



Herbert v. East Coventry Township Zoning Hearing Board, 56 Ches. Co. Rep. 69 (2008)

By Robert W. Gundlach, Jr.

In *Herbert v. East Coventry Township Zoning Hearing Board*, the Court of Common Pleas of Chester County examined whether, on grounds of estoppel or vested rights, a subdivision created without the benefit of subdivision approval could become legally recognized as such. In this case, the appellant's (Herbert) predecessors in title made numerous conveyances of a 6.8 acre property (the Property) in which two separate parcels were separately described and conveyed, and to which the County assigned separate tax parcel identification numbers. None of the conveyances were made with the benefit of subdivision approval. Subsequently, Herbert came to possess both parcels, giving Herbert title to the entire Property.

When Herbert acquired the combined parcels, the Property was improved with a house and detached garage on an area described as Premises "A," and a barn located on an area described as Premises "B." A dispute arose when the Township discovered that Herbert had moved a mobile home onto Premises "B." The Township issued a letter to Herbert directing that all work related to installation of the trailer cease until the necessary approvals were obtained. Thereafter, the Township Zoning Officer mistakenly issued Herbert a zoning permit to locate a mobile home on the Property. Approximately 20 days later, the same Zoning Officer notified Herbert that the zoning permit had been issued by mistake, and that no further work could proceed on the mobile home installation. The Zoning Officer then issued a written enforcement notice, directing Herbert to remove the mobile home from the Property.

Herbert filed an application with the Zoning Hearing Board (the Board) appealing the cease and desist order, and seeking a variance from setback limitations and an allowance of his use based on vested rights. The Board resolved the issue by finding that none of Herbert's predecessors in title had achieved a lawful subdivision. Consequently, the Board decided that the Property's existing dwelling house constituted its principal use, thereby precluding the location of the mobile home because it would constitute a second dwelling and a second principal use. Herbert filed the instant appeal to the Court of Common Pleas.

First, the court examined Herbert's argument that the series of conveyances in which two separate parcels were separately described and conveyed over 33 years coupled with the assignment of separate tax identification numbers, all without Township objection, had resulted in a legally enforceable *de facto* subdivision that the Township was now estopped from denying. The court found that Pennsylvania case law clearly establishes that separate lot descriptions in a single deed and the resulting assignment of separate tax identification numbers to each lot description do not, in and of themselves, control land use determinations. The court also found that Herbert had failed to provide competent evidence to suggest that the Township was culpable of any misrepresentation that would sustain the application of estoppel or vested rights.

Second, Herbert argued that it was in contravention of The Pennsylvania Statutory Construction Act, 1 Pa. C.S. §1926 for the Board to apply Section 515.1 retroactively to a subdivision-by-deed that occurred 15 years before that Section's enactment. Section 515.1 provides that a municipality may refuse to issue a permit or allow development of realty resulting from a subdivision in violation of an adopted subdivision, even though the violation occurred while the land was in the hands of a prior owner. However, the court found that Section 515.1 is a preventive measure that applies prospectively, and that the board did not err in its determination as such.

Finally, the court examined Herbert's argument that he had vested rights in the permit that was mistakenly issued by the Zoning Officer to locate the mobile home on the Property. The court found that five elements must be met in order for a permit holder to have acquired vested rights in a permit:

1. permit applicant's due diligence in attempting to comply with the law
2. the applicant's good faith throughout the proceedings
3. the expenditure of substantial unrecoverable funds
4. expiration without appeal of the period during which an appeal could have been taken from the issuance of the permit
5. the insufficiency of evidence to prove that individual property rights or the public health, safety, or welfare would be adversely affected by the use of the permits

The court found that in this instance, Herbert lacked due diligence in complying with the law because he moved the mobile home onto the Property before the issuance of the permit to do so. The court also found a lack of substantial expenditures. Additionally, the court found that the permit was revoked before the appeal period from its issuance had expired, and that Herbert did not have a vested right in the permit sufficient to prevent its revocation.

Finding no error of law or abuse of discretion, the court affirmed the Board's decision.

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