.T. 10/2/14 at 13-14]

Four months after the building permit was issued for the main construction, the Township issued a second permit for an addition to the restaurant. [Exhibit A-2, March 28, 1984 Permit] Later, the Township issued Appellant a third building permit in 2006 to install a walk-in cooler and to replace a fence. [Exhibit A-5, December 4, 2006 Permit] The permits were issued despite the fact that the site plans showed that the improvements would violate the dimensional restrictions in the Zoning Ordinance in the following

respects: there would be no 20' buffer along the property line abutting a residential zoning district as required, the parking stalls would be less than the required 19' x 9', and the impervious coverage would be 89% (80% is the maximum allowed). [Exhibit A-1, Existing Site Plan] The Appellant was clear in its plan for the property and the Township was definitive in its approval.

There is nothing in the record to indicate the bases on which the Township issued the permits in 1983 and 1984 and allowed the site to be developed with these non-compliant conditions. It may be that the Appellant's plans were considered an improvement to the existing site. [*Cf.*, Exhibit A-11 and A-1] It may also be that the conditions on the existing site when the Appellant proposed its 1983 improvements were nonconforming. The township records do not provide an answer.¹ Nevertheless, in 1983 the Appellant plainly disclosed to the Township the entire extent of its proposed development. And from that time until today, the building has been used as a Wendy's restaurant combining eat-in and drive-through purchase without complaint from the Township.

In order to decide the current application, we start with the proposition that if the Township were before the Board attempting to enforce the zoning restrictions on account of the existing conditions, we would hold that the Appellant is entitled to a variance by estoppel to maintain the property in its current state. The elements of a variance by estoppel² are: (1) the municipality's failure to enforce the ordinance provisions, (2) the landowner's good faith and reliance on the municipality's action; (3) the landowner's

¹ As Appellant's counsel conceded at the hearings, the Board cannot find that the property is lawfully nonconforming without clear and convincing proof.

expenditure of substantial sums in reliance, and (4) unnecessary hardship resulting from the denial of the relief. *Pietropaolo v. Zoning Hearing Board of Lower Merion Township*, 979 A.2d 969 (Pa. Cmwlth. 2009). All the elements are present in this matter.

First, the Township did far more than engage in “active acquiescence” beginning in 1983. It issued permits to the Appellant – three times – for the construction of and additions to the building on the property, with no buffer and with undersized parking stalls. Second, the Appellant acted in good faith by applying for the building permits and disclosing the extent of the proposed improvements on its plans. It further relied on the Township staff to review the plans and evaluate them for compliance with the township codes and ordinances. Third, in constructing the improvements and additions to the property, the Appellant expended substantial sums in reliance on the Township’s grant of the permits. Finally, the Appellant would suffer substantial hardship if the Zoning Ordinance provisions were enforced now. The hardship would not only be financial,³ but the engineers’ testimony proved that requiring the buffer would in itself render the site unusable for the restaurant and its associated parking demand.

So the Board is convinced that, pursuant to the principles of variance by estoppel, the existing improvements are permitted to remain despite the violations. The question now is whether the Appellant is entitled under the same (or some other) principles to demolish the building and replace it with a modernized version in the same location.⁴

² The Commonwealth Court has often noted with regard to these elements that the various labels given to the equitable relief sought imposes an analytical rigidity that is not helpful. *Vaughn v. Zoning Hearing Board of the Township of Shaler*, 947 A.2d 218 (Pa. Cmwlth. 2008).

³ The *Vaughn* case states that the “hardship” element is satisfied by the mere loss of the funds expended in reliance on the municipality’s actions. 947 A.2d at 225.

⁴ The new improvements will not be exactly the same. Appellant proposes to reduce the impervious surface slightly to 87% and to increase the rear yard setback to 21.5 feet. It will also reconfigure the driveway and drive-through to improve safety for traffic travelling on City Avenue. [N.T. 11/6/14 at 24-29, 67-68]

Based on the unique facts of this matter, the Board will grant a variance by estoppel to permit the new construction.

The caselaw does not provide a clear resolution here. Variance by estoppel and other equitable remedies most often arise when a landowner is defending an action by the municipality to remove a structure or stop a use that the municipality belatedly has deemed to be in violation of the zoning ordinance. *E.g., Pietropaolo, supra*. The cases offer no guidance on the issue of whether a landowner can replace a building or use established under a claim of variance by estoppel or vested right.⁵

Without a definitive answer from the appellate courts, the Board examined the caselaw pertaining to replacement of nonconforming buildings. In *Trettel v. Zoning Hearing Board of Harrison Township*, 658 A.2d 741 (Pa. 1995), for example, a country club sought permission to tear down and replace a 50' x 20' nonconforming maintenance shed that was located 56 feet into the required 70-foot setback. The Township granted a building permit to allow the shed to be replaced in the same location and to be 10 feet wider than the existing one. The club's neighbors appealed. The zoning board sustained the grant of the permit and the common pleas court affirmed the board. The Commonwealth Court, however, reversed. The Court held that the township ordinance only allowed rebuilding a nonconforming building if it was destroyed by "casualty" and was the same size as the previous building.⁶

⁵ The Appellant claimed that the 1983 permit must have permitted the building as a matter of right. There is no evidence of that. Mr. Wylie testified that he had no first hand information regarding the reasons for granting the permit. Appellant conceded, though, that if its present plans were applied to a completely vacant property at the subject location, they would require variances. [N.T. 11/6/14 at 23-24]

⁶ This is essentially the same provision that is in the Lower Merion Zoning Ordinance, which allows nonconforming buildings that are "damaged or destroyed" (though to an extent of not more than 75% of its value) to be replaced as long as they do not exceed the size of the previous building. Code §155-99 D.

On appeal, the Supreme Court reversed the Commonwealth Court and reinstated the zoning board's decision to allow the replacement. The Supreme Court reasoned that the zoning ordinance's other provisions that allow nonconforming structures to continue (and to be extended if the zoning board grants permission) apply to such structures that are being replaced not because of casualty. *Id.* at 742-743. In conclusion, the Court reasoned:

Given the high degree of similarity between the old and new sheds in terms of their position, size, and use, there was a sound basis for the board's conclusion that the old shed could be replaced without causing detriment to the neighborhood.

Id. at 743; *see also*, *Zeiders v. Zoning Hearing Board of Adjustment of West Hanover Township*, 397 A.2d 20 (Pa. Cmwlth. 1979)(restrictions on reconstructing nonconforming buildings must be specific; court affirmed the zoning board decision that allowed rebuilding in the absence of casualty and with *de minimus* increases in size).

Although this matter does not involve a nonconforming building, the Board finds the courts' analyses in those cases instructive. The difference here is that the Appellant's building is permitted to remain where it is not because it is legally nonconforming to a general township-wide change in the zoning ordinance (as in the cases above). Instead, as we previously discussed, the Appellant's building is permitted to remain because the Township permitted it (several times) on this specific property. There is nothing in the Lower Merion Zoning Ordinance that expressly prohibits replacing the building in this particular set of circumstances.

The Board views this matter as somewhere on the continuum between the nonconforming building cases of *Trettel* and *Zeiders* and the case of a landowner who has

been expressly granted a dimensional variance by the Board. In both circumstances, replacement of the building is allowed. We will, therefore, grant a variance to allow the existing building to be replaced as described at the hearings. At the hearing, the Appellant's representatives agreed to take measures to advise its customers to reduce the noise from vehicles as they idle in the queue for take-out service. The Board will condition the grant of relief on taking such measures, including erecting signs (that conform to township ordinances) so advising its customers.

As for the existing and proposed commercial signs for the property, the testimony indicated that the existing nonconforming pylon sign will remain. No relief is required for that, though we note that if the sign is ever replaced, the Zoning Ordinance does explicitly require that it be made to conform. Code §155-93.4 B. With regard to the signs to be made part of the "blade" that forms a new structural feature of the proposed building, the Board finds that these are wall signs, and do not require a variance from Section 93.3 C(2) to extend above the building wall. The plans indicate that they are individually and collectively below the maximum square footage permitted under the Zoning Ordinance. At the hearing, the Applicant's representatives agreed to effectively mitigate any glare from these signs that might affect the adjoining residential neighbors. They also agreed to relocate the menu board sign so that it faces east, to reduce the impact on those neighbors. [N.T. 11/6/14 at 54-57, 61] We will condition the grant of a variance for the construction of the building on the Appellant's implementing those measures.

ORDER

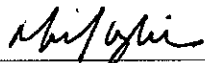
AND NOW, this 9th day of December, 2014, it is hereby ORDERED that the application of Wendy's of New York, LLC for variances from Code §§155-87 A(5), 155-94 A, and 155-87 A is GRANTED for the reasons set forth in the foregoing opinion. The relief is granted based on, and conditioned on adherence to the plans and testimony presented at the hearings, except insofar as modified by the Board's opinion and these additional conditions:

1. Appellant will take measures to advise its customers to reduce the noise from vehicles as they idle in the queue for take-out service; the measures shall include erecting signs (that conform to township ordinances) so advising its customers; and

2. Appellant will mitigate any glare from the signs on the "blade" as described in the hearings and will relocate the proposed menu board sign so that it faces east, to reduce the impact on residential neighbors.

Chairman Fox, and Members Brier and Davidson participating, all voting "aye."

Attest:



Michael Wylie
Secretary