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MANAYUNK NEIGHBORHOOD COUNCIL,
INC.

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY, PENNSYLVANIA

V.

SEPTEMBER TERM, 2006

PHILA. BD. OF BUILDING STANDARDS, ET
AL.

NO. 1384

STATUTORY APPEALS PROGRAM

BRIEF OF APPELLEE

The City of Philadelphia, Board of Building Standards, acting through its undersigned attorney, hereby submits this brief in the instant matter and respectfully requests that this Court deny the Appeal of Manayunk Neighborhood Council, Inc.

I. MATTER BEFORE THE COURT

Appellant, Manayunk Neighborhood Council, Inc., appeals the July 25, 2006 decision of the City of Philadelphia Board of Building Standards (“Board”) that affirmed the Philadelphia Historical Commission’s (“Commission”) approval of a permit to alter an historic property located at 3 Rector Street (“Subject Property”) in the Manayunk section of Philadelphia.

II. ISSUES ON REVIEW

1. Should the decision of the Board be reversed for a lack substantial evidence appearing in the complete record?

Proposed ruling: No; the decision of the Board should be affirmed.

2. Should the decision of the Board be reversed for error of law?

Proposed ruling: No; the decision of the Board should be affirmed.

III. STANDARD OF REVIEW

The standard of review of the Board's adjudication where, as here, a complete record was made before the local agency, is limited to determining whether constitutional rights have been violated, whether an error of law has been committed, or whether necessary findings of the Board are supported by substantial evidence. 2 Pa.C.S. § 754(b). The reviewing court is not make its own review of facts, but only determine whether the findings of the administrative agency necessary to the decision are supported by substantial evidence. Bethenergy Mines, Inc. v. Workers' Compensation Appeal Board (Skirpan), 531 Pa. 287, 612 A.2d 434 (1992); *cf.*, 2 Pa.C.S. § 704. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Peak v. Commonwealth. Unemployment Compensation Board of Review, 509 Pa. 267, 275, 501 A.2d 1383, 1387 (1985); *cf.*, Bowman v. Dep't of Environmental Resources, 549 Pa. 65, 700 A.2d 427 (1997); Kish v. Annville-Cleona School District, 165 Pa.Cmwlth. 336, 645 A.2d 361, 363-364 (1994), *citing* Bey v. Board of Education, School District of Philadelphia, 87 Pa.Cmwlth. 571, 488 A.2d 89 (1985). For an adjudication to be in accordance with law, an agency's decision must not represent a manifest and flagrant abuse of discretion or a purely arbitrary execution of its duties or functions. Slawek v. State Board of Medical Education and Licensure, 526 Pa. 316, 586 A.2d 362 (1991).

IV. BACKGROUND

The Appellee adopts the Intervenor-Appellee's recitation of the factual background to this matter in the Brief of Appellee Rector Street Associates, L.P., and only intends to highlight various points. The proposed alteration of the property located at 3 Rector Street has for some

time been an unusual situation, both because of the unique historical aspect of the structure itself and the nature in which the Philadelphia Historical Commission became involved in approving the building permits sought by the applicant, Rector Street Associates, L.P.. It is admitted by all parties that the property is, in its own right, historically significant. The property is subject to certain restrictions intended to preserve its character on account of two provisions of the City's Property Maintenance Code: PM-703.1.2, delineating a portion of Manayunk as an "historic district" for purposes of special property maintenance controls; and PM-704.2.2, setting forth the specific controls applicable to the Manayunk Historic District.

As indicated, the Manayunk Historic District is unusual in that Manayunk was not designated as an Historic District for purposes of placement on the Philadelphia Register of Historic Places; i.e., as set forth in the Preservation Ordinance (§ 14-2007 of the Philadelphia Zoning Code). In fact, the Historical Commission, was not and is not involved in the designation or active preservation of the Manayunk Historic District, excepting that the buildings within the district have been placed on the Philadelphia Register of Historic Places. That said, under PM-704.2, the Commission's purview is strictly limited to review of permit application; conversely, with respect to properties designated pursuant to the Preservation Ordinance, the Commission has a much wider range of powers and duties.

A few additional bits of confusion about the District must be rectified, in order to set the record straight. The Appellant correctly states that the property located at 3 Rector Street is within a National Historic District. This district is specifically referenced at PM-703.2.1; in fact, the district itself is more properly referred to as the Manayunk National Historic District, though "National" is dropped here due for the sake of avoiding the sort of confusion that seems to have affected the Appellant's argument. Also, as indicated above, neither the district nor the

properties therein are on the actual Philadelphia Register of Historic Places; the Commission does, however, have a “register” of properties in the Manayunk Historic District, but that should not be confused with the official Philadelphia Register. Only one property within the Manayunk Historic District also happens to be on the actual Philadelphia Register. The upshot is that the scope of review of permit applications set forth in the Preservation Ordinance has nothing to do with the permit at issue here.

V. ARGUMENT

Here again, the City adopts the well-crafted legal arguments raised by the Intervenor-Appellee, and simply submits this Brief to highlight certain points of particular importance which. In addition, the City emphasizes, below, the Board of Building Standards’ obligation to defer to the decision of the Historical Commission in this matter. The factual errors discussed above do not detract from the Intervenor-Appellees arguments, but have great impact on the Appellant’s claims.

A. **The Board of Building Standards did not commit legal error**

The Appellant’s brief relies mostly on allegations that the Board of Building Standards committed legal error by repeating errors of law that the Appellant claims were made by the Commission. The Appellant’s claims in this regard are wrong, primarily because the Appellant misinterprets the meaning of the Manayunk Ordinance and then confuses the Commission’s duties under this ordinance with the normal procedures implemented by the Commission in its reviews of permits brought to their attention under the Preservation Ordinance.

i. ***The Commission may direct the Commission staff to approve a permit***

Among other things, the Plaintiff relies on an apparent anomaly in the Manayunk Historic District ordinance. Under PM-704.2.2, permits may only be issued if the “Commission staff” determines that the character of the district will be retained. Despite the fact that the Ordinance does not define “Commission staff”, the Plaintiff suggests that City Council intended that the Commission’s support staff approve permit applications for the district. The Commission’s staff does consist of professional preservationists, but it also includes a receptionist as well as occasional interns and volunteers. In other words, the only way to make sense of Plaintiff’s understanding of the meaning “Commission staff” is to apply it only in a restricted sense meaning the “professional staff”. This, however, is no more a legitimate reading of the phrase than simply defining the term to mean the appointed Commission itself.

It would be highly unlikely, and perhaps an unlawful delegation of authority, for City Council to have entrusted decisions regarding permit applications to staffers when City Council has created an independent Commission for that very purpose. Even if Council intended that the Commission’s professional staff make such decisions, the staff itself serves at the pleasure of the Commission, thus the Commission has every right and all the authority necessary to direct the staff’s actions—this includes the authority to direct the staff to approve permit applications for the Manayunk Historic District. *See, e.g., FINDINGS OF FACT AND CONCLUSIONS OF LAW, Conclusion of Law No. 8.* The question of who approves permit applications may arise from unfortunate legislative drafting, but the ultimate answer is moot—the Commission was, and is in charge of its own staff, therefore there was never any serious controversy about the Commission’s decision to review the permit application at a public hearing.

Ironically, under the Appellant's reading, neither the applicant, nor the Appellant itself would have ever had any opportunity to make their case to either the Commission or its staff. Instead, such a regime would force applicants and opponents to make their initial case before the Board of Building Standards—eliminating the very purpose of having such applications reviewed by persons qualified in historic preservation. This is an absurd result and yet another reason why the Appellant's reading of the ordinance is incorrect.

ii. Commission was not required to apply the Secretary's Standards

The Appellant mistakenly cites Society Hill Civic Association in support of its claim that the BBS erred by adopting the Commission's decision because the Commission did not apply the Secretary of the Interior's "Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings" (Secretary's Standards). Society Hill Civic Association v. Philadelphia Board of License and Inspection Review, 905 A.2d 579 (Pa. Commw. 2006); **36 CFR Part 67**. The Standards and Guidelines are referenced in § 14-2007(7)(k) of the Preservation Ordinance as one of several criteria that may guide the Commission in its review of permit applications brought to their review under the Preservation Ordinance. At most, Society Hill merely states that the Commission is required to apply the Secretary's Standards in its review of permit applications brought under § 14-2007(7)(k), as directed by the Commission's own **Regulation 6.3a**. This Regulation, however, only governs permit applications for alterations to properties actually designated on the Philadelphia Register of Historic Places, not the Manayunk Historic District—it *does not apply in any way to the instant matter*. The Appellant forgets that the neither the Preservation Ordinance nor the Rules and regulations of the Commission were operative in this matter. As we have been discussing, the instant matter arises from the *Property*

Maintenance Code, not the Preservation Ordinance. The only criteria applicable to reviews of permit applications relating to the Manayunk Historic District, are those provided by PM-704.2 et seq., more fully discussed by the Intervenor-Appellee.

Even where, as here, a property is within a National Historic District, this bears no significance to the instant matter because such designation has nothing to do with the duties and obligations of the Commission in this case. If, for example, there were some Federal involvement (funding, oversight, etc.) in the proposed construction, the Commission would be obligated to determine whether there would be an adverse impact on an historic resource, pursuant to the National Historic Preservation Act, as well as the National Environmental Protection Act, irrespective of whether a property is already designated historic under either a local or national historic preservation regime. In *Brotman*, the Court specifically referenced the Standards and Guidelines because the Statue of Liberty is actually owned by the Government, therefore 36 CFR § 68.3 applied pursuant to the National Historic Preservation Act, 16 U.S.C. § 470. *Brotman v. United States*, 111 F. Supp. 2d 418, 421 (D.N.Y. 2000).

National Historic Districts and Sites are *not*, in and of themselves, afforded any specific protections when owned by private entities, but may be eligible for certain Federal tax credits, such as the Rehabilitation Investment Tax Credit; numerous other state and Federal tax incentives also exist in order to promote historic preservation¹. *See, e.g.*, Treasury Regulation Section 1.48-12. The Secretary's Standards are therefore applied by the Commission in three contexts:

¹ Properties not on the National Register, but preliminarily determined to be eligible for inclusion may also qualify for such credits.

- review of an application to obtain Federal tax credits or other Federal tax incentives;
- review of any project with direct Federal involvement or funding;
- review of any permit applications involving properties registered on the Philadelphia Register of Historic Places or within *local* Historic Districts designated as such under §14-2007(4)(a) and (5).

The Subject Property is *not* designated on the Philadelphia Register of Historic Places, nor is the Manayunk National Historic District a local Historic District such that the Secretary's Standards have any relevance here.

iii. The Restrictions under § 14-1615 of the Zoning Code are irrelevant

The Appellant suggests that Council's creation of the Manayunk Special Services District, at § 14-1615 of the Philadelphia Zoning Code, mandated that the Commission deny its approval for any construction exceeding the height restrictions contained in § 14-1615(8). Once again, the Appellant confuses one code provision, in this case, a zoning overlay, with the limited scope of review given to the Commission in PM-704.2. The Appellant is quite correct if it means to suggest that the Commission cannot grant a variance from a height restriction governing a Special Services District, because the Commission has no authority to even consider zoning overlays—the Commission's review is limited to the Property Maintenance Code alone.

Any review of construction pursuant to a request for a variance from the height restrictions contained in § 14-1615(8) must be sought before the Zoning Board of Adjustment, not the Historical Commission. In other words, it is an entirely moot question in this appeal whether the proposed construction exceeds the maximum height allowed under § 14-1615(8).

The Appellant's claim that the Commission "usurped" the authority to grant a variance is utterly specious. The Commission did not grant a building permit, it merely reviewed the permit for the limited purposes set forth in the Manayunk Historic District ordinance. Nothing the Commission did here has any effect at all on whether any other city agency did or will grant approval for the permit.

B. Substantial evidence is in the record to support the Findings of the Board

The City fully adopts the discussion and conclusions reached by the Intervenor-Appellee with respect to the evidence in the Record that supports the pertinent Findings of Fact of the Board of Licenses and Inspections, with the exception of the misinformation regarding the designation of the property on the Philadelphia Register of Historic Places, discussed above.

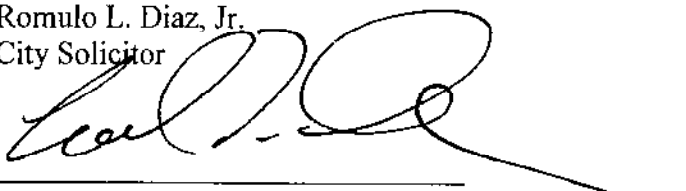
VI. CONCLUSION

Wherefore, for the reasons set forth above; viz., that the Board of Building Standards did not commit any errors of law and there is substantial evidence in the record to support the findings of fact necessary to their conclusions, the City of Philadelphia respectfully requests that this Court deny the appeal of Manayunk Neighborhood Council, Inc..

Respectfully submitted,

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By:


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CERTIFICATION OF SERVICE

I, Leonard F. Reuter, hereby certify that service of a true and correct copy of the
forgoing Response Brief in the above-captioned Local Agency Appeal, was made by regular

First-class mail on June 4, 2007, to:

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