

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JAMES A. SPOSITO,
Complainant

v.

FELL TOWNSHIP ZONING BOARD,
Respondent

DOCKET NO. H-5486

ADMISSIONS

FINDINGS OF FACT

CONCLUSIONS OF LAW

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

James A. Sposito, Esquire,
COMPLAINANT

V.

Fell Township Zoning Board,
RESPONDENT

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DOCKET No. H-5486

ADMISSIONS

Pursuant to 16 Pa. Code, Section 42.55, Request for Admissions, Commission Counsel requests that Respondent Fell Township Zoning Board admit the following facts. Such facts will be deemed admitted unless within twenty (20) days after service of this request, Respondent serves upon Commission Counsel a sworn and properly executed answer admitting, denying or objecting to each item.

1. The Complainant herein is James A. Sposito, Esquire
2. The Respondent herein is Fell Township Zoning Board.
3. On or about September 3, 1992, Complainant timely filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter Commission).
4. The complaint was served upon Respondent on September 15, 1992.
5. On or about June 21, 1994 Complainants filed an amended complaint. This was served upon Respondents on or about September 13, 1994.
6. After completion of the investigation, a probable cause finding was approved by the Legal Division. Respondent was notified by mail.
7. All attempts at conciliation, including the holding of a conciliation conference on September 23, 1994, have failed.

CEx 1.

8. The case was approved for public hearing and placed on the public hearing docket by the Commission at their February, 1998 Commission meeting.
9. Complainant James A. Sposito, has a physical impairment, a knee disability, which substantially limits one or more of his major life activities, and thus has a handicap/disability under the provisions of the PHRA.
10. On or about June 30, 1992, Complainant Sposito, in his capacity as attorney for clients in a zoning matter, objected to the Respondent zoning boards use of the second floor of a retired firehall, being then used as the municipal building, for its public meetings, because of its inaccessibility.
11. Since that time, Complainant Sposito has requested that a meeting place be provided that would permit him access.
12. To date the Respondent Fell Township Zoning Board has not complied with the request.

Date: 9/21/98

Nancy L. Gippert
Nancy L. Gippert
Assistant Chief Counsel
PA Human Relations Commission

FINDINGS OF FACT *

1. The Complainant herein is James A. Sposito, Esquire (hereinafter "Sposito"), an attorney who periodically represents clients who have outstanding issues involving zoning questions. (NT 26.)
2. The Respondent herein is the Fell Township Zoning Board (hereinafter the "Zoning Board"). (CE 1.)
3. Since 1992, the Zoning Board has been composed of three members:
 - a. Anthony Seinflone, Chairperson;
 - b. Michael Lisowski; and
 - c. Joseph J. Kluck.(NT 62-63, 92, 146, 181.)
4. The Zoning Board receives legal advice and assistance from solicitors retained by the Zoning Board. (NT 147.)
5. In 1992 the Zoning Board had retained two attorneys: James Walker and Dennis Mark. (NT 189.)

* The foregoing Admissions are incorporated herein as if fully set forth. To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional findings of fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

NT	Notes of Testimony
CE	Complainant's Exhibit
RE	Respondent's Exhibit

6. The Fell Township Board of Supervisors appoints Zoning Board members and controls where Zoning Board meetings are held. (NT 51, 149.)

7. Zoning matters are generally controlled by the parameters of the township's zoning ordinance. (RE 5.)

8. The Zoning Board hears the appeals made by anyone who wants to question or challenge a decision of the township's zoning officer/building inspector. (NT 148.)

9. Township residents make application to the zoning officer/building inspector for permits to do various things to property in the township. (NT 151.)

10. On or about the spring of 1992, Thomas Spall and Jean Tyrell together purchased property in Fell Township on which they wanted to build a storage facility/sheet metal shop. (NT 27, 57, 80, 134.)

11. The property in question adjoined property owned by Michael Burney (hereinafter "Burney"). (NT 27, 57-58.)

12. On or about the spring of 1992, Spall and Tyrell applied for and were granted a construction permit to build a storage facility/sheet metal shop. (NT 27, 80.)

13. The property in question and the surrounding area were zoned A-1, residential/agricultural. (NT 135; RE 2.)

14. Burney objected to the issuance of the building permit to Spall and Tyrell and filed an appeal with the Zoning Board. (NT 57-58.)

15. Burney retained attorney James J. Walker to represent him. (NT 135.)

16. Walker informed the Zoning Board that they would have to retain someone else to handle the Burney/Spall matter. (NT 147, 189.)

17. The Zoning Board retained attorney Dennis Mark to assist them on the Burney/Spall dispute. (NT 189.)

18. On or about June 8, 1992, Mark scheduled the Zoning Board to hear several matters on June 15, 1992, including the Burney/Spall issue. (NT 73, 159.)

19. The Zoning Board hearing scheduled for June 15, 1992 was the first hearing the Zoning Board had in 1992. (NT 182.)

20. Fell Township owned a building which housed the township maintenance department, the police, the fire department, and in which the township supervisors and the Zoning Board periodically held meetings. (NT 113.)

21. This building had previously been a bank and in 1992 was known as the Fell Township Simpson Municipal Building (hereinafter the "municipal building"). (NT 27, 179.)

22. In the early 1990s the Fell Township Board of Supervisors were contemplating a new municipal building. (NT 166-167.)

23. Prior to 1992, the Zoning Board had conducted meetings in an upstairs room in the municipal building which was accessible only by a flight of narrow curved stairs which were badly lighted and which did not have handrails which fully covered the entire flight of stairs. (NT 28, 29, 31, 34, 35; CE 5-7.)

24. On or about June of 1992, once upstairs, there was a limited number of chairs and the bathroom facility was inoperable. (NT 31, 32; CE 8.)

25. At some point Thomas Spall and Jean Tyrell married (hereinafter collectively referred to as the "Spalls"). (NT 27, 57-58.)

26. The Spalls attended the Zoning Board hearings on June 15, 1992 which were held on the first floor of the municipal building. (NT 159, 164, 185.)

27. At some point, the Spalls retained Sposito to represent their interest in being allowed to construct a storage facility/sheet metal shop. (NT 57-58.)

28. On June 15, 1992, the Spall/Burney issue was not resolved and the matter was rescheduled to August 26, 1992. (NT 185, 172, 174, 177.)

29. Initially, the Zoning Board was scheduled to meet at the municipal building, however, on August 26, 1992, the Zoning Board changed the location to the first floor of the Gratton Singer Hose Company building. (NT 77, 177.)

30. The Spalls and Sposito were advised of the location change. (NT 77, 111-112.)

31. Neither the Spalls nor Sposito attended the Zoning Board hearing on August 26, 1992. (NT 172, 174.)

32. The Zoning Board sustained Burney's objection to the permit issued to the Spalls. (NT 73.)

33. Sposito, on behalf of the Spalls, appealed the Zoning Board's decision to the Lackawanna County Court of Common Pleas, which appeal was unsuccessful. (NT 73-74.)

34. In a letter to the Zoning Board dated June 30, 1992, Sposito requested that the Zoning Board hold their meeting/hearing on the Spall/Burney matter in an accessible location. (RE 2.)

35. The second floor room at the municipal building was not accessible to members of the public with mobility disabilities. (NT 28-35.)

36. Sposito had been diagnosed with osteoarthritis of the right knee. (NT 20, 94.)

37. In September 1991, Sposito had orthoscopic knee surgery. (NT 38, 118.)

38. The osteoarthritis of Sposito's knee rendered it difficult for Sposito to walk on level surfaces, to sit because he had to stretch his leg, and to go up and down stairs. (NT 38, 40.)

39. Sposito had to either use a cane or lean on something to stand more than a few minutes. (NT 38.)

40. In 1992, Sposito regularly underwent physical therapy and did an exercise program at home. (NT 96.)

41. Sposito had considerable pain and swelling in his knee and took both Vicodin and steroids and had intermittent cortisone shots. (NT 39, 95.)

42. At times Sposito's knee would simply give out. (NT 42, 119.)

43. Since June 15, 1992, the Zoning Board has not met at the municipal building. (NT 175.)

44. The municipal building was condemned in 1996. (NT 55, 91.)

45. The parties stipulated that since 1996, the Zoning Board has held their meetings in an accessible facility. (NT 10.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of the case.
2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing.
3. Sposito is an individual within the meaning of the Pennsylvania Human Relations Act (hereinafter "PHRA").
4. The Fell Township Zoning Board is a public accommodation under the PHRA.
5. Sposito's relationship with the Fell Township Zoning Board was that of a user of a public accommodation.
6. Sposito fails to state a claim of a violation of any provision of Section 5(h) of the PHRA.
7. Sposito's public accommodation claims are effectively moot.

OPINION

This case arises on a complaint filed by James A. Sposito (hereinafter "Sposito") against the Fell Township Zoning Board (hereinafter the "Zoning Board"), at Pennsylvania Human Relations Commission (hereinafter "PHRC") Docket No. H-5486.

Initially, Sposito and Thomas and Jean Spall (hereinafter collectively referred to as the "Spalls") filed a complaint with the U.S. Department of Housing and Urban Development (hereinafter "HUD"), alleging disability-based discrimination "in the conditions or terms of sale, rental occupancy, or in services or facilities." On the HUD complaint form question 5 asks, what kind of house or property was involved? Sposito and the Spalls checked the box designating that the property involved was neither a house for less than five families nor a building for more than five families, but "other, including vacant land held for residential use." Attached to the HUD complaint cover sheet was a copy of Sposito's and the Spalls' "Injunction Petition for Mandamus and Writ of Prohibition" filed in the Court of Common Pleas of Lackawanna County. The HUD complaint and the petition were then attached to a PHRC complaint cover sheet and assigned Docket No. H-5486.

Generally, the petition and HUD complaint alleged that Sposito and Spalls objected to the location of past Zoning Board meetings because the meeting room on the second floor of the Fell Township Municipal Building was inadequate and not accessible.

On or about June 21, 1994, the PHRC received an amended complaint by Sposito and the Spalls which alleged that on or about June 30, 1992 and up to June of 1994, the Zoning Board "refused to make a reasonable accommodation in terms of finding a meeting place that is handicap accessible." Paragraph 4 of the amended complaint lists the following sections of the PHRA as allegedly violated: 5(h)(1), (3), (3.2) and (7); and 5(i)1. At the public hearing, an oral motion to amend the complaint to add Section 5(i)(4) was granted. Before the public hearing, the Spalls withdrew as Complainants, leaving Sposito as the sole Complainant.

The PHRC investigated Sposito's allegations and, at the conclusion of the investigation, informed the Zoning Board that probable cause existed to credit Sposito's allegations. Thereafter, the PHRC engaged in conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently, the parties were notified that this matter had been approved for a public hearing.

The public hearing was held on January 29, 1999, in Scranton, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The PHRC's interest in the complaint was overseen by Assistant Chief Counsel Margaret D. Blough. Harry T. Coleman, Esquire, appeared on behalf of the Zoning Board. The parties were afforded an opportunity to submit post-hearing briefs. Post-hearing briefs for both sides were received on May 12, 1999.

At issue in this case are two separate components of the PHRA: (1) a public accommodation question, and (2) a housing issue. First, this opinion will address the issues surrounding the alleged unlawful discrimination by a public accommodation.

In pertinent part, Sections 5(i)(1) and 5(i)(4) make it an unlawful discriminatory practice

(i) For any person being the owner, lessee, proprietor, manager, superintendent, agent or employe of any public accommodation. . . to

(1) Refuse, withhold from, or deny to any person because of his. . . disability. . . either directly or indirectly, any of the accommodations, advantages, facilities or privileges of such place of public accommodation. . .

(4) Construct, operate or otherwise make available such place of public accommodation, resort or amusement which is not accessible.

These sections are read in conjunction with the PHRA's definition of a public accommodation found at Section 4(l). Section 4(l) defines a public accommodation to include

. . . all Commonwealth facilities and services, including such facilities and services of all political subdivisions thereof. . .

Clearly the Zoning Board is a public accommodation under the PHRA. The question that would normally remain is whether the Zoning Board denied its service to a person with a disability. However, in the present case, the answer to this fundamental question need not be reached.

First, during the public hearing, the attorney on behalf of the state's interest in the case declared that the Complainant is not seeking damages under the public accommodation provisions of the PHRA. Generally, when public accommodation allegations are made, the PHRA's singular available remedial measure is the issuance of a cease and desist order. Here, the parties have stipulated that since 1996 the

Zoning Board has been in full compliance with the accessibility requirements of the PHRA. This stipulation effectively moots the entire public accommodation issue.

This leaves the allegations that the Zoning Board has violated the housing provisions found under Section 5(h) of the PHRA. In pertinent part the housing sections allegedly violated declare it to be an unlawful discriminatory practice

(h) For any person to:

(1) Refuse to sell, lease, finance or otherwise to deny or withhold any housing accommodation or commercial property from any person because of the . . . disability of any person, prospective owner, occupant or user of such housing accommodation or commercial property. . .

(3) Discriminate against any person in the terms or conditions of selling or leasing any housing accommodation or commercial property or in furnishing facilities, services or privileges in connection with the ownership, occupancy or use of any housing accommodation or commercial property because of the . . . disability of any person. . .

(3.2) Refuse to make reasonable accommodations in rules, policies, practices or services when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a housing accommodation.

(7) Construct, operate, offer for sale, lease or rent or otherwise make available housing or commercial property which is not accessible.

Clearly the Zoning Board is not a housing accommodation within the meaning of Section 4(i) of the PHRA. The essential question for resolution in this case is whether the Zoning Board comes under the PHRA's definition of commercial property. Section 4(j) defines commercial property as:

(1) any building, structure or facility, or portion thereof, which is used, occupied or is intended, arranged or designed to be used or occupied for the purpose of operating a business, an office, a manufactory or any

public accommodation; and (2) any vacant land offered for sale, lease, or held for the purpose of constructing or locating thereon any such building, structure, facility, business concern or public accommodation.

Under this definition only (1) possibly applies, while (2) involves vacant lands and is clearly not applicable.

Under the circumstances presented, Sposito's relationship to the Zoning Board does not implicate any part of the housing provisions of Section 5(h) of the PHRA. Several times during the public hearing the parties were instructed to articulate how, specifically, Sposito's relationship either does or does not implicate Section 5(h)'s housing provisions. In the PHRC post-hearing brief in support of the complaint Section 4(j) is set forth, followed by the conclusive assertion that, "[T]here can be no other conclusion that can be derived from the definitional sections that, when a public accommodation, which the governmental services as provided by the Fell Township Zoning Board uncontestably are, the General Assembly has provided that the physical facilities in which those services are provided are covered by Section 5(h) as well as under Section 5(i) of the PHRA."

This conclusory assertion appears to suggest that there is no distinction to be made between a public accommodation and commercial property. Put in another context, a critical distinction can easily be found.

Consider a developer/owner of a small two-story commercial mall. Further, consider the circumstances involved in the interactive relationship these individuals have with this two-story mall. The first, a black female with a mobility disability approaches the developer/owner and makes application to rent a space on the

second floor in which to open a gift shop. The developer/owner refuses her a lease, both because she is black and is a female. Additionally, to get to the space she wants to rent 15 steps must be climbed. There is no elevator.

The second individual is a black female who also has a mobility disability. This individual wants to shop in the business which went into the space which had been denied to the first individual. The business which went into the denied space is a barber shop. When the second individual attempts to go in for a haircut, she first encounters a significant barrier in the 15 stairs, and further, she learns that the barber shop will only cut the hair of white males.

Under the PHRA, the relationship between the first individual and the developer/owner falls under the housing provisions of the PHRA. Under Section 5(h)(1), the developer/owner has refused to lease commercial property because of the first individual's race and sex. Also, under Section 5(h)(7) of the PHRA, the developer/owner has constructed and offered for lease commercial property which is not accessible.

The second individual's relationship is with a public accommodation which happens to have been placed in commercial property. This relationship is addressed by the public accommodation provisions of Section 5(i) of the PHRA.

Here only the first individual has a Section 5(h) housing claim. The second individual is restricted to a Section 5(i) public accommodation claim.

In the present case, Sposito's relationship with the Zoning Board is a matter which implicates Section 5(i)'s public accommodation provisions only. His

relationship with the Zoning Board fails to implicate Section 5(h)'s prohibitions against discrimination in housing.

For this reason, Sposito's complaint should be dismissed. An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JAMES A. SPOSITO,
Complainant

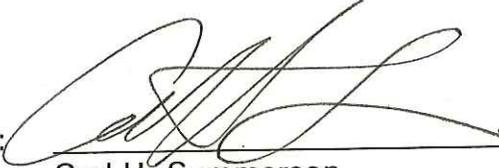
v.

FELL TOWNSHIP ZONING BOARD,
Respondent

DOCKET NO. H-5486

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Complainant has failed to state a claim under Sections 5(h)(1), (3), (3.2) and (7) of the Pennsylvania Human Relations Act. Further, the Permanent Hearing Examiner finds that the Complainant's Section 5(i)(1) and (4) claims are effectively moot. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Admissions, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

By: 

Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

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FELL TOWNSHIP ZONING BOARD,
Respondent

FINAL ORDER

AND NOW, this 28th day of September, 1999, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Admissions, Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Admissions, Findings of Fact, Conclusions of Law, and Opinion as its own finding in this matter, and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

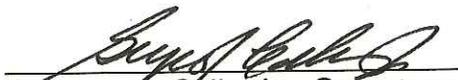
ORDERS

that the complaint in this case be, and the same hereby is, dismissed.

By:


Robert Johnson Smith, Chairperson

Attest:


Gregory J. Celia Jr., Secretary