

# PITTSBURGH LEGAL JOURNAL

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# PLJ

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## OPINIONS

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**Moon First, An Unincorporated  
Association by Jesse Nicholson,  
Edwin Nelson, Anthony Mester,  
Joseph Dentici, and Franklin Square v.  
Moon Township Board of Supervisors  
and Wal-Mart Stores East, L.P. and  
Michael Crawford, Joan Leach,  
Jennifer Bugarin, and Kamran Farzan**

*Motion to Present Additional Evidence—Petition to Intervene*

1. Moon First appealed decision of Moon Township Board of Supervisors to approve Wal-Mart's Preliminary Development Plan. Appellants claimed they were denied the opportunity to gather and present evidence at the hearing due to lack of notice and due to the fact that the Board earlier denied the Plan and Appellants did not anticipate the need for additional evidence.

2. The Court denied the Motion to Present Additional Evidence, finding that Appellants had notice and an opportunity to present evidence at the hearing, and a substantial record was developed.

3. Petition to Intervene was granted because Intervenor has standing, and their interests may vary from those of Appellant.

(Lynn E. MacBeth)

*Barbara Ernsberger* for Moon First, Michael Crawford, Joan Leach, Jennifer Bugarin, and Kamran Farzan.  
*Michael Santicola* for Moon Township Board of Supervisors.  
*Dusty Elias Kirk* for Wal-Mart Stores East L.P. Township of Hampton Council.

No. SA 08-000926. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION**

James, J., January 23, 2009—Moon First, an Unincorporated Association, by Jesse Nicholson, Edwin Nelson, Anthony Mester, Joseph Dentici, and Franklin Square, a Pennsylvania Limited Partnership, ("Appellants") filed a motion to present additional evidence relevant to their appeal of the Moon Township Board of Supervisors ("Board") granting conditional uses to Wal-Mart. A special meeting was held on July 10, 2008, to reconsider the Wal-Mart Preliminary Development Plan ("Plan"). Appellants claim that they were denied the opportunity to gather and present evidence at this hearing due to a lack of notice. Furthermore, since the Board denied the Plan at a hearing on July 2, 2008, Appellants claim they did not anticipate the need for the additional evidence.

Appellants' Motion is filed pursuant to 53 P.S. § 11005-A which states that "if, upon motion, it is shown that proper consideration of the land use appeal requires the presentation of additional evidence, a judge of the court may hold a hearing to receive additional evidence, may remand the case to the body, agency or officer whose decision or order has been brought up for review, or may refer the case to a referee to receive additional evidence." 53 P.S. § 11005-A. However, "a court of common pleas faces compulsion to hear additional evidence in a zoning case only where the party seeking the hearing demonstrates that the record is incomplete because the party was denied an opportunity to be heard fully, or because relevant testimony was offered and

excluded." *In re Scheiber*, 927 A.2d 737, 740 (Pa.Cmwlth. 2007). Additionally, the burden to demonstrate the refusal of an opportunity to be heard or that relevant testimony was offered and excluded is on the moving party. *McGrath Constr., Inc. v. Upper Saucon Twp. Bd. of Supervisors*, 952 A.2d 718, 730 (Pa.Cmwlth. 2008).

The Board held public meetings in regard to the Plan on April 2, 2008, June 4, 2008, and July 2, 2008. The meeting on July 2, 2008, lasted from 7:00 p.m. until 1:45 a.m. the next morning. Members of Moon First were in attendance for all of the meetings and their objections were noted on record. Also, members testified at the June 4, 2008, and July 2, 2008 meetings, as well as at the special meeting on July 10, 2008. The only vote that took place at the July 10, 2008 meeting, which Appellants claim lacked notice, was later rescinded. However, Appellants were afforded an opportunity to testify at the meeting. Appellants were afforded several opportunities to be heard and took advantage of those opportunities. Also, at the July 2, 2008 meeting Wal-Mart presented extensive evidence. Therefore, Appellants have not met the burden that they were refused an opportunity to be heard or that relevant testimony was offered and excluded. Additionally, there was voluminous evidence and testimony taken which provides this court with more than a sufficient record for review.

As a result, the Motion For Leave to Present Additional Evidence is denied.

The Pennsylvania Rules of Civil Procedure also state "an application for intervention may be refused, if the interest of the petitioner is already adequately represented." Pa. R.C.P. No. 2329(2). In the current case Intervenor may be directly affected by the increased noise, light, and traffic that a Wal-Mart would cause. Because Pa. R.C.P. 2329(2) is discretionary and Intervenor's interests may vary from those of Appellants, their Petition is not precluded by the Pennsylvania Rules of Civil Procedure. *Grant*, 726 A.2d at 360.

Also, the motion is not prohibited because Intervenor is not owners of the property. "Just as the interest of a zoning applicant need not be founded upon a fee simple title, but can arise from equitable ownership or from a lease, the interest of an objector is not dependent upon land ownership (as distinguished from possessory interest) in zoning, which is concerned with land use rather than land titles." *Active Amusement Co. v. Zoning Bd. of Adjustment*, 479 A.2d 697, 701 (Pa.Cmwlth. 1984). Users of nearby land understandably have an interest in the proper implementation of land planning policies through zoning, in relation to the benefits to be gained, not only with respect to the land value of a titleholder, but also with respect to the enjoyment of the land by a user of it, whether in connection with residential occupancy or business operation. *Id.*

Since Intervenor has standing pursuant to the Pennsylvania Rules of Civil Procedure and their interests may vary from Appellants, their Petition to Intervene is granted.

**ORDER OF COURT**

AND NOW, this 26th day of January, 2009, it is hereby ORDERED that the Motion of Intervention filed on behalf of Intervenor, Michael Crawford, Joan Leach, Jennifer Bugarin, and Kamran Farzan is granted. The Motion for Leave to Present Additional Evidence filed on behalf of Appellants, Moon First, Jesse Nicholson, Edwin Nelson, Anthony Mester, Joseph Dentici, and Franklin Square is hereby denied.

BY THE COURT:  
/s/James, J.

**Moon First, An Unincorporated  
Association by Jesse Nicholson,  
Edwin Nelson, Anthony Mester,  
Joseph Dentici, and Franklin Square v.  
Moon Township Board of Supervisors  
and Wal-Mart Stores East, L.P. and  
Michael Crawford, Joan Leach,  
Jennifer Bugarin, and Kamran Farzan**

*Land Development Plan Application—Conditional Uses—  
Waiver from Ordinance*

1. The Board approved three conditional use requests and one waiver request permitting Wal-Mart to increase front yard setback; reduce the bufferyard along the northern property line; have streetscape landscaping within a right of way; and waive requirement to construct sidewalks, paying a fee instead.

2. Appellant opposed the approval contending that the Board erred in not considering health, welfare and safety of the community, or the traffic, light and noise that would result from the development.

3. The Court affirmed the decision of the Board, finding that Wal-Mart demonstrated with testimony that the proposed use satisfied the requirements of the zoning ordinance. Appellants could not meet their burden of showing that the use posed a substantial threat.

4. Traffic concerns, standing alone, are one of the inevitable accompaniments of suburban progress. To overcome approval, appellant must establish with a high degree of probability that the proposed use would substantially affect the health, safety and welfare of the community greater than would be expected under normal circumstances.

*(Lynn E. MacBeth)*

*Barbara Ernsberger* for Moon First, Michael Crawford, Joan Leach, Jennifer Bugarin, and Kamran Farzan.

*Michael Santicola* for Moon Township Board of Supervisors. *Dusty Elias Kirk* for Wal-Mart Stores East L.P. Township of Hampton Council.

No. SA 08-000926. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION**

James, J., March 9, 2009—This appeal arises from the decision of the Moon Township Board of Supervisors (“the Board”) dealing with land development approvals for a Wal-Mart Supercenter to be located in Moon Township, Allegheny County, Pennsylvania. Specifically, the proposed Wal-Mart will be in the West Hills Shopping Center, which sits at the intersection of University Boulevard and Broadhead Road. The Property is located in the Township’s C-2 Highway Commercial zoning district and is also subject to the University Boulevard (UB) Overlay District. The proposed development was to consist of a 123,365 sq. ft. Wal-Mart as well as several outparcels to be developed later. On August 13, 2007, Wal-Mart submitted a Preliminary and Final Major Land Development Plan Application to the Township. Subsequently, they filed a conditional use application and a request for a waiver under the Township’s Ordinance. They requested approval for ten conditional uses and a waiver from the Ordinance. The Board granted three

conditional use deviations and the waiver. It is from that decision that Appellant, Moon First, appeals.

When the trial court takes no additional evidence, the scope of its review is limited to determining whether the Board committed an error of law, abused its discretion or made findings not supported by substantial evidence. *Mars Area Residents v. Zoning Hearing Board*, 529 A.2d 1198, 1199 (Pa.Cmwlth. 1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637, 640 (Pa. 1983).

The Board approved three conditional use requests and one waiver request which permit Wal-Mart to (1) increase the front yard setback beyond the 85 ft. maximum front yard setback; (2) reduce the 40’ bufferyard along the northern property line; (3) have streetscape landscaping along University Boulevard within the right of way; and (4) waive the requirement to construct sidewalks from the West Hills Nissan dealership to the entrance along University Boulevard as required by Section 188-403, and pay a fee in lieu of this requirement.

The Appellant contends that the Board erred in granting the conditional use permitting Wal-Mart to reduce the 40-foot bufferyard along the northern property line. They allege that the Board did not consider the health, welfare and safety of the community. The Appellant also claims that the Board failed to consider the potential traffic, light and noise that would result from the Wal-Mart development.

Township Ordinance §208-213(D)(1) provides that buildings and access drives may not be located closer than 40 feet to any front, side or rear lot line. According to §208-854 (A) of the Ordinance, an applicant may deviate from the bufferyard provided that: (1) the landscape plan preserves and incorporates existing vegetation in excess of the minimum standards set forth in §208-213 and §208-214, and demonstrates innovative design and use of plan material; (2) the landscape plan illustrates that the intent of §208-213 and §208-214 can be more effectively met in whole or in part, through the proposed alternative means; (3) natural land characteristics or existing vegetation on the proposed development site would achieve the intent of §208-213 and §208-214; (4) innovative landscaping or architectural design is employed on the proposed development site to achieve a screening effect that is equivalent to the screening standards of §208-213 and §208-214; and (5) the required landscaping or buffering would be ineffective at maturity due to topography or the location of the improvements on the site. This Court disagrees with the Appellant and finds that Wal-Mart demonstrated that the requested 10-foot bufferyard allows them to better develop the Property. With landscaping, the 10-foot bufferyard would enhance the existing paved areas, maintain the required landscape bufferyard and meet the requirements of the Ordinance. Their plan satisfies the Ordinance’s requirements for the deviation in the bufferyard. Additionally, the plan preserves and incorporates existing vegetation and installs significant planting in the bufferyard. Wal-Mart’s civil engineer testified that the 10-foot bufferyard would integrate landscaped planted islands and defined landscaped pedestrian walkways that would reduce the negative visual effects of the vast paved areas that currently exist. Furthermore, Wal-Mart established that the natural land characteristics achieve the intent of §208-213 and §208-214 because the Colony West apartment complex is lower than University Boulevard by a 20-foot grade. Wal-Mart established that the 10-foot bufferyard will alleviate the concerns of the residents of Colony West concerning traffic, lighting and noise in the area. Finally, Wal-Mart demonstrated that without the bufferyard reduction, the

roundabout access to Colony West would be impossible.

In this case, the Appellant has the burden of proving that the proposed use is a type permitted by conditional use and that the proposed use complies with the requirements in the Ordinance. *Appeal of Baird*, 537 A.2d 976 (Pa.Cmwlt. 1988). Then the burden shifts to those protesting the use to prove that it will have an adverse effect on the general public. *Shamah v. Hellam Township Zoning Hearing Board*, 648 A.2d 1299 (Pa.Cmwlt. 1994). When dealing with the granting or denial of a conditional use, the protestors must show with "a high degree of probability" that the proposed use will "pose a substantial threat." *Bray v. Zoning Board of Adjustment*, 410 A.2d 909, 914 (Pa.Cmwlt. 1980).

The proposed Wal-Mart Supercenter is a conditional permitted use in the Township's C-2 Highway Commercial zoning district and therefore is consistent with the neighborhood. Wal-Mart satisfied the objective requirements of the Ordinance. Wal-Mart further supplied evidence regarding any traffic changes that may result from the proposed plan. Wal-Mart's civil engineer testified that the reduction of the bufferyard would provide a 360 degree access for emergency vehicles. Without the reduction, the engineer testified that the roundabout access to Colony Park would be severely compromised.

Because Wal-Mart satisfied the objective criteria of the Ordinance for a conditional use, it is presumed that the proposed use is consistent with the general welfare and the burden shifts to the objectors to rebut that presumption. They must prove with a high degree of probability that the proposed use will adversely affect the public welfare in a way not expected from that type of use. *Bray* at 914. Objectors appeared at the hearings but did not offer any evidence on the bufferyard issue and failed to prove with a high degree of probability that the Wal-Mart Supercenter will adversely affect the public welfare in a way not expected from that type of use.

Our Supreme Court has provided guidance to evaluate traffic concerns in the context of a special exception:

Any traffic increase with its attendant noise, dirt, danger and hazards is unpleasant, yet, such increase is one of the 'inevitable accompaniments of suburban progress and of our constantly expanding population' which, *standing alone*, does not constitute a sufficient reason to refuse a property owner the legitimate use of his land. It is not just any anticipated increase in traffic which will justify the refusal of a 'special exception' in a zoning case. The anticipated increase in traffic must be of such character that it bears *substantial* relation to the health and safety of the community. A prevision of the effect of such an increase in traffic must indicate that not only is there a likelihood but a high degree of probability that it will affect the safety and health of the community, and such prevision must be based on evidence sufficient for the purpose. Until such strong degree of probability is evidenced by legally sufficient testimony no court should act in such a way as to deprive a landowner of the otherwise legitimate use of his land.

*Appeal of O'Hara, C.S.C., Archbishop of Philadelphia*, 131 A.2d 587, 596 (Pa. 1957) (citations omitted) (italics in the original).

As objectors, Appellant must establish with "a high degree of probability that the proposed use will substantially affect the health, safety and welfare of the community" greater than would be expected under normal circumstances. *Sunnyside Up Corporation v. City of Lancaster*

*Zoning Hearing Board*, 739 A.2d 644, 650 (Pa.Cmwlt. 1999), citing *Tuckfelt v. Zoning Board of Adjustment of Pittsburgh*, 471 A.2d 1311, 1314 (Pa.Cmwlt. 1984). This Court finds that Appellant failed to reach this standard.

Based upon the substantial evidence, the Board properly granted the Conditional Use Approvals and Waiver Approval. The Board correctly found that the deviations from the Ordinance did not impact the health, safety and welfare of the Township. Therefore, the decision of the Moon Township Board of Supervisors is affirmed.

#### ORDER OF COURT

AND NOW, this 10th day of March, 2009, the decision of the Moon Township Board of Supervisors is affirmed.

BY THE COURT:

/s/James, J.

### James J. and Carol E. Leo v. Township of Hampton Council

*Conditional Use Application—Right to Natural Expansion—Permitted Uses—Neighborhood Commercial District*

1. Property owners requested conditional use to allow twenty-two (22) outdoor display spaces for sale of vehicles.

2. Request was denied by Council and the Court upheld the denial.

3. Conditional use was denied because it was not of a type permitted as a conditional use under the zoning ordinance in the Neighborhood Commercial District and failed to comply with other provisions of the ordinance.

4. Property owners claimed, in the alternative, they were entitled to expansion of existing nonconforming use based on prior approvals.

5. The right to natural expansion associated with nonconforming uses is not applicable to uses permitted by special exception or conditional use.

6. An accessory use cannot be the basis for establishment of a nonconforming principal use.

(Lynn E. MacBeth)

Matthew J. Carl for James and Carol Leo.

Vincent A. Tucceri for Township of Hampton Council.

No. SA 08-000676. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

#### OPINION

James, J., February 2, 2009—This appeal arises from the decision of the Hampton Township Council (hereinafter "Council") dealing with property located at 3793 Mt. Royal Boulevard. (hereinafter "Subject Property"). The Subject Property is an auto repair business with limited approved auxiliary car sales located in a Neighborhood Commercial Zoning District.

On January 28, 2008, in response to an Enforcement Notice, James J. Leo filed a Conditional Use Application, (hereinafter "Application") pursuant to the Hampton Township Zoning Ordinance (hereinafter "Ordinance") Sections 8.7.C.5. and 12.321, to allow twenty-two (22) out-

door display spaces for the sale of vehicles. On April 9, 2008, Council held a public hearing on the Application and on May 14, 2008, Council issued a decision denying the Application.

Before this Court is the timely appeal of James J. Leo and Carol E. Leo (hereinafter "Appellants") on the denial of the Application.

When the trial court takes no additional evidence, the scope of review is limited to determining whether the Board committed an error of law, abused its discretion or made findings not supported by substantial evidence. *Mars Area Residents v. Zoning Hearing Board*, 529 A.2d 1198, 1199 (Pa.Cmwlt. 1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Association v. Zoning Hearing Board of Adjustment*, 462 A.2d 637, 640 (Pa. 1983).

A conditional use applicant has the burden of proving that the proposed use is of a type permitted as a conditional use under the zoning ordinance and that the proposed use complies with the requirements of the zoning ordinance. *Appeal of Baird*, 537 A.2d 976, 977 (Pa.Cmwlt. 1988); *Todorovich v. Municipality of Monroeville*, 156 PLJ 57, (2007, James, J.).

In the instant case, Council found that the use proposed in the Application as submitted does not meet the definition of Article VIII, Section 8.700.C.5, since automobile sales can not be interpreted to constitute a neighborhood commercial use "similar" to those listed as permitted and compatible with those uses as permitted in the Neighborhood Commercial District.

Also, Council found that the Appellants' Application did not comply with Section 12.130, inasmuch as it does not meet all other requirements of the Ordinance in the zoning district where the use is proposed (12.130b); that it is not in general conformity or in harmony with the area in which it is proposed (12.130c); that it is not in conformity with the Zoning and subdivision regulations otherwise applicable to the Subject Property, including but not limited to density, bulk and use (12.130f); and that it is not complimentary to the neighborhood in which it is proposed to be established (12.130h).

Council concluded that based upon the purpose of the Neighborhood Commercial District as set forth in the Ordinance, the Appellants' Application does not comply with Section 12.130. The proposed plan also fails to comply with Section 12.321, requiring the business to be within an enclosed facility.

This Court finds that the Appellants have not met the burden of proving that the proposed use is of a type permitted as a conditional use under the Ordinance and that the proposed use complies with the requirements of the Ordinance.

The Appellants' Application claimed, in the alternative, that they are entitled to an expansion of the existing nonconforming use of the property for the sale of vehicles based upon a 1986 Nonconforming Use Approval.

In the instant case, Council found that the 1986 Hampton Township Zoning Board's decision recognized only the existence of and permitted the continued use of the property for limited consignment auto sales accessory to the primary service station business and under the restrictions imposed by that decision.

Council also found that the 1997 conditional use approval permitted the subject property to operate as an automotive repair station with only minor auxiliary car sales limited to a maximum of five (5) and subject to other limitations relating to banners and signage.

Council concluded that the 1997 conditional use approval eliminated the previous restriction under the 1986 Zoning Hearing Board decision that had limited the car sales to con-

signment sales only. Thus, the 1997 decision allowed the Applicant, for the first time, to display and sell up to five (5) cars without any restrictions as to their ownership.

This Court agrees that the 1997 conditional use approval allowed the Appellants, for the first time to display and sell cars without any restrictions as to their ownership. The right to natural expansion associated with nonconforming uses is not applicable to uses permitted by special exception or conditional use. *Upper St. Clair Twp. Grange Zoning Case*, 152 A.2d 768, (Pa. 1957); A.R.E. *Lehigh Valley Partners v. ZHB of Upper Macurgie Twp.*, 590 A.2d 842, 844 (Pa.Cmwlt. 1991).

An accessory use cannot be the basis for the establishment of a nonconforming principal use: *Ashline v. Bristol Township Board of Adjustment*, 182 A.2d 531, 533 (Pa. 1972), *Stokes v. Zoning Board of Adjustment*, 167 A.2d 316, 317 (1961). Nor will the manifestly casual use of a property by the owner thereof, inconsistent with the terms of the ordinance and prior to the effective date thereof, commit the premises to a nonconforming use status: *Kiddy's Appeal*, 143 A. 909, 910 (Pa. 1928).

Council heard the witnesses and reviewed the exhibits. It is the duty of Council in the exercise of its discretionary power to determine whether a party has met its burden. *A.A. Shaniah v. Hellam Township Zoning Hearing Board*, 648 A.2d 1299, 1304 (Pa.Cmwlt. 1994). The record supports the findings and the decision of Council will be affirmed.

#### ORDER OF COURT

AND NOW, this 2nd day of February, 2009, it is hereby ORDERED, ADJUDGED and DECREED that the decision of the Township of Hampton Council is affirmed.

BY THE COURT:  
/s/James, J.

### **Daniel G. Kamin, et al., Appellants v. Zoning Board of Adjustment of the City of Pittsburgh and Botero Development LLC and City of Pittsburgh**

*Variance Application—Demolition and Reconstruction—  
Density Variance—Access Ramp Variance*

1. The court reversed the Zoning Board's granting of requests for a density variance and access ramp variance.

2. Appellants opposed the variances because applicant could show nothing unique or unusual about the property indicating that its dimensions imposed an unnecessary hardship not shared by other property owners that would justify a variance in this case.

3. Although the property located on Fifth Avenue in the 7th Ward of Pittsburgh had been vacant for a number of years and the proposed plan was to demolish it and build a new structure, the Board's finding that any use of the property would require demolition of the building was not supported by the evidence, which showed that the property could in fact be used in strict conformity with the Code.

(Lynn E. MacBeth)

Thomas R. Solomich for Appellants.

Lawrence H. Baumiller for City of Pittsburgh Zoning Board of Adjustment and City of Pittsburgh.

Clifford B. Levine for Botero Development, LLC.

No. SA 08-000777. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

#### OPINION

James, J., February 23, 2009—This appeal arises from the decision of the Zoning Board of Adjustment of the City of Pittsburgh (hereinafter “Board”) dealing with property located at 5135 Fifth Avenue, in the 7th Ward, of the City of Pittsburgh (hereinafter “Subject Property”). The Subject Property is an existing building located in a multi-unit residential, moderate density zoning district.

Botero Development (hereinafter “Developer”) submitted to the Board an application for two variances under the Pittsburgh Zoning Code (hereinafter “Code”) related to the demolition of the existing building and for the construction of a 3-story structure containing 16 apartment units.

The first variance applied for by the Developer was a density variance from Code Section 903.03.C to increase the density of the proposed structure permitted under the Code by decreasing the minimum lot size per unit from the required 1,800 square feet to 736.9 square feet.

The second variance applied for by the Developer was an area variance from Code Section 925.06A.15 to permit an access ramp to encroach upon a required side setback by 108 inches instead of 40 inches permitted by the Code.

On March 6, 2008, the Board conducted a hearing on the Developer’s application and on June 7, 2008, the Board granted the two requested variances.

Before this Court is the timely appeal of Daniel G. Kamin, Robert S. Kamin, Carole Kamin, Philip Kamin, Michael Kamin, Matthew Kamin, Tiziana DiMatteo, Rupert Croft, Joanne Harvey, Michael Lotze, Cathleen Digioia, Paula Deasy, Henry Hoffstot and Morewood-Shadyside Civic Association (hereinafter “Appellants”) on the granting of the two variances followed by the intervention of Botero Development and the City of Pittsburgh.

When the trial court takes no additional evidence, the scope of review is limited to determining whether the Board committed an error of law, abused its discretion or made findings not supported by substantial evidence. *Mars Area Residents v. Zoning Hearing Board*, 529 A.2d 1198, 1199 (Pa.Cmwlth. 1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Association v. Zoning Hearing Board of Adjustment*, 462 A.2d 637, 640 (Pa. 1983).

To establish entitlement to a variance, the Appellant must prove the following:

- 1) the zoning ordinance imposes unnecessary hardship resulting from the unique physical characteristics of the property, as distinguished from the impact of the zoning regulation on the entire district;
- 2) the alleged hardship is not self inflicted;
- 3) the requested variance will not destroy the character of the neighborhood nor be detrimental to public welfare.

*Id.* 462 A.2d at 640.

The Developer has the burden of demonstrating that the proposed development satisfies the applicable review criteria necessary to obtain a variance under the Code. “This burden upon the land owner requesting a variance is a heavy one.” *Polonsky v. Zoning Hearing Board of Mt. Lebanon*, 590 A.2d 1388, 1390 (Pa.Cmwlth. 1991). To establish unnecessary

hardship, the Appellant must demonstrate that due to physical characteristics, the property cannot be used for the permitted purpose or could only conform to such purpose at a prohibitive expense, or that the property has either no value or only a distress value for any permitted purpose. *Davis v. Zoning Board of Adjustment*, 468 A.2d 1183, 1184-1185 (Pa.Cmwlth. 1983).

To justify the grant of a dimensional variance, courts may consider multiple factors:

- 1) the economic detriment to the Appellants if the variance was denied;
- 2) the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements; and
- 3) the characteristics of the surrounding neighborhood.

*Hertzberg v. Zoning Board of City of Pittsburgh*, 721 A.2d 43, 50 (Pa. 1989)

In the instant case, the Board found that the Subject Property is unique in its location, size and topography. The building has also been vacant for a number of years and credible testimony was presented that the property could not be reasonably used for any use permitted and would not be financially viable without some type of variance.

The Board concluded that the hardship reflected by the existing conditions of the property, including the cost associated with the need to provide a parking structure to provide off-street parking and the costs associated with construction on the site, justifies the grant of a variance from the minimum lot size requirement for the Subject Property. Furthermore, the Board found that the grant of the variance for the railing along the side walk is justified by the narrowness of the lot, that it is de minimis and not objected to.

A review of the record shows that the previous occupants of the Subject Property were an architectural studio and a day care. Although vacant for a number of years, it is disputed that the Subject Property will suffer economic detriment if the variance is not granted. In fact, testimony was presented that there was an offer of \$500,000.00 to purchase the Subject Property with the intention of remodeling the Subject Property exactly as it is now without any request for variance.

The Board found that any use of the property would require demolition of the building even though evidence was presented that the Subject Property could in fact be used in strict conformity with the Code.

There is also nothing unique or unusual about the Subject Property indicating that its dimensions imposed an unnecessary hardship not shared by other property owners that would justify a variance in this case.

The purpose of the proposed variances are to demolish an existing building and construct a 3-story structure containing 16 apartment units, which does not currently fit in the zoning district.

This Court finds that the Boards granting of both variances was not justified and, therefore, the spot zoning issue will no be ruled upon. The decision of the Zoning Board of Adjustment of the City of Pittsburgh must be reversed.

#### ORDER OF COURT

AND NOW, to-wit, this 25th day of February, 2009, it is hereby ORDERED, ADJUDGED and DECREED that the decision of the Zoning Board of Adjustment of the City of Pittsburgh is reversed.

BY THE COURT:  
/s/James, J.

**Robert A. Woolhandler v.  
City of Pittsburgh Zoning Board of  
Adjustment and City of Pittsburgh**

*Application for a Use Variance—Requirements for  
Certificate of Occupancy*

1. Appellant Property Owner originally applied for a use variance and, after a hearing in 1992 and denial of his application, an order was entered in 1996 by the Court reversing the decision of the Zoning Board.

2. In 2005, Appellant sought clarification of that order, seeking a variance, certificate or similar relief.

3. Appellant did not obtain a Certificate of Occupancy within one year of the date of approval, as required by the Code.

4. In order to establish a vested right to a certificate of occupancy, a land owner must establish due diligence in attempting to comply with the law; good faith throughout the entire proceeding; expenditure of substantial unrecoverable funds; expiration of the period during which an appeal could have been taken from issuance of a permit; and insufficiency of evidence that individual property owners or public health, safety and welfare would be adversely affected.

5. The court found that Appellant did not act in good faith because he knew or should have known that he was using his property in a manner that violates the code. Further, the court found that he could not establish that he exhibited due diligence in attempting to comply with the law, nor did he produce any evidence that he expended substantial funds. The court also found that he was not entitled to a variance.

*(Lynn E. MacBeth)*

*Angelo A. Papa* for Robert A. Woolhandler.  
*Lawrence H. Baumiller* for City of Pittsburgh Zoning Board of Adjustment and City of Pittsburgh.

No. SA 95-2723. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION**

James, J., March 23, 2009—This appeal arises from the decision of the City of Pittsburgh Zoning Board of Adjustment (“Board”) dealing with Property located at 5562 Wilkins Avenue, Pittsburgh, Pennsylvania, 15217 owned by Appellant Dr. Robert A. Woolhandler. It is an attached 2 and ½ story house located in an R-2 (Residential Two-Unit) zoning district. The Appellant purchased the Property in 1977 and used it as a residence as well as a home office. The Appellant saw patients at the Property during regular business hours starting in the fall of 1977. In 1990, Appellant and his family moved to another residence but Appellant continued to use the Property as an office and leased the second floor to a family counselor and an addiction counselor.

On June 1, 1992, Appellant filed an Application for a use variance to use the Property as a doctor’s office and to rent out the offices on the second floor. Neither the 1992 Pittsburgh Zoning Code nor the current Pittsburgh Zoning Code permits such offices in the R-2 zoning district.

After a hearing on July 2, 1992, the Board denied Appellant’s Application and found that he failed to prove that the variance was necessary to avoid unnecessary hardship and that the proposed use was not contrary to the public interest. Appellant appealed to the Court of Common Pleas

and Judge Alan S. Penkower remanded the case to the Board so that the Appellant could present additional evidence. The Board heard the remanded case on May 25, 1995 and again denied the variance. They determined that Appellant failed to prove that the Property was unique or that it could not be used for residential purposes. Appellant appealed and on December 2, 1996, Judge James H. McLean issued the following order:

[T]he decision of the City of Pittsburgh Zoning Board of Adjustment dated October 12, 1995 denying a variance for use of property at 5562 Wilkins Avenue as a medical office is hereby reversed.

Appellant claims that Judge McLean’s Order entitles him to a variance. On July 20, 2005, he filed a Motion for Clarification seeking “to secure a clarification and/or expansion of the Order of December 2, 1996 to include that he be given a use certificate or similar relief.” The Appellant claims that he is entitled to a variance because of that Order.

When the trial court takes no additional evidence, the scope of its review is limited to determining whether the Board committed an error of law, abused its discretion or made findings not supported by substantial evidence. *Mars Area Residents v. Zoning Hearing Board*, 529 A.2d 1198, 1199 (Pa.Cmwlth. 1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637, 640 (Pa. 1983).

After Judge McLean issued the 1996 Order, the Appellant failed to establish the Certificate of Occupancy. Both the 1992 Code and the current Code contain provisions that require an Applicant to establish the Certificate of Occupancy within one year of the date of approval. Section 922.09.G.2 entitled Variances Not Involving Physical Improvements, states:

If the Variance does not involve physical improvements, and a Certificate of Occupancy has not been issued for the Variance within one (1) year of the date of approval or authorization, the approval shall lapse. No Certificate of Occupancy shall be issued after approval lapses unless the approval or authorization is renewed pursuant to Sec. 922.09.G.3.

Additionally, the Appellant does not have vested rights to a certificate of occupancy in this case. The Pennsylvania Supreme Court has set the criteria for determining whether a property owner acquired a vested right as a result of using land contrary to the Ordinance in *Petrosky v. Zoning Hearing Board of Upper Chichester Township*, 402 A.2d 1385 (Pa. 1979). The applicant must establish:

- (1) due diligence in attempting to comply with the law;
- (2) good faith throughout the entire proceeding;
- (3) expenditure of substantial unrecoverable funds;
- (4) expiration of the period during which an appeal could have been taken from issuance of a Permit; and
- (5) insufficiency of evidence that individual property owners or public health, safety and welfare would be adversely affected by use of the Permit.

*Randolph Vine Associates v. Zoning Hearing Board Adjustment of Philadelphia*, 573 A.2d 255, 259 citing *Petrosky*. In the instant case, the Appellant cannot establish that he exhibited due diligence and good faith in attempting

to comply with the law. He took no affirmative steps to secure his certificate of occupancy for nearly a decade when he filed the Motion for Clarification. Additionally, Appellant has not acted in good faith because he knew or should have known that he was using his Property in a manner that violates the Code. The Supreme Court stated in *Highland Park Community Club of Pittsburgh v. Zoning Bd. of Adjustment of City of Pittsburgh*, 506 A.2d 887, 892 (Pa. 1986) that:

A pre-condition to its application is a good faith attempt to comply with the requirements of the applicable Zoning Code. Where total physical compliance would produce a hardship, good faith requires that the property owner address the zoning authority under the appropriate statutory procedure for a special exception, a variance or to establish his right to a nonconforming use.

Further, Appellant did not produce any evidence showing that he expended substantial funds. Therefore, Appellant has not established that he has a vested right to a certificate of occupancy.

Finally, Appellant is not entitled to a variance in this case. The 1992 Code does not allow use variances and the Appellant does not meet the criteria for a variance under the current Code. The Board may not grant a variance unless it finds that all of the following conditions exist:

- (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 of 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;
- (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; and
- (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.
- (6) 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.

Pittsburgh Code §922.09.E

The Appellant's property is part of a row of attached single-family houses that can be used in conformity with the Code. Therefore, Appellant does not meet the variance requirements.

The Board did not commit an error of law, abuse its dis-

cretion or making findings not supported by substantial evidence. Therefore, Dr. Woolhandler is not entitled to a variance because any variance given has lapsed, he failed to prove vested rights and he has not met the requirements for a variance.

#### ORDER OF COURT

AND NOW, this 27th day of March, 2009, the Board did not commit an error of law, abuse its discretion or making findings not supported by substantial evidence.

BY THE COURT:  
/s/James, J.

### Frances Kelly v. MIC General Insurance Corporation, a GMAC Insurance Company

*Death of Policyholder—Continuation of Insurance Policy—Underinsured and Uninsured Motorist Coverage*

1. Summary judgment was entered in favor of Plaintiff finding that she should be regarded as a new policyholder after she advised the insurance company in 1999 of the death of her husband, the original insured.

2. Defendant argued that the case was analogous to one where an ex-wife received the insured auto as part of a divorce settlement, and that her ex-husband's previous election of a lesser amount of UM/UIM coverage was binding upon her.

3. The court disagreed and found that there was a new contract because the original party who contracted with Defendant died. There was no assignment or transfer to his widow; rather there was merely an implicit offer (by Defendant) to begin a similar relationship with Plaintiff, which was implicitly accepted. This conduct created a new contract, invoking Defendant's statutory duty to advise Plaintiff of her options regarding UM/UIM coverage and to reduce that coverage only if she signed a rejection form.

(Lynn E. MacBeth)

Michael P. Petro for Plaintiff.

Marna K. Blackmer for Defendant.

No. GD 06-8909. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

#### MEMORANDUM IN SUPPORT OF ORDER INTRODUCTION

Friedman, J., April 3, 2009—The parties have both filed Motions for Summary Judgment in the captioned Action for Declaratory Judgment, involving (1) the amount of UM/UIM coverage that Plaintiff has under the contract between the parties, and (2) whether Plaintiff is entitled to an award of counsel fees in connection with this action.

We conclude that the Motion of Plaintiff should be granted and that of Defendant should be denied, as to the amount of UM/UIM coverage, only. There is a Stipulation on the docket reflecting that the demand for attorneys' fees was withdrawn, so we decline to consider that issue further.

The legal question, as the Court sees it, is whether or not Plaintiff should have been, or was, regarded as a new policyholder by Defendant after she advised them in 1999 of the

death of her husband, the original Insured who was the policyholder since 1984.

#### ISSUES RAISED

In its Motion for Summary Judgment, Defendant contends Plaintiff's situation is analogous to that of the plaintiff in *Nationwide v. Buffetta*, 230 F.3d 634 (3d Cir. 2000). There, an ex-wife received the insured auto as part of a divorce settlement. She had previously been insured under her husband's policy, as Plaintiff here was. The United States Court of Appeals for the Third Circuit held that the ex-husband's previous election of a lesser amount of UM/UIM coverage (in the 13th year of the policy, three years prior to the accident there in question) was binding upon the ex-wife even though she was given sole ownership of the insured auto as part of the divorce settlement. Defendant argues that we should adopt the reasoning of the Third Circuit and hold that a widow is similarly bound.

In her Motion for Summary Judgment, Plaintiff contends, in essence, that Defendant had the same statutory duty to her as it does to every other holder of a policy at the initiation of a contract relationship. (This would be different from the coverage relationship Plaintiff previously had by virtue of her husband's contract with Defendant.)

#### FACTUAL BACKGROUND

The undisputed facts are as follows:

1. The original policy was purchased by Plaintiff's husband in 1984. The original application is believed to be Exhibit B to Defendant's Motion for Summary Judgment. (The exhibit stickers are not readable in the original Motion.)
2. In November 1992, Plaintiff's husband "signed a paper requesting" decreased UM/UIM coverage of \$15,000/\$30,000 (Defendant's Motion, ¶ 6); the liability coverage at that time was \$50,000/\$100,000; the policy number at that time was 604900579.
3. The policy at issue (that in effect on November 14, 2004) was preceded by other annual policies with MIC General Insurance covering the period from November 20, 1984 to November 19, 1999, each having the same policy number, 604000759; each renewal during that period was sent to plaintiff's husband, not to plaintiff.
4. Plaintiff's husband died on February 26, 1999.
5. Plaintiff had notified Defendant of her husband's death some time after February 26, 1999, "to have his name taken off of the policy." (Defendant's Motion ¶ 11)
6. The November 20, 1999 Amended Declarations Page and endorsements referred to a *new* policy number, 147086A02M, and further described the Insurer as GMAC Insurance, GM Employee Vehicle Insurance, Underwritten by MIC General Insurance; *this was sent to Plaintiff herself, not to her husband.*
7. Subsequent premium statements, renewal declarations pages and endorsements, issued for renewals effective November 20, 2000 through November 20, 2003, covering the period ending November 19, 2004, had the same issuer as was effective on November 20, 1999; no "Rejection Form" as required by §1731 was sent to Plaintiff during any of those policy periods. The policy number for the renewals beginning November 20,

2000 was 047086A01A. The slight difference in the policy number would seem to have no apparent significance.

8. This second policy number was changed slightly on Defendant's letter to Plaintiff dated September 8, 2004, regarding its "Offer #: 0147086AQ1" (Plaintiff Motion, Exhibit 1); this letter informed Plaintiff that there would be a new insurer, related to the previous one, and also that her then current policy was "non-renewed."

9. The November 20, 2003 renewal is the policy in question.

10. It is undisputed that Plaintiff's husband had obtained a lower amount of UM/UIM coverage which he did not increase during his lifetime. (See form he signed on November 9, 1996.)

11. It is also undisputed that Plaintiff's husband's election of UM/UIM complied with pertinent Pennsylvania law.

12. Prior to Plaintiff's husband's death, her husband was the "first named insured" and was also the policyholder. Plaintiff is listed by name on the 1984 Application under "Driver Information" and "Household residents." (Pursuant to ordinary contract law principles, plaintiff was an intended third-party beneficiary of her husband's contract with defendant.)

13. At the time of her husband's death in 1999, liability coverage under the terms of the husband's contract with Defendant was \$50,000/\$100,000, and UM/UIM coverage was \$15,000/\$30,000.

14. At the next renewal period after the policy holder's death, Defendant sent Plaintiff the same forms as it had been sending her husband; this was for the term from November 20, 1999 through November 19, 2000.

15. Defendant did *not* include the "rejection form" required by 75 Pa.C.S.A. §1731(b) in the 1999 packet sent to Plaintiff in or about October 1999 for the first year after her husband's death; Defendant also did not send Plaintiff the rejection form with any renewals subsequent to the 1999-2000 policy year. Section 1731 is quoted below, in full:

(b) Uninsured motorist coverage.—Uninsured motorist coverage shall provide protection for persons who suffer injury arising out of the maintenance or use of a motor vehicle and are legally entitled to recover damages, therefore from owners or operators of uninsured motor vehicles. *The named insured shall be informed that he [or she] may reject uninsured motorist coverage by signing the following written rejection form:*

#### REJECTION OF UNINSURED MOTORIST PROTECTION

By signing this waiver I am rejecting uninsured motorist coverage under this policy, for myself and all relatives residing in my household. Uninsured coverage protects me and relatives living in my household for losses and damages suffered if injury is caused by the negligence of a driver who does not have any insurance to pay for losses and damages. I knowingly and volun-

tarily reject this coverage.

Signature of First Named Insured

Date

16. The "rejection form" required by §1731 is different from the "sign down form," which Defendant uses to refer to the "Important Notice" required by 75 Pa.C.S.A. §1791.

17. The "sign down form" and instructions for the most recent renewal before the accident are found at Defendant Exhibit K, which is the packet for 2003.

18. The "Important Notice"/"Sign down" form (in Defendant Exhibit K) is intended only to comply with §1791 and says the following:

MIC GENERAL INSURANCE CORPORATION  
IMPORTANT NOTICE  
PENNSYLVANIA

Insurance Companies operating in the Commonwealth of Pennsylvania are required by law to make available for purchase the following benefits for you, your spouse or other relatives or minors in your custody or in the custody of your relatives, residing in your household, occupants of your motor vehicle or persons struck by your motor vehicle:

- (1) Medical benefits, up to at least \$100,000.
  - (1.1) Extraordinary medical benefits, from \$100,000 to \$1,100,000 which may be offered in increments of \$100,000.
  - (2) Income loss benefits, up to at least \$2,500 per month up to a maximum benefit of at least \$50,000.
  - (3) Accidental Death benefits, up to at least \$25,000.
  - (4) Funeral benefits, \$2,500.
  - (5) As an alternative to paragraphs (1), (2), (3) and (4), a combination benefit, up to at least \$177,500 of benefits in the aggregate or benefits payable up to three years from the date of the accident, whichever occurs first, subject to a limit on accidental death benefit of up to \$25,000 and a limit on funeral benefit of \$2,500, provided that nothing contained in this subsection shall be construed to limit, reduce, modify or change the provisions of section 1715(d) (relating to availability of adequate limits).
  - (6) Uninsured, underinsured and bodily injury liability coverage up to at least \$100,000 because of injury to one person in any one accident and up to at least \$300,000 because of injury to two or more persons in any one accident or, at the option of the insurer, up to at least \$300,000 in a single limit for these coverages, except the policies issued under the Assigned Risk Plan. Also, at least \$5,000 for damage to property of others in any one accident.

Additionally, insurers may offer higher benefit levels than those enumerated above as well as additional benefits. However, an insured may elect to purchase lower benefit levels than those enumerated above.

Your signature on this notice or your payment of any renewal premium evidences your actual knowledge and understanding of the availability of these benefits and limits as well as the benefits and limits you have selected.

Signature

Date

19. The renewal packets sent to Plaintiff by Defendant and its predecessors always referred to her as "a valued customer since 1984," even though her husband was the sole policy holder from 1984 until his death in February 1999 and Plaintiff had been simply a named third-party beneficiary of her husband's yearly contract with Defendant.

20. After her husband's death, Plaintiff did not make any written requests to raise the UM/UIM to equal that of her liability coverage.

21. Plaintiff never received or signed a §1731 rejection form.

#### DISCUSSION

Plaintiff contends that she became a *new* insured upon the death of her husband and also contends that a *new* policy, *with Plaintiff*, was created in 1999 as evidenced by the new policy number that was created at the same time, 147086A02M. This new policy would have triggered Defendant's obligation under §1731 to send Plaintiff a "rejection form," presumably with the paperwork for the policy term of November 20, 1999 to November 19, 2000.

Defendant contends that no "new" policy was ever issued to Plaintiff and that the new number was mere coincidence. Defendant also contends that the applicable policy is the 1984 original as amended (from time to time) and renewed annually, last on November 20, 2003 for the period ending November 19, 2004. Defendant contends that Plaintiff is bound by her deceased husband's choice of lower UM/UIM coverage and denies that it had any duty to *Plaintiff* in 1999 or thereafter to comply with §1731.

It is undisputed that if a new policy had been issued to Plaintiff in 1999 after her husband's death or in September 2004, the Insurer would have to have obtained a new rejection form under §1731 or else the UM/UIM coverage would remain equal to liability coverage.

As stated earlier, Defendant asks us to rely on a federal circuit court case, *Buffetta, supra*. We note that the Third Circuit expressly declined to certify the question presented in *Buffetta* to the Pennsylvania Supreme Court despite a joint motion of the parties that it do so. We also note that we are not bound by the Third Circuit opinion although we obviously must give it great consideration. The case the Third Circuit relied on, *Kimball v. Cigna Insurance Co.*, 443 Pa.Super. 143, 660 A.2d 1386 (1995), *does* bind us, *Kimball* involved a totally different set of facts from those presented here.<sup>1</sup>

In *Kimball*, the party claiming to be entitled to the higher UM/UIM coverage was *not* the policyholder. Rather, she was the daughter of a still-living policyholder. She was merely *covered* by her father's contract with the insurer. She clearly had no standing under ordinary contract principles to complain about the lower amount chosen by the policyholder as she was not the "First Named Insured" whose signature is required by §1731 before lower limits are deemed accepted. The Superior Court held that the *policyholder's* election of lower UM/UIM coverage was binding on her, and noted that if the daughter wanted different limits she should have bought her own separate policy.

Here, Plaintiff is the policyholder and also is the person

asserting the violation of §1731. She is clearly one the Legislature has sought to protect. Furthermore, she became the policyholder at Defendant's invitation, when it offered her her own policy, albeit in the form of a "renewal," as of the effective date of November 20, 1999.

When Plaintiff was *not* the policy holder, her *only* method of increasing UM/UIM coverage, according to *Kimball*, was to purchase her own separate policy. However, once her husband died, the only way Plaintiff would have *any* insurance at all was if she either (1) became a policyholder or (2) succeeded in having herself covered by someone else's policy. The reality here is that Defendant offered to make Plaintiff a policyholder and she accepted.

There is no merit to Defendant's position that a widow who was never a party to the contract of insurance should be bound by a selection she, as a mere third-party beneficiary (a/k/a "named insured" or "household member"), never had the power to make.

We conclude that the Pennsylvania Supreme Court, under ordinary contract principles that apply to policies of insurance, would hold that, where the original *policyholder* dies and the Insurer enters into a new relationship with similar terms with the surviving spouse, a former "covered" individual, that surviving spouse becomes a *new* policyholder and §1731 applies.

Fairness and public policy also dictate this result. The Legislature clearly felt that the *holder* of a policy of insurance is entitled to be made *aware* of the significance of UM/UIM coverage and of his or her right to choose a lower amount in exchange for a lower payment for this particular coverage. That is the very purpose of §1731.

The Legislature also made a public policy decision that an Insurer should not have to re-warn the *same* person every year, and in subsequent years, if a §1731 rejection form had been signed, should merely have to advise the policyholder of the statutorily-mandated options for coverage, leaving the burden of changing whatever coverages had already been selected to the policyholder. That is the purpose of §1791.

No matter how Defendant tries to characterize its first contact with Plaintiff after her husband's death, the fact remains that Defendant sent her what amounts to an *offer* to make her a policyholder as of the next renewal date after her husband's death, November 20, 1999. By that time, Defendant knew Plaintiff's husband was dead, so there can be no question that Defendant thought the husband was merely renewing. Plaintiff, for the first time, was a purchaser of her own separate policy for the year November 20, 1999–November 19, 2000.

Starting with the term beginning November 20, 1999 and every year thereafter, Defendant was required to comply with §1731 at least once and admittedly failed to do so. *Kimball* is still good law and virtually mandates this result, *Buffetta* notwithstanding.

## CONCLUSION

There was indeed a "new" contract between Plaintiff and Defendant, not necessarily merely because some numbers changed but because the original party who contracted with Defendant for auto insurance coverage *died*. There was no assignment or transfer to Plaintiff, his widow; rather there was merely an implicit offer (by Defendant) to begin a similar relationship with Plaintiff, which Plaintiff implicitly accepted. This conduct created a *new* contract, not an "assignment" and not a "transfer." As a general rule, the death to a party of a contract does not create an automatic assignment of the contract by operation of law nor does death automatically transfer the rights under the contract to a surviving spouse or an heir. When Plaintiff's husband died

on February 26, 1999, the contract *he* was party to expired by its terms at the end of the last renewal period for which *he* contracted, i.e. on November 19, 1999.

The "sign down"/"Important Notice" Defendant sent to Plaintiff herself pursuant to §1791 for each policy year after her husband's death does not satisfy the duty Defendant had under §1731 to Plaintiff, with whom it was *contracting for the first time*, as of November 20, 1999.

Defendant's contractual and statutory duties to Plaintiff *prior* to her husband's death were indeed based on the *coverage* provided to her by the contract between Defendant and Plaintiff's husband. However, those duties of Defendant to Plaintiff *changed* when Plaintiff herself became the *contracting* party, not merely a *covered* party.

Defendant's duties to Plaintiff included the statutory duty to advise her affirmatively of her options regarding UM/UIM coverage and to reduce that coverage only if *she* signed a rejection form as required by §1731. Since Defendant admittedly did not do so, the law imposes the maximum amount, that equal to the liability limits, here \$50,000/\$100,000.

Defendant or its predecessor should have sent the Plaintiff, the party it offered to contract with beginning as of November 20, 1999, the rejection form mandated by the Legislature in §1731.<sup>2</sup> Since it failed to do so, and never cured that mistake, Plaintiff has full UM/UIM coverage equal to the liability limits to her policy.

An Order stating this declaration is attached.

BY THE COURT:  
/s/Friedman, J.

Dated: April 3, 2009

<sup>1</sup> We believe the *Kimball* facts are also far-removed from the *Buffetta* facts, another reason why we decline to follow *Buffetta*, which found them similar.

<sup>2</sup> We note Defendant also should have included a new rejection form with the new policy described in its letter of September 2004. However, we do not need to reach the question of whether Plaintiff, *prior* to November 14, 2004, would have read the §1731 rejection form and acted under the Important Notice to demand reinstatement of full UM/UIM benefits prior to the accident. This would be a jury question, were it not moot because of Defendant's earlier non-compliance, in 1999 and onward, with §1731.

## ORDER OF COURT

AND NOW, to-wit, this 3rd day of April 2009, for the reasons set forth in the accompanying Memorandum in Support of Order, the Motion for Summary Judgment of Plaintiff is GRANTED in part, and it is hereby DECLARED as follows:

The UM/UIM coverage of the policy of insurance between the parties that was in effect on November 14, 2004 is \$50,000/\$100,000, for the reason that Defendant or its predecessor failed to comply with 75 Pa.C.S.A. §1731 as of the first policy year when Plaintiff was the policyholder and contracting party; November 20, 1999–November 19, 2000 and also failed to comply for any policy year thereafter.

It is further ORDERED that the Motion for Summary Judgment of Defendant is DENIED.

BY THE COURT:  
/s/Friedman, J.