

**IN THE PHILADELPHIA COURT OF COMMON PLEAS
SPECIAL DOCKET PROGRAM**

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Manayunk Neighborhood Council
and
Kevin Smith

<hr/> MANAYUNK NEIGHBORHOOD	:	Court of Common Pleas of
COUNCIL, INC.	:	Philadelphia County
and	:	
KEVIN SMITH	:	Civil Division
<i>Appellants</i>	:	Statutory Appeal
v.	:	
CITY OF PHILADELPHIA ZONING BOARD	:	DECEMBER TERM
OF ADJUSTMENT	:	
and	:	No. 03448
RECTOR STREET ASSOCIATES L.P.	:	
<i>Appellees</i>	:	
<hr/>	:	

APPELLANTS BRIEF IN SUPPORT OF THEIR APPEAL

D) Matter Before the Court

Before the court is the statutory appeal of Manayunk Neighborhood Council and Kevin Smith. Appellants seek reversal of the November 30, 2006 decision of the Philadelphia Zoning Board of Adjustment which granted Applicants, Raymond Labov and/or Rector Street Associates L.P. three variances regarding (1) the use restrictions in G-2 industrial districts, (2) the minimum side yard requirements in G-2 industrial districts and (3) the minimum off street parking requirements. The Appellants pray that the variances be revoked.

II Statement of Questions Involved

A) Did the Zoning Board commit an error of law by granting variances without any finding of unnecessary hardship?

Proposed Ruling: Yes, the variances were improper and should be overturned.

B) Did the Zoning Board commit an error of law by failing to address whether there were permitted uses to which the land could feasibly be put?

Proposed Ruling: Yes, the Board committed an error of law and the variances should be overturned.

C) Did the Zoning Board exhibit capricious disregard for competent evidence by refusing to hear testimony regarding uses to which the land could feasibly be put?

Proposed Ruling: Yes, the Board exhibited capricious disregard and the decision of the Board should be overturned.

D) Did the Zoning Board commit an error of law by granting variances without substantial evidence to support its decision?

Proposed Ruling: Yes, the Board's decision is not supported by substantial evidence and the variances should be overturned.

E) Did the Zoning Board commit legal error by failing to address the issue of whether the variances were the minimum necessary?

Proposed Ruling: Yes, the Board failed to address the legal issue of the minimum variance and the variances should be overturned.

F) Did the Zoning Board abuse its discretion by granting variances which are not supported by the findings of fact?

Proposed Ruling: Yes, the findings of fact do not support the variances and the variances should be overturned.

G) Can the Zoning Board grant relief from the height limits of 14-1615 without hearing testimony regarding hardship about height and without findings of fact?

Proposed Ruling: No, the Applicant provided no testimony about the height restrictions of Section 14-1615, and there are no findings of fact about height, therefore the Board cannot grant variance relief for an issue that was never before the Board.

III) FACTS AND LAW

THE BUILDING

The building at the focus of this appeal was built in 1880s as the office for the Archibald Campbell Mills. See Architectural Committee Minutes. The building was purchased by the Labov family approximately forty years ago. The building is identified in the record as "3 Rector Street" or the "Labov Building." The Labovs used the old office building for storage of plumbing supplies from the 1960s up until the building was marketed for sale. The building was safe, secured and sealed as of June 2005. The building is not being maintained and is deteriorating. The Agreement of Sale presented to the ZBA states that Mr. Labov is required to maintain the building.

The four buildings located adjacent to 3 Rector are: To the east - a historic masonry office building used by Venturi Scott Brown Architects. To the south, a large manufacturing building known as Richard's Apex which is used for the manufacture of cutting oils. To the west, Venice Island which has a large public parking Lot run by Manayunk Development Corporation. To the north, a historic masonry office building located at 2 Rector Street, which has been refurbished for use as the Bourbon Blue restaurant and prior to that a Smith and Hawken retail gardening shop. The 3 Rector building is zoned G-2 Industrial.

THE ZONING PROVISIONS

The G-2 Industrial designation provides for a large number of permitted uses. The Court is requested to take judicial notice of Section 14-508 of the Philadelphia Code attached as Exhibit 1. The G-2 zoning code contains approximately fifty-six paragraphs identifying the classes of permitted uses. The retail repair of items is also permitted by right. Accessory uses are also permitted by right. The G-2 Industrial district allows all uses in the L-3 Light Industrial District.

The L-3 Light Industrial district regulations are found in Phila. Code Section 14-505. The Court is requested to take judicial notice of Section 14-505 of the Philadelphia Code attached as Exhibit 2. The L-3 zoning code contains approximately thirty two paragraphs identifying the classes of uses. The retail repair of items is also permitted by right. Accessory uses are also permitted by right.

City Council enacted special overlay zoning for the area where the 3 Rector Street property is located. Phila. Code 14-1615 et seq. The Court is requested to take judicial notice of Section 14-1615 of the Philadelphia Code attached as Exhibit 3. City Council has specifically noted that the light industrial zoning specifically "allows for a variety of commercial uses" Phila Code. 14-1615(k). There are many offices and small businesses operating along Main Street Manayunk. Phila. Code 14-1615(1)(d). City Council enacted legislation specifically directed at maintaining the balance of uses along and adjacent to Main Street Manayunk. City Council imposed a three story height limit on the area where 3 Rector Street is located. Phila. Code 14-1615(8)(1).

THE APPLICATION

The Applicant expressly states that the G-2 zoning provisions are the only zoning restrictions which they sought variances from. See Record, Finding of Fact #14. An affidavit by Mr. Labov recites economic hardship relating to unsuccessful attempts to sell the property.

THE HEARING

Appellants provided testimony before the zoning board. MNC provided testimony from Kevin Smith, photo documentation of the 3 Rector Street and 2 Rector Street buildings, photos and maps of current businesses in Manayunk, and testimony from John Hunter, registered architect, John Cluver historical architect and Jane Glenn, former president of Manayunk Neighborhood Council. The Board also received testimony from neighbor Joy Griffin.

The photographs provided by MNC show businesses located in older masonry buildings such as 3 Rector Street. The photographs show offices, small manufacturing shops, repair shops and other uses compatible with the G-2 and L-3 zoning provisions. Zoning Board Chairman Mr. Auspitz noted that heavy industry was unlikely in Manayunk, c.f. 14-1615(1)(s), however if, "[w]e're talking about retail or office, that's a possibility..." N.T. 06-0812 page 45, lines 6-7.

Mr. John Hunter works at the architect's office adjacent to the 3 Rector property. N.T. 06-0812 page 49, lines 5-7. Mr. Hunter is a registered architect who testified that

the 3 Rector Building (Labov) and the 2 Rector Building (Bourbon Blue) are similar, and 3 Rector could be restored as 2 Rector has been. N.T. 06-0812 pages 55-56. There are numerous uses for the 3 Rector Building. N.T. 06-0812 pages 56.

Mr. John Cluver, an architect specializing in historic buildings, notes that both the Labov building and the Bourbon Blue building are on the national register, and uses other than residential would be more consistent with the historical character of the buildings. N.T. 06-0812 page 57.

The Applicant included a letter specifying that off street parking is available on the Manayunk Development Corp. lot on Venice Island. See File; Finding of Fact #14. John Hunter testified that the 2 Rector Street property, (Bourbon Blue) met their off street parking requirements by leasing spaces at the MDC parking lot. N.T. 06-0812 page 52, lines 10-20. Applicants' attorney Mr. Feldman indicated that they could utilize the MDC parking lot to provide off street parking. N.T. 06-0812 page 53, lines 6-7.

THE FINDINGS OF FACT

The findings of fact list the dates of hearings leading up to the Zoning Board Hearing. Findings of Fact 1-13. The findings of fact recite testimony by three witnesses which the board necessarily found credible. Findings of Fact 15-17 (Griffin, Glenn, Hunter). The findings of fact ignore all testimony by the applicant and the applicant's experts. The findings of fact do not identify what the unique hardship at the property is. The findings of fact do not indicate that the property will not have an adverse effect on the neighborhood. The findings of fact do not indicate that the variances are the minimum variances necessary. The findings of fact do not find unnecessary hardship. Finding of Fact #19 recites that the Zoning Board granted the variances.

The Conclusions of Law recite the variance requirements of the Philadelphia Code. Conclusions of Law #1-6. The Conclusions of Law recite case law regarding variances. Conclusions of Law #7-11. Conclusion of Law #12 merely concludes that "[a]pplicant has provided ample indicia of hardship." The Conclusions of Law do not mention unnecessary hardship, minimum variances, or the virtually valueless requirements. The Conclusions of Law do not reference any findings of fact.

IV ARGUMENT

Standard of Review

Where the court takes no additional evidence, review is limited to determining whether the Board's decision is supported by the evidence and free of legal error. Township of East Caln v. ZHB, 915 A.2d 1249 (Pa. Cmwlth 2007); One Meridian Partners, LLP v. ZBA of City of Phila., 867 A.2d 706, 707-08 (Pa. Cmwlth 2005). The applicable standard of review of the Zoning Board's determinations is whether the Board committed a manifest abuse of discretion or an error of law in granting a variance. Sweeney v. ZHB of Lower Merion, 534 Pa. 197, 626 A.2d 1147 (Pa. 1993). An abuse of discretion is found where the Zoning Board's findings of fact are not supported by substantial evidence. Valley View Civic Assn. v. ZBA, 501 Pa. 550, 554, 462 A.2d 637, 639 (1983).

Scope of Review

The Philadelphia Code sets out detailed list of criteria which the Zoning Board must consider when granting a variance. Phila. Code 14-1802. Our supreme court has observed, "[t]he criteria [in 14-1802(1)] can be boiled down into three key requirements, that of: 1) unique hardship to the property; 2) no adverse effect on the public health, safety or general welfare; and 3) the variance will represent the minimum variance that will afford relief at the least modification possible." East Torresdale Civic Association v. ZBA of Philadelphia, 536 Pa. 332, 324-25, 639 A.2d 446, 447 (1994). The variance criteria of the Pennsylvania Municipalities Planning Code Section 910.2(a) are also applicable to variances sought in Philadelphia SCRUB v. ZBA, 772 A.2d 1040 (Pa. Cmwlth. 2001)

A) The Zoning Board improperly granted variances without any evidence of unnecessary hardship.

In order to grant a variance, the Philadelphia Zoning Board must find that "a literal enforcement of the provisions of this Title would result in unnecessary hardship." § 14-1801(1)(c); see North Chestnut Hill Neighbors v. ZBA of Philadelphia, 2007 Pa. Cmwlth Lexis 368, (Pa. Cmwlth July 2007). The law distinguishes between economic hardship that results from zoning law in general and the unnecessary hardship which is

needed (but not sufficient) for obtaining a variance. Larsen v. ZBA of Pittsburgh, 543 Pa.415, 423-24, 672 A.2d 286, 290 (Pa. 1996). A Zoning Board must find that the hardship is unnecessary and unrelated to the purpose of the zoning regulation before granting a variance. All zoning laws create districts and assign uses to those districts. Zoning ordinances create hardship for all residents, as uses are excluded from districts. This hardship is necessary to the function of a zoning ordinance, Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926), but necessary hardship does not entitle the applicant to a zoning variance. Larsen v. ZBA of Pittsburgh.

An applicant for a variance is required to prove that the denial of a variance will cause more hardship than the zoning law intends to impose. This is "unnecessary hardship". Larsen v. ZBA of Pittsburgh, 543 Pa.415, 423-24, 672 A.2d 286, 290 (Pa. 1996). Here, a developer bought industrially zoned property, which expressly prohibits residences, expecting to construct residences. The hardship of not being able to evade the restrictions of the zoning ordinance is not unnecessary hardship; it is economic hardship and it is not sufficient to support a variance. O'Neill v. Zoning Board of Adjustment, 434 Pa. 331, 254 A.2d 12 (Pa. 1969); Vagnoni v. ZHB of Exeter Township, 459 A.2d 1361 (Pa. Cmwlth 1983); Laurento v. ZHB of Borough of West Chester, 638 A.2d 437 (Pa. Cmwlth 1994).

The Commonwealth Court recently reviewed variance standards in Township of East Caln v. ZHB, 915 A.2d 1249 (Pa Cmwlth 2007), where the court discussed the rule that an owner or developer's wish to develop property in violation of the zoning ordinance cannot create unnecessary hardship.

A variance, whether labeled dimensional or use, is appropriate only where the property, not the person, is subject to the hardship. Therefore, we held that the owner was not entitled to the variance as the property was well suited to the purposes for which it was zoned and actually used. We commented that the owner had proven nothing more than that adherence to the ordinance would impose a burden on his personal desire to sell vehicles for Land Rover.

East Caln. at 1253 (citations and quotations omitted). This analysis shows that the 3 Rector building is not subject to a hardship, the developer has an economic hardship due to purchasing a property that is uniquely unsuited for their residential development.

B) The Applicant did not show there were no permitted uses to which the property could feasibly be put.

Even if the Applicants established an unnecessary hardship, they must also establish that the variance was necessary for the reasonable use of the property, Larsen v. ZBA of Pittsburgh, at 427, 292. Thus, there is no hardship if the property simply is unsuitable for the owner's choice of development project.

However, [Hertzberg] did not alter the principal that a substantial burden must attend all dimensionally compliant uses of the property, not just the particular use the owner chooses.

Caln at 1253 (parsing Yeager v. ZHB of Allentown, 779 A.2d 595, 598 (Pa. Cmwlth 2001)). Given the clear principle that a use variance is not available if the property can be used for any permitted use, the obvious question is: Did the Applicant show that the building located at 3 Rector Street could not be used for G-2 uses? The answer is no. The applicant showed that variances were necessary to build the condo complex, not that variances were necessary to use the 3 Rector building with uses that G-2 zoning allows.

A review of the G-2 industrial ordinance 14-508, shows roughly fifty-six (56) separate paragraphs, with many paragraphs containing multiple uses. Under the G-2 code, manufacturing automatically includes retail repair. Section 14-508(1)(r). Additionally, uses that are accessory to the above uses are also permitted by right. Section 14-508(1)(z). Rather than repeat the hundreds of uses, a short list of current uses which the MNC photographs show on and around Main Street Manayunk is helpful:

- G-2 14-508(f), 14-508(r) Manufacture and repair of carpets
- 14-508(l) Machine shop
- 14-508(m)(.3), 14-508(r) Manufacture and repair of signs
- 14-508(m)(.10), 14-508(r) Manufacture and repair of furniture
- 14-508(m)(.17), 14-508(r) Manufacture and repair of motor vehicles

Turning to Section 14-508(1)(a), the G-2 Industrial district permits all uses which appear in the L-3 Industrial District. A review of the L-3 industrial ordinance, 14-505, shows that there are roughly thirty two (32) separate paragraphs of uses, with individual paragraphs containing up to ten or more different uses. Further, anytime that any sort of manufacturing is mentioned, retail repair of those items is permitted. Section 14-

505(1)(o). Additionally, any uses which are accessory to the above uses are also permitted by right. Section 14-505(1)(s). Again, the MNC photos show many uses:

- L-3 14-505(c) Recording Studio
- 14-505(e) Parcel delivery, food commissary
- 14-505(h) Laboratory
- 14-505(i)(.3) Bakery
- 14-505(i)(.4) Ice Creamery
- 14-505(i)(.8) Medicine
- 14-505(i)(.10) Medical instruments
- 14-505(i)(.14) Pasta
- 14-505(k) Offices

Clearly, there has been no showing that the 3 Rector Street property cannot be used for the 56 G-2 uses or the 32 L-3 uses permitted by law. More succinctly, there is no evidence and no finding of fact that the 3 Rector Street Property cannot be utilized for the real world uses shown in the photos and map provided by MNC and Kevin Smith.

The law requires a "hardship that attends the property, as distinguished from its owner". Caln at 1253 (quoting Yeager v. ZHB of Allentown, 779 A.2d 595, 598 (Pa. Cmwlth 2001)). The Applicants showed that the property is unsuited for their desired use, however, the legal requirement is that the Applicants must show that the property cannot be used as zoned. They have not done this, and the variances must be overturned.

C) The Zoning Board showed capriciously disregard for competent evidence by refusing to hear testimony regarding uses permitted at the property.

Adjacent and surrounding uses are relevant to the question of whether a property is useless for any purpose for which it is zoned. East Torresdale Civic Ass'n. v. ZBA, 85 Pa. Commw. 12, 481 A.2d 976, 978 (1984), aff'd, 508 Pa. 614, 499 A.2d 1064 (1985). Thus, the information about which businesses that actually are located in the surrounding neighborhood is relevant to the question of whether the 3 Rector Street property can be used for any purposes for which it is zoned.

The uses which the 3 Rector Street property could be put to are relevant if they are permitted in G-2 zoning district. N.T. 06-0812 page 49, line 7-9 (Ms. Eden). Clearly, photos of the uses next to the 3 Rector Street property, and in and around Main Street are relevant to show that 3 Rector Street can be used for a permitted use. The MNC photos

show buildings similar to 3 Rector Street that have businesses permitted by G-2 zoning. The business in the photos include uses which are permitted under 14-505 and 14-508: carpet repair, machine shops, metal work, sign making, furniture repair, motor vehicle repair, music studio, bakery, bake at home pasta, and of course offices.

The Zoning Board clearly indicated that the information about surrounding uses was unwanted. An administrative agency cannot simply refuse to hear competent evidence; this renders the decision invalid under the capricious disregard of competent evidence standard. Leon E. Wintermyer v. WCAB, 571 Pa. 189, 812 A.2d 478 (2002). Clearly, the Board did not allow testimony about a relevant issue: whether the property was useless for any purpose, East Torresdale, and the refusal to hear relevant evidence invalidates the variances. Leon E. Wintermyer.

D) The Board does not have substantial evidence to support the zoning variance

The Applicants did not present substantial evidence on each of the relevant criteria needed to establish unnecessary hardship and inability to use the property, and thus did not prove the right to the variances. Larsen v. ZBA of Pittsburgh, (Pa. 1996).

The Applicant's testimony about financial hardship cannot support a variance. The Applicant presented testimony in the form of a "hardship affidavit", see record, Finding of Fact #14, reciting that the subject property had been listed for sale for an extended period of time. The Applicants merely provided evidence that the seller's profit expectations are too high. Id. In Township of Falls the Commonwealth Court noted that evidence that the owners are unable to sell the property for a certain price is simply evidence of economic hardship. Economic hardship will not support a variance or a claim that the property cannot be used as zoned. Township of Falls at 15.

The hardship evidence which the Applicants produced was an affidavit that Mr. Labov had been unable to sell the property for an unspecified time, at an unspecified price. The testimony that a property has not sold at a particular price does not establish that the property is "almost valueless as zoned" but merely establishes that the property will not sell at that price. Id. "Apparently, the owners did not attempt to market the property in a price range that would yield that profit of less than [their hoped for profit]."

Township of Falls at 15.

In Vagnoni v. ZHB of Exeter Township, 459 A.2d 1361 (Pa. Cmwlth 1983) the Commonwealth Court held that testimony that a property had been marketed for at least five years without success was not substantial evidence to support a variance. The Vagnoni court further noted that the variances were not needed for the reasonable use of the property; they were desired by a developer who wished to maximize the development project. The expert testimony on behalf of 3 Rector simply establishes that the Applicants need variances to develop their pet project, this is not substantial evidence to support a variance.

In Laurento v. ZHB of Borough of West Chester, 638 A.2d 437 (Pa. Cmwlth 1994) the Commonwealth Court found that the inability to build the desired residential project was not substantial evidence of unnecessary hardship, but instead was merely evidence of economic hardship. The facts of Laurento and 3 Rector Street are similar: the "hardship" is simply that the zoning restriction prevent the particular development scheme which is currently desired by the owner, and variances are not appropriate.

Finally, the inability to sell will not support a variance, because a mere inability to sell is not substantial evidence, and "[w]ithout substantial evidence to support ... crucial findings of fact, there is no evidentiary basis for the [ultimate finding of unnecessary hardship]" Township of Falls. at 16.

E) The Zoning Board failed to address the issue of whether the variances were the minimum necessary.

The failure to make findings of fact regarding the minimum variances is an error of law which invalidates the Board's decision. Sweeney v. ZHB of Lower Merion, (Pa. 1993); Larsen v. ZBA of Pittsburgh, (Pa. 1996); North Chestnut Hill Neighbors v. ZBA of Philadelphia, 2007 Pa. Cmwlth Lexis 368, (Pa. Cmwlth July 20007). Doris Terry Trust v.,ZBA of Pittsburgh, 873 A.2d 57 (Pa. Cmwlth. 2005). There are no findings of fact regarding whether the three variances were the minimum variances necessary to provide relief, therefore the variances must be overturned.

The testimony of record suggests that the minimum variances needed to allow a reasonable use of the property would be variances needed to use the building as an office.

The 3 Rector building was constructed as an office. Offices are a permitted use in G-2 Zoning. See 14-508(1)(a)(allowing all L-3 uses), 14-505(k). Chairman Auspitz opined that the building could be used as an office, "[w]e're talking about retail or office, that's a possibility..." N.T. 06-0812 page 45, lines 6-7. The photos from MNC show that many other buildings along Main Street Manayunk are used for offices. See MNC Photos. The property just to the east of the 3 Rector Street property is actually used as an office for an architectural firm. Clearly, the best solution is to use the office building as an office.

Next, the fact that the owners have used the property for a permitted use since the 1960s indicates that the property can be used as zoned, Township of Falls v. ZHB, 498 A.2d 13 (Pa. Cmwlth 1985), thus the minimum variance needed for the reasonable use of the 3 Rector Street property would be to address off street parking by providing spaces at the MDC parking lot as was done for parking at the identical building across the street. See File (MDC Parking Available Letter); Finding of Fact #14; N.T. 06-0812 page 52, lines 10-20 (John Hunter- MDC Parking); N.T. 06-0812 page 53, lines 6-7 (Mr. Feldman MDC Parking). The record suggests that a height increase was needed to accommodate more parking, which then required more height to pay for a more expensive parking solution. See record Thyssen Krupp brochure, N.T. 06-0812 page 34 line 23-24. Clearly, providing off street parking at the MDC lot negates the parking needs and allows the use of the building without complicated parking inside the building.

F) The Zoning Board abused its discretion by granting variances which are not supported by the findings of fact.

The Board failed to make findings of fact on basic legal issues 1) unique hardship; 2) no adverse effect on the neighborhood and 3) relief at the least modification possible. See East Torresdale Civic Association. These are errors of law which invalidate the Board's decision to grant variances. Sweeney v. ZHB of Lower Merion, (Pa. 1993); Larsen v. ZBA of Pittsburgh, (Pa. 1996); North Chestnut Hill Neighbors v. ZBA of Philadelphia, 2007 Pa. Cmwlth Lexis 368, (Pa. Cmwlth July 2007).

First, the Findings of Fact fail to identify what the unique hardship is. The facts that were put before the Zoning Board merely establish that the industrial zoning classification conflicts with the Applicant's personal desire to increase the value of the

property by pursuing residential development instead of industrial, commercial, retail or office development. The inability to maximize profit does not support the Board's finding of a variance, Township of Falls; and it is not substantial evidence to support a finding of fact. There are no findings of unnecessary hardship. There are no findings that the property cannot be used for any permitted use. There are no findings that the property has only a distressed value.

The Findings of Fact fail to find no adverse effect on the neighborhood. The Zoning Board clearly erred here as the findings of fact recite the opposition to variances because they would be detrimental to the neighborhood. Finding of Fact 15, 16 and 17. There are no findings of fact that the variances are not detrimental to the neighborhood. When the only findings of fact support denying a variance, the Board cannot use those findings of fact to support granting the variance. Rees v. ZHB of Indiana Township, 2 Pa. Commonwealth Ct. 551, 279 A.2d 354 (1971). The only findings of fact on this issue indicate that the variances would be detrimental, therefore the Board's decision is not supported by the findings of fact.

The Findings of Fact fail to explain how the variances are the least modification possible. See argument E) supra.

The critical conclusion of law in this case merely states that the applicant provided "indicia of hardship." Conclusion of Law #12. As there are no factual findings about hardship, there can be no legal finding of unnecessary hardship. Doris Terry Trust (Pa. Cmwlth. 2005). While the Zoning Board has wide discretion to find facts; they cannot grant a variance based on facts that do not exist in the record. Doris Terry Trust v. ZBA of Pittsburgh, 873 A.2d 57 (Pa. Cmwlth. 2005)("The Board members appear to have drawn on their personal knowledge of [the Applicant] and of the neighborhood, but this knowledge is not a valid substitute for evidence of record."). The court has plainly stated, "[w]ithout substantial evidence to support those crucial findings of fact, there is no evidentiary basis for the [finding of unnecessary hardship]" Township of Falls v. ZHB, at 16. The Board's 3 Rector decision is fundamentally flawed, it has no crucial findings of fact. Without findings of fact there is no basis for a variance.

The Findings of Fact also fail to address any of the statutory requirements of the grant of a variance under the Philadelphia Code. See North Chestnut Hill Neighbors v.

ZBA of Philadelphia, 2007 Pa. Cmwlth Lexis 368, (Pa. Cmwlth July 20007)(applying Phila. Code Section 14-1807(3)). The Board's findings of fact fail to find any of the elements needed to establish unnecessary hardship under the Philadelphia Code, under case law, and under the MPC. The findings of fact fail to provide facts sufficient for review of the decision of the Zoning Board decision

When findings of fact are insufficient as a matter of law, the agency decision may be overturned out of hand. WCAB v. Paris Neckware, 22 Pa Cmwlth 543, 350 A.2d 212 (1976); Melwood Corporation v. ZBA of Pittsburgh, 107 Pa.Commonwealth Ct. 246, 528 A.2d 668 (1987). Importantly, the lack of findings of fact about relevant issues does not render the record incomplete, Monaghan v. Board of School Directors of Reading School District, 152 Pa. Commw. 348, 618 A.2d 1239, 1241-42 (Pa.Cmwlth. 1992), it merely means the variance should be overturned. The record before the local agency is full and complete if there is a complete and accurate record of the testimony actually taken. Id. Given this complete record, and the clearly incorrect findings, the decision of the Zoning Board should be overturned.

G) The Board cannot grant variances on issues that were never before it.

The Applicants have suggested that the Zoning Board has somehow granted a variance from the three story height limit imposed by Phila. Code Section 14-1615. The Applicant papers clearly indicate that they were only seeking relief from the use, setback and parking provisions of 14-508. See Finding of Fact #14, see Record Applicant's "Relevant Zoning" list with Section 14-508. The Commonwealth Court recently reviewed the effect of failing to know which zoning laws apply to a property. In Doris Terry Trust v. ZBA of Pittsburgh, 873 A.2d 57 (Pa. Cmwlth. 2005) the court stated, "The burden of zoning compliance is on upon the landowner; his failure to determine the zoning requirements applicable to the construction of a building on his property cannot be the basis for establishing an unnecessary hardship." Id. at 64. Thus, the Applicant's failure to request a height variance cannot create an unnecessary hardship.

There is no mention of hardship due to the height restrictions in the record, in the finding of fact or in the conclusion of law. The Applicants have not set out the facts necessary to obtain a height variance, thus the Zoning Board cannot grant relief.

5) Relief

Wherefore, for all the above listed reasons, the Appellants request that the decision of the Philadelphia Zoning Board of Adjustment be overturned. The Appellants request that the use variance to allow residential uses in G-2 zoning district be stricken. The Appellants request that the side lot variance be denied. The Appellants request that the off street parking variance be stricken or amended to require that all required parking be provided at the MDC parking lot.

Respectfully Submitted

Henry L. Schirmer Jr., Esq.
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