

DEC 04 2007

IN THE
COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

FIRST JUDICIAL DISTRICT OF PA
USPHY: *[Signature]*

MANAYUNK NEIGHBORHOOD : COURT OF COMMON PLEAS
COUNCIL, Inc. and KEVIN SMITH : PHILADELPHIA COUNTY

Appellants

v.

ZONING BOARD OF : DECEMBER TERM, 2006
ADJUSTMENT, CITY OF : No.: 3448
PHILADELPHIA, and RECTOR :
STREET ASSOCIATES, L.P. :

Appellees/Intervenors

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PRO PROTHY
RECORDED

ORDER & OPINION

GREENSPAN, J.

DATED: December 4, 2007

Manayunk Neighborhood Council, Inc. and Kevin Smith have appealed from the November 30, 2006, decision of the Philadelphia Zoning Board of Adjustment ("Board") in which the Board granted variances to Rector Street Associates, L.P. to construct a residential addition to an historic industrial warehouse.

The relevant facts are as follows. The building at issue is a warehouse located at 3 Rector Street in the Manayunk section of Philadelphia. (N.T. 10/04/06: 3).¹ 3 Rector Street is an historic structure situated along the river and pedestrian tow path. (N.T. 10/04/06: 4). Originally a mill, the building dates back to the late 1800's. (N.T. 10/04/06: 4, 54). Today, the building is a vacant warehouse with G-2 industrial designation. (N.T. 10/04/06: 5, 39, 44, 75). G-2 industrial zoning prohibits residential

¹ N.T. refers to the notes of testimony from an October 4, 2006, hearing before the City of Philadelphia Zoning Board of Adjustment.

use. While zoned for industrial use, the building housed a plumbing and heating supply business (Labov's) from 1946 to 2001.² (N.T. 10/04/06: 4-5). Due to the combined effects of the inability to compete with large, super-store competitors and the increasing difficulties resulting from the age of the building, mounting maintenance costs and lack of loading areas for customers and deliveries, the failing business vacated the premises in 2001. (N.T. 10/04/06: 4-6, 44). The vacant building was then placed on the real-estate market where, despite the great heights of the economic real estate boom, it remained unsold for several years. (N.T. 10/04/06: 5, 28-29).

The owners of the building were unable to secure a serious purchase offer for the property, which was being sold as is. (N.T. 10/04/06: 5). Several factors contributed to the undesirability of the structure. Significant repairs would have been required in order to operate an industrial or commercial enterprise from 3 Rector Street. Even if the historic building had undergone the necessary repairs, the building still would have been unfit for modern manufacturing as the property lacks a loading dock for deliveries, parking for customers, and room for horizontal expansion. (N.T. 10/04/06: 5-6, 44).

Any debate over the building's fitness for industrial use is irrelevant as, following local and national trends, industry has not returned to Manayunk. (N.T. 10/04/06: 75). The building, and its surrounding neighborhood, is no longer suited for industry. Moreover, the building is ill-suited for a commercial business because the location has no frontage on the main street and substantial renovation would be required for a commercial or retail venture. (N.T. 10/04/06: 8). Finally, the ultimate failure of the prior

² While the Labov family owned the property and originally owned the business, the business was sold in the late 1990's. Under new ownership, the business continued to operate under the Labov family name. The new business owner relocated the business and vacated 3 Rector Street in 2001. (N.T. 10/04/06: 4-5).

commercial plumbing business further demonstrates the lack of commercial feasibility at 3 Rector Street. (N.T. 10/04/06: 5).

Under Pennsylvania law, a reviewing court must affirm an adjudication by the Board unless it finds that the adjudication is in violation of the constitutional rights of the appellant, is not in accordance with law, that statutory provisions were violated in agency proceedings, or that any finding of fact made by the agency and necessary to support its adjudication was not supported by substantial evidence. 2 Pa.C.S. § 754(b). Substantial evidence has been defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Valley View Civic Association v. Zoning Bd. of Adjustment, 462 A.2d 637, 640 (Pa. 1983); Direnzo Coal Co. v. Dep’t of General Services, 825 A.2d 773, 775 (Pa. Cmwlth. 2003).

Under Philadelphia Code §14-1802, the criteria for granting variances include a determination that a literal enforcement of the provisions would result in unnecessary hardship and that the grant of the variance would not adversely affect public health, safety or general welfare. Unnecessary hardship is found where the “physical features of the property are such that it cannot be used for a permitted purpose or that the property can be conformed for a permitted use only at a prohibitive expense.” Allegheny West Civic Council v. ZBA, City of Pittsburgh, 689 A.2d 225, 227 (Pa. 1997). To meet the hardship standard, there are multiple factors relevant for consideration, such as the prohibitive expense of developing the property without a variance, the surrounding neighborhood, the length of vacancy and condition of disrepair, and the economic feasibility of converting the property without a variance. Hertzberg v. Zoning Bd. of Adjustment of City of Pittsburgh, 721 A.2d 43, 49 (Pa. 1998). An applicant is not

required to prove that a property is valueless without a variance in order to prove unnecessary hardship. Hertzberg v. Zoning Bd. of Adjustment of City of Pittsburgh, 721 A.2d 43, 48 (Pa. 1998). Nor is it mandatory for an applicant to prove that it would be impossible to develop a property in conformity with the applicable zoning ordinance in order to prove unnecessary hardship. Talkish v. Zoning Hearing Bd. of Harborcreek Twp., 738 A.2d 50, 52 (1999). Hardship can be established where the applicant demonstrates that the property has no value or distressed value if used only for one of the permitted purposes. Eighteenth & Rittenhouse Assoc. v. Zoning Bd. of Adjustment, 26 Pa. Cmwlth. 554, 557, 364 A.2d 973, 976 (1976).

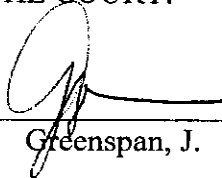
Here, the physical features of the property, namely its state of disrepair, large size, historical significance, lack of loading area, lack of parking and location are such that the warehouse cannot be used for a permitted G-2 purpose without unnecessary hardship. The facility at 3 Rector Street could conform to G-2 permitted uses, but only at a prohibitive cost as conformity would require extensive renovation. Conformity would also require substantial investment in industry or business while local economic trends indicate that such permitted G-2 uses are no longer viable ventures in Manayunk. Moreover, to wait until a buyer for such a limited G-2 use appears would leave this property vacant and hence subject to the many ills that befall vacant properties. Clearly the neighborhood and community would suffer in such an event.

At the hearing below, the property owners established unnecessary hardship by presenting substantial evidence to the Board. Only after consideration of the substantial evidence, the Board granted the variances. The Board recognized that the "as is" sale of the structure presented unnecessary hardship and that the Manayunk neighborhood trend

was against demolition and toward preservation of otherwise unusable historic sites by conversion to residential uses. As such, the Board granted variances allowing for a conversion from G-2 industrial use to residential use.³ The Board's findings of unnecessary hardship were supported by substantial evidence. As such, the adjudication of the Board is affirmed.

For the foregoing reasons, this Court affirms the November 30, 2006, decision of the Board.

BY THE COURT:



Greenspan, J.

³ Appellants argue that appellees failed to obtain a height variance, however, appellants waived this issue when they did not make this argument before the Board. Issues that are not raised at the board level are waived and may not be addressed on appeal. Sherwood v. Elgart, 383 Pa. 110, 115, 117 A.2d 899, 901 (1955); Myers v. State College Zoning Hearing Board, 108 Pa.Cmwlth. 624, 627, 530 A.2d 526, 527 (1987). In any event, given the fact that the appellees requested that the Board grant "any other variances, use certificates or special use permits that are necessary," in their original variance application, the claim is meritless; the term "any other variance" necessary includes a height variance.

CERTIFICATE OF SERVICE

I, Delores Bates, hereby certify that a true and correct copy of the foregoing order/verdict/or opinion was served on the below listed parties in the manner indicated below in accordance with the Rules of Civil Procedure.

Re: Manayunk Neighborhood Council Inc et al. v. Zoning Board of Adjustments
December Term, 2006, No. 3448

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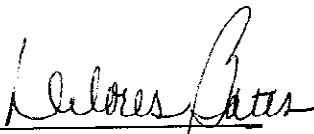
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Delores Bates
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