STATEMENT OF QUESTIONS PRESENTED

I. WHEN A COMMON PLEAS COURT RECEIVES A COMPLETE RECORD OF THE PROCEEDING BELOW, MAY THE COMMON PLEAS COURT MAKE NEW FINDINGS OF FACT?

ANSWERED IN THE AFFIRMATIVE BY THE TRIAL COURT'S ACTIONS.

II. WHEN A LOCAL AGENCY FAILS TO MAKE SPECIFIC FINDINGS OF FACT ON NECESSARY ISSUES, MAY A VARIANCE BE AFFIRMED BASED ON NEW FINDINGS OF FACT??

ANSWERED IN THE AFFIRMATIVE BY THE TRIAL COURT'S ACTIONS.

III. WHEN THE RECORD LACKS ANY SUPPORT FOR A VARIANCE, MAY THE COMMONWEALTH COURT OVERTURN THE VARIANCES WITHOUT THE NEED FOR A REMAND?

NOT ANSWERED BY THE TRIAL COURT OR AGENY

STATEMENT OF THE CASE

PROCEDURAL HISTORY OF THE CASE

This statutory appeal comes to the Commonwealth Court as an appeal of the order and opinion of Philadelphia Common Pleas Court affirming the decision of the Philadelphia Zoning Board of Adjustment to grant variance relief.

OFFICIAL DECISIONS APPEALED

a. The decision of Common Pleas Court was authored by Judge Jane Greenspan.

b. The decision of the Zoning Board of Adjustment was determined by David L. Auspitz, Eleanor M. Dezzi, William E. Hall, Judith Eden and Samuel Staten, Jr.

FINDINGS OF FACT AND CONCLUSIONS OF LAW BY THE BOARD

a. On April 28, 2006, Rector Street Associates L.P. ("Rector") presented an application for a zoning and use permit to the Philadelphia Dept. of Licenses and Inspections. RR at 30(a).

b. The zoning and use application was refused on 6/11/2006. RR at 31(a).

c. Rector then filed a petition of appeal to the Philadelphia Zoning Board of Adjustment ("Board") on June 16, 2006. RR at 32(a).

HEARING EXHIBITS

a. At the hearing, Rector presented an agreement of sale. ("agreement") Zoning Board FF # 14.

b. The agreement is dated February 7, 2005. RR at 5(a).

c. Paragraph 4(f) the represents and warrants that the property can be used under the present applicable zoning for any use permitted, RR at 13(a), under G-2 Industrial Zoning, RR at 26(a).

d. Paragraph 6 (a) states that the representations and warranties in Paragraph 4 are conditions of the agreement. RR at 18(a).

e. Paragraph 13 states that the Seller shall continue to maintain the property RR at 22(a) - 23(a).

f. Paragraph 18 of the agreement states that the property shall remain vacant and without tenants until settlement. RR at 25(a).

g. Paragraph 18 further states that Seller, Raymond Labov, retained the right to continue the business of storing plumbing supplies on the property. Id.

h. At the hearing, Rector presented an affidavit of expenses from property owner Raymond Labov. Zoning Board FF # 14

i. At the hearing, Rector included an exhibit identified as "relevant Philadelphia Code Sections (15-508)". Zoning Board FF # 14

j. Rector did not refer to, identify, argue or cite Philadelphia Code Section 14-1615 during the hearing. October 4, 2006 Hearing Transcript.

THE VARIANCE

a. On November 30, 2006, the Zoning Board granted variance relief. ZBA Order.

THE BOARD'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

a. The Zoning Board made nineteen findings of fact. Zoning Board FF #1-#19.

b. Findings of Fact 1 through 13 are an inventory of the documents which the zoning board received prior to the hearing.

c. Finding of Fact 14 recites an inventory of the documents which the Board received from Rector on the day of the hearing.

d. Findings of Fact 15 through 17 recite testimony of neighbors who opposed the grant of a variance.

e. Finding of Fact 18 notes the receipt by the Board of an amended plan from Rector.

f. Finding of Fact 19 notes that the Zoning Board granted the variance.

g. There are no findings of fact regarding testimony by Rector.

h. There are no findings of fact regarding testimony by Rector's witnesses.

i. There is no finding of an unnecessary hardship.

j. There is no finding of an unique hardship.

k. There is no finding of no adverse effect on the neighborhood.

l. There is no finding regarding the minimum variances necessary.

m. The Board also authored Conclusions of Law in support of its decision.

n. Conclusions of Law 3 is a typographical error and duplicates Conclusion of law 5.

o. Conclusions of law 4, 5, and 6 recite three sections of the Philadelphia Code, 14-508(4)(c)(2), 14-508(3)(b) and 14-508(9), which the board considered granting variance relief from.

HEARING TESTIMONY

a. The full October 4, 2006 Zoning Board hearing was transcribed.

b. The Board cites nine pages of hearing testimony in the findings of fact.

c. One page is cited for the date of the hearing F.F. 12, RR 46(a).

d. Five pages are cited regarding architect and variance opponent John Hunter. F.F. 17, N.T. p48-52. 55(a)-59(a)

e. One page is cited for variance opponent Jane Glenn. F.F. 16, RR at 60(a).

f. Two pages are cited on behalf of variance opponent Joy Griffin, F.F. 15, RR at 61(a)-62(a).

g. The Board does not cite any hearing testimony

APPEAL TO COMMON PLEAS

a. Upon appeal to the Common Pleas Court, the Common Pleas Court did not take new evidence. Docket.

b. The Common Pleas Court did not allow new legal arguments. Docket.

c. The Common Pleas Court affirmed the Board, Order and Opinion.

d. The Common Pleas Court did not cite to any findings of fact made by the Board. Order and Opinion.

e. The Common Pleas Court made new findings of fact. Order and Opinion.

f. The Common Pleas Court's finding of facts cited to the unsworn opening statements of Rector's attorney, RR 47(a), 48(a), 49(a), 50(a), and to the unsworn opinions of the Zoning Board Members RR at 51(a), 52(a), 53(a), 54(a).

SUMMARY OF ARGUMENT

I. The Common Pleas Court exceeded the scope of appellate review by making findings of fact and therefore Common Pleas must be reversed.

II. The Board failed to make necessary findings of fact and therefore the Board's grant of variances must be reversed.

III. When the record lacks any support for a variance, the Commonwealth Court may overturn the variances without the need for a remand.

ARGUMENT

I. THE COMMON PLEAS COURT EXCEEDED THE SCOPE OF APPELLATE REVIEW BY MAKING FIDINGS OF FACT AND THEREFORE COMMON PLEAS MUST BE REVERSED.

On October 4, 2006, the Philadelphia Zoning Board of Adjustment ("Board") held a hearing on the application of Rector Street Associates ("Rector") for variance relief regarding the property known as 3 Rector Street. (Transcript Page 1, RR at 46). The Board heard live testimony from several fact witnesses for and against the variances along with legal arguments from Rector's attorney and opposing arguments from Manayunk Neighborhood Counsel's attorney. The Board granted the variances.

At the hearing, Rector was represented by counsel, and argued that the property suffered a zoning hardship because it was not suitable for any use permitted under the applicable zoning. Rector further argued that the property suffered a zoning hardship because the Seller, Mr. Labov, could no longer use the property for his plumbing supply business. At the hearing, MNC presented the testimony of, among others, John Hunter, Jane Glenn and Joy Griffin, all of whom were opposed to the zoning variance. The Board granted the variances requested by Rector. MNC and Kevin Smith appealed the decision to Common Pleas Court.

Upon appeal the Board issued findings of fact and conclusions of law. The Board failed to support the grant of the variance with findings of fact. The findings of fact contain no statements about unnecessary hardship, no statements of harm to the public, no mention of the minimum variance, and no statement of permitted uses of the property. None of the testimony of Rector, or its attorney, or its witnesses was found credible by the Board and used in the Board's findings of fact. The testimony of witnesses who opposed the variance, Mr. Hunter, Ms. Glenn and Ms. Griffin was found credible and used in the Board's findings of fact.

A. When a Common Pleas Court reviews a complete record it may not make new findings of fact.

The Local Agency Law, 2 Pa.C.S. 751 et seq., establishes the framework for reviewing the decisions of local agencies such as the Philadelphia Zoning Board of Adjustment. Under 2 Pa.C.S. 754(b) a reviewing court presented with a complete record of the Board hearing is to exercise appellate review, which requires analyzing the Board's decision for violations of constitutional rights, errors of law, violations of agency procedure, and considering whether necessary findings of fact are supported by substantial evidence. 2 Pa.C.S. 754(b).

The record of the hearing is complete if there is an accurate representation of the testimony heard at the hearing. Retirement Bd. v. Colville, 852 A.2d 445 (Pa. Cmwlth 2004). The record is not incomplete simply because the applicant failed to request all the relief it could have requested or because the applicant failed to present enough evidence at the hearing Id. If the Appellant has sufficient facts to frame their appeal and the Court has a record to rule on, the record is complete and the Court may not remand the case to hear testimony which was not presented. Id. at 451. In Retirement Board, the Commonwealth Court reviewed a decision of the Common Pleas Court regarding an agency appeal, when one party sought to introduce evidence to Common Pleas which was not introduced at the agency hearing. Commonwealth Court held that where the record accurately reflects the testimony presented at the agency hearing, the record is complete and the new testimony would be excluded. In the Rector Street case, a full and complete record of the testimony given at the October 4, 2006 Board hearing was taken,

When a court receives a complete record of the Board hearing, the court is required to exercise a limited scope of review. The court reviews the Board's decision to determine if the Board has committed an error of law or made findings of fact which are not supported by

substantial evidence. The reviewing court may not make its own determinations of the credibility of the testimony in the record and the reviewing court may not make new findings of fact. A court undertaking appellate review upon a complete record of the hearing below is focused first and foremost on the findings of fact provided by the Board. The reviewing Court is not entitled to bypass the Board's findings of fact and comb the documents and transcripts for facts that the court believes; this constitutes an improper substitution of judgment. The point of appellate review is to evaluate whether the decision the Board actually made was within the legal guidelines, not to decide what else the Board ought to have found. East Torresdale Civic Ass'n v. Zoning Bd. of Adjustment, 639 A.2d 446 (Pa. 1994)

The Local Agency Law requires two types of review, review for an error of law, and review for an abuse of discretion. When a Court reviews a Board decision under the error of law standard, the Court looks to see whether the Board has made the necessary findings of fact. Quite simply, the court reviews the decision to see if any findings of fact missing. When a Court applies the substantial evidence test to the Board's findings, the Court reviews the decision to see if any findings of fact should be removed because they are not based on the facts in the record, as may happen if the Board assumes facts not of record, Doris Terry Trust v. Zoning Bd. of Adjustment, 873 A.2d 57 (Pa. Cmwlth. 2005), or if the Board relies on unsworn statements, North Chestnut Hill Neighbors v. Zoning Bd. of Adjustment, 928 A.2d 418 (Pa. Cmwlth 2007) or an attorney's opening statements. Rees v. Zoning Hearing Bd., 315 A.2d 317 (Pa Cmwlth 1974). A large number of findings does not guarantee that the Board has made all of the required findings of fact. See Township. of E. Caln v. Zoning Hearing Bd. , 915 A.2d 1249 (Pa. Cmwlth 2007)(including well over fifty findings of fact).

In the case presented to this court, there are errors of law because the Board failed to make any of the necessary finding of fact on unnecessary hardship, public detriment, minimum variance, suitability of the property for other uses, or the owners inability to market the property for sale.

B. The Common Pleas Court erred as a matter of law by making new findings of fact and by substituting its judgment for that of the fact finder.

The Common Pleas Court heard the case on a complete record, but affirmed the Board after making new findings of fact. The Common Pleas Court was presented with a decision containing several errors of law, which the Common Pleas addressed by adding reviewing the transcript and making new findings of fact. However, because the Common Pleas Court was reviewing a complete record, the scope of appellate review set forth in 2 Pa.C.S. 754(b) does not allow the Common Pleas court to attempt to fix errors of law by making new factual findings.

The Common Pleas Court's findings are also flawed because they improperly assume evidence that was never before the board. The court may not rely on an attorney's opening statements as facts. Rees v. Zoning Hearing Bd., 315 A.2d 317 (Pa Cmwlth 1974). In North Chestnut Hill the this Court noted that an attorney's unsworn statements are not facts. North Chestnut Hill Neighbors v. Zoning Bd. of Adjustment, 928 A.2d 418 (Pa. Cmwlth 2007). In Doris Terry Trust v. Zoning Bd. of Adjustment, 873 A.2d 57 (Pa. Cmwlth. 2005), the court noted that it was improper for the Board to assume facts not of record and thereby shift the burden of proof from the applicant to the objectors. When the Common Pleas attempted to repair the errors of law by making new findings of fact, however the court erred by taking facts from the personal opinions of Zoning Board members, Doris Terry Trust v. Zoning Bd. of Adjustment, 873 A.2d 57 (Pa. Cmwlth. 2005) (facts assumed by Board are not proper support for variance), and the

opening arguments of Rector's attorney, North Chestnut Hill n.8; Rees at 320 (citations to opening statement of attorney are not factual evidence) from the transcript to create new facts. The trial court thus erred but relying on the Board's opinions, the attorney's argument and thus improperly assumed facts not of record.

A court conducting proper appellate review under the Local Agency Law, 2 Pa.C.S. 751 et seq., does not look directly to the record and make new findings of fact. Tucker v. Zoning Bd. of Adjustment, 437 A.2d 499 (Pa. Commw 1981), Rees v. Zoning Hearing Bd., 315 A.2d 317 (Pa Cmwlth 1974). Where a Court of Common Pleas has overstepped the bounds of appellate review and made its own findings of fact, the reviewing court must focus on the Board's findings, not the trial courts. Melwood Corp. v. Zoning Bd. of Adjustment, 528 A.2d 668 (Pa. Cmwlth 1987), Tucker.

II. THE BOARD FAILED TO MAKE NECESSARY FINDINGS OF FACT AND THEREFORE THE BOARD'S GRANT OF VARIANCES MUST BE REVERSED

A. The Board did not make the necessary findings of fact because there is no evidence to support the decision of the board.

The Board conducted a full and complete hearing but the board and the trial court were both unable to cite specific competent testimony from fact witnesses to support the decision to grant variances. The reason for the lack of relevant evidence is the complete lack of competent testimony. The bulk of the testimony on behalf of Rector was simply argument by their attorney, which, as the court in Rees **specifically noted,** is not sufficient to establish facts. It is well settled that an attorney's unsworn **statements are not evidence.** North Chestnut Hill. Thus, a board or court may not cite an **attorney's opening statement as factual evidence.** Rees.

The Board did not mention any testimony by Rector in support of the variance. The Board did not mention any testimony by Rector's experts or witnesses. The Board was unable to

cite any specific factual testimony which supported the grant of the variance. In contrast, the Board did discuss the testimony of witnesses who were opposed to the variance. The Board cited the testimony of John Hunter, FF 15, Jane Glenn FF 16, and Joy Griffin. FF 17. Given the complete lack of facts in support of the variance, the only conclusion is that the Board and the trial court were swayed by the arguments, and then constructed a decision based on assumed facts rather than the facts which were properly supported in the record. Rector's arguments about the variance are contradicted by the testimony of the only fact witnesses the Board found credible and cited.

The fundamental factual issue in this case is that Rector's arguments are contradicted by their own exhibits and legal documents. Rector presented the Board with an agreement of sale that states the property is suitable for many permitted uses under G-2 zoning. Rector's legal arguments that the property could not be used for a permitted use is quite simply, insufficient as evidence to contradict the facts established by Rector' own legal documents. The property could be use for other permitted use. The agreement of sale also states that Mr. Labov retained the right to continue the plumbing supply storage at the 3 Rector Street property. Although Rector argued strenuously that the property could not be used for plumbing supply business, the facts submitted to the Board clearly state that Mr. Labov retained the right to operate the plumbing supply business from this very building. Clearly, if the property owner expressly reserved the right to continue the business, he had not given up the business as suggested by Rector's attorney.

The arguments presented by Rector' are just that - legal argument, asserting that development is good; but this is no substitute for competent evidence about unnecessary hardship. Rees. Although Rector swayed the Board with their arguments, and the Board then

assumed facts, Rector failed to present the necessary factual witnesses and hard evidence, therefore the Board was unable to support its decision with finding with facts.

B. The Board did not make any of the necessary findings of fact

The Zoning Board failed to make the necessary findings of fact to support the variances it granted to Rector. The Board failed to make ANY findings of fact which directly support of the variance. Necessary findings of fact for a variance in Philadelphia include: unique hardship, no detriment to public and minimum relief. East Torresdale Civic Ass'n v. Zoning Bd. of Adjustment, 639 A.2d 446 (Pa. 1994). Additional findings of facts are needed based on the requirements of the ordinance. Township. of E. Caln v. Zoning Hearing Bd., 915 A.2d 1249 (Pa. Cmwlth 2007)(use variance needs showing regarding other possible uses)

The list of necessary findings of fact varies with the type of variances that are requested by the applicant for the variance. The fundamental requirements for a variance are stated in somewhat different terms by different courts, because each municipal ordinance tends to use somewhat different language to define what must be shown to obtain a variance. In Philadelphia, a long list of criteria are presented in Section 14-1802 of the Philadelphia Code, however for analytic purposes, the Supreme Court in East Torresdale Civic Ass'n v. Zoning Bd. of Adjustment, 639 A.2d 446 (Pa. 1994) has pruned the thick of statutory law back to a fundamental three prong test, a unique hardship, no detriment to the public and a minimum variance. In East Torresdale, the Board granted a variance which the Common Pleas affirmed. The Commonwealth Court reversed. The Supreme Court reinstated the variance stating that the appellate court could not substitute its judgment for the Board, and stating that the criteria for a zoning variance are 1) unique hardship, 2) no adverse effect on the public and 3) a minimum variance requirement. East Torresdale at 447. The Commonwealth Court has recently reviewed

the three pronged test from East Torresdale to in North Chestnut Hill, where the three prong test of East Torresdale is upheld and applied with a finding that the Board erred when it failed to consider all three prongs of the East Torresdale test. In North Chestnut Hill, the Board issued a variance, the Common Pleas affirmed and Commonwealth Court vacated the decision based on the Board's failure to make a necessary finding of fact regarding the element of the minimum variance. Here, the Board repeated the earlier failure to make this same any findings of fact regarding the minimum variance.

The East Torresdale elements are not the only necessary findings of fact, for certain other types of variances. In Township of East Caln, the Zoning Board granted a variance, and made at least fifty findings of fact. The Common Pleas Court affirmed the variance. Upon review, the Commonwealth Court reversed the Board finding that despite the voluminous findings of fact, the applicant had not established a very important element of a use variance, the fact that the property could not be used for a permitted use. "Showing that a lot can be used in a more profitable fashion is insufficient; there must be no permitted use to which the land can feasibly be put before a use variance is granted." Township of East Caln.

Clearly, a finding that the property could not be used for a permitted use is a necessary finding of fact for the 3 Rector variances. However, the Board did not make this crucial finding of fact. This omission is rather telling. The likely reason for this omission is simple: the property at 3 Rector Street does not have an unnecessary hardship, it can be use for many permitted uses, and Rector itself has presented this fact. A direct statement that the property can be used under the present zoning for any permitted use removes the authority of the Board to find unnecessary hardship. As Rector itself submitted this fact to the Board, there is little point in further discussion. Clearly, once the Board received an admission that the property **could** be

used as is for permitted uses, the Board could not truthfully find that the property **could not** be used for permitted uses.

Another arguments advanced by Rector was that the failure to sell the property established the building had a hardship, in effect arguing that it was valueless as zoned. The sole basis for this argument was a one page affidavit from Mr. Labov. However, this document is actually nothing more than a notarized expense report about the property, it fails to mention, let alone establish an unnecessary hardship. While an inability to sell a property be used to establish an unnecessary hardship, Rector has not met the test to establish hardship by a failure to sell which is set forth in Rees v. ZNB of Indiana Township, 315 A.2d 317 (Cmwlth. 1974). Rees held that a statement from the owner of the property that they were unable to sell was not sufficient evidence to establish hardship. Rees v. ZNB of Indiana Township at 320. The Court found that the test for establishing a hardship by a failure to sell requires specific evidence of an (1) active, (2) prolonged and (3) specific testing of the marketability, which should be presented by (4) a disinterested real estate broker. Rees v. ZNB of Indiana Township at 320. Before the Board, Rector's evidence about marketing the property consisted solely of argument from their attorney. The only direct factual evidence that any attempt was made to market the property is a passing reference to a tattered for sale sign in the corner of a photo. Rector resented no evidence about an active, prolonged and specific testing of the market. Rector did not present any fact witness testimony, and did not present a disinterested Real Estate Broker as needed. There is no evidence about any specific measures taken to market the property, there are no listing agreements, no offers, nothing to establish any effort to sell aside from the tattered and faded for sale sign. As the Board heard no witness testimony on the attempt to sell, the Board made no specific findings of fact about the attempts to sell. There is no testimony on even the most basic

aspects of selling the property. There is no evidence about what potential buyers felt the property was worth, whether the price was reduced or what the asking price was!. Clearly, Rector failed to present evidence or prove the facts needed to meet the test set out in Rees v. ZHB of Indian Township, therefore the Board could not find a hardship by failure to sell.

C. The failure to make necessary findings of fact is an error of law which requires reversal.

Where a Board granted a variance but failed to address a required provision of the zoning ordinance, the variance is an error of law. Sweeney v. Zoning Hearing Bd., 626 A.2d 1147 (Pa. 1993). In Sweeney, the Commonwealth Court held that the Board was required, under the law, to make specific findings of fact to support the determination of unnecessary hardship. The Sweeney court held that the Board made an error of law when it failed to make a finding of fact regarding a necessary finding of fact, the uniqueness of the hardship.

Here, the Board conduced a hearing and heard live testimony. The Board made findings of fact, however the Board's findings of fact only cite nine (9) pages of testimony from the entire hearing. The Board cites page 1 of the transcript to establish the date of the hearing. FF. 12. The only testimony which the board finds credible is testimony of witness who opposed to the grant of the variance. The Board cites pages 68 and 69 for the testimony of Joy Griffin that project would impose a hardship on the neighborhood. FF.15 The Board cites page 58 for the testimony of Jane Glenn that the building would blockade public enjoyment of the river. FF. 16. The Board cites pages 48, 49, 50, 51 and 52 for the testimony of John Hunter who opposed the application and noted problems with the design, footprint and parking. FF 17.

Thus, the only testimony which the board found credible is from three witnesses who testified that the variances were against the public health safety and welfare. Thus, where the

Board did make findings of fact relating to public detriment, these findings are that the neighbors opposed the variances because of public detriment. Findings of Fact #15, #16, and #17. Thus the only findings of fact which the Board specifically made, are evidence against granting the variances.

The Board is required to make specific findings of fact to grant a variance, however it made no such findings of fact in this case. At the most basic level, the Board is required to meet the three prong test set forth in East Torresdale and make findings regarding the unique hardship, findings regarding a lack of harm to the public, and findings regarding the minimum variance. The Board clearly has not done this. Under the East Torresdale three prong test, the Board's grant of the variances fails because the Board did not find a unique hardship, the Board did not make a finding regarding the minimum variance.

A reviewing court must consider whether the Board committed an error of law and failed to make necessary findings of fact. Here, the Board totally failed to issue findings of fact to support the variance. Under East Torresdale, the Board must make findings on a minimum of three issues, (1) unique hardship, (2) no detriment to the public and (3) minimum variance needed for use.

The Board did not make a finding regarding the first prong, that the property suffered and unnecessary hardship. This should come as no surprise because the Board was presented an agreement of sale which stated the property could be used for many uses permitted by the zoning ordinance. The Board did not make any finding regarding detriment to the public, however the board did rely on the statements of three witnesses, all of whom testified about the detriment that the variances would create to the public. The Board did not make a finding about the minimum variance need to use the property. This is not surprising, as the Board was presented with an

agreement of sale which stated that Mr. Labov retained the right to continue the plumbing supply business, and clearly the right to continuing the existing permitted use is a reasonable use.

The failure to make the necessary findings should result in a reversal of the variances. There is no finding of fact on the issue of unique hardship. In Sweeney v. Zoning Hearing Bd., 626 A.2d 1147 (Pa. 1993), the Commonwealth Court overturned a variance because the Board failed to make the necessary finding of fact regarding unique hardship. There is no finding of fact on the issue of minimum variance. In North Chestnut Hill the Commonwealth Court overturned a variance because the Board failed to make the necessary finding of fact regarding the minimum variance.

III. WHEN THE RECORD LACKS ANY SUPPORT FOR A VARIANCE, THE COMMONWEALTH COURT MAY OVERTURN THE VARIANCES WITHOUT THE NEED FOR A REMAND

Commonwealth court may properly exercise appellate jurisdiction and reverse the variances without remand in two situations: Where the record is totally devoid of evidence upon which the Board could make findings to support a variance. Tucker; or where the record contains competent facts which only support the denial of the variance. Melwood Corp. v. Zoning Bd. of Adjustment, 528 A.2d 668 (Pa. Cmwlth 1987).

Under Tucker, the Commonwealth Court need not remand because the record does not contain any competent evidence about unnecessary hardship, the minimum variance, or suitability for permitted uses or hardship due to failure to sell. Although there are pages and pages of discussion and argument about these facts, the applicant produced no witnesses with first hand knowledge.

Under Melwood Corp. v. Zoning Bd. of Adjustment, 528 A.2d 668 (Pa. Cmwlth 1987), the Commonwealth Court need not remand because the only facts of record indicate that the

property is suitable for permitted uses; the agreement of sale expressly states that the property is suitable for the uses permitted in G-2 zoning, and the agreement of sale indicates that the Seller, Mr. Labov felt the property was still suitable for the plumbing supply business as he expressly retained the right to continue that use up until settlement.

At the hearing Rector submitted several documents including an agreement of sale. FF. 14. The agreement of sale states in Paragraph 4(f) that the property may be used for any use permitted under the applicable zoning. RR 13(a). The agreement of sale further indicated at Paragraph 6(a) that the representation and warranty in 4(a) was effective as legal condition. RR 18(a). The agreement of sale also expressly states in Paragraph 18 that the property could continue to be used for Mr. Labov's plumbing supply storage business up until the time of settlement. RR 25(a)-26(a).

The Commonwealth Court should reverse the variances without remand.

The Commonwealth Court has exercised reversal without remand option in Melwood and Tucker because under appellate review the Board cannot take new evidence, thus if the Board did not make a necessary finding of fact because it lacked evidence, the Board cannot make the necessary finding of fact, and there is no reason to remand.

Normally the failure to make a necessary finding of fact will require a remanded to the Board, because the Board is the only fact-finder in appellate review. However, under the factual situation of this case, a lack complete lack of necessary findings by the zoning board and improper findings by the Common Plèas Court, authorizes the court to revoke the variances without the necessity of a remand.

In Melwood the court succinctly framed the situation with the findings of fact in this way: "The problem we are now presented with is that we have no findings of fact *properly*

before us on the issue of whether Melwood was entitled to a special exception. As we have noted the Board made no specific findings on this issue and the trial court improperly made such findings. Under normal circumstances we would remand this case...." The Melwood Court went on to find that, because the factual record in the case only supported one legal conclusion, the court could directly reverse the variances without need for a remand. This case is exactly like Melwood in all significant respects. The only findings of fact based on testimony are that the variance would harm the public interest, which requires a denial of the variance.

This case is also analogous to Tucker, where the Board did not make specific findings of fact, the Common Pleas Court affirmed and the Commonwealth Court reversed without remand. The factual issue in Tucker was whether home with a carriage house had an unnecessary hardship. The Tucker court held that there was no evidence that the property was not suitable for the uses for which it was presently zoned. The lack of necessary findings of fact required reversal, but a remand was not needed because the record was entirely lacking in evidence which the Board could base findings of fact to support the variance. This case is exactly like Tucker. The record contains an agreement of sale submitted by Rector which states that it is a condition of the agreement of sale that the property could be used for many permitted uses under the applicable zoning. Significantly, the Pennsylvania Supreme Court held in West Torresdale Civic Ass'n v. Zoning Bd. of djustment, 576 A.2d 352 (Pa. 1988) that legal conditions in an agreement of sale were binding on the reviewing court. The court was required to interpret the agreement as written, the Court could not assume facts to contradicted what the agreement stated on its face.

Here, the agreement of sale contains two crucial factual representations. First, that the property may be used for any use permitted by the zoning ordinance. RR at 13(a). Second, that Mr. Labov has the right to continue using the building for the business of storing plumbing

supplies until the time of settlement. RR at 25(a). These are the facts submitted by the applicant, Rector. The Board and Common Pleas Court erred by relying on the non-factual legal arguments by Rector's attorney that the property was useless, when the factual evidence submitted to the Board proves just the opposite.

CONCLUSION

WHEREFORE, for all the above reasons, the Appellants respectfully request that this Honorable Court reverse the decision of the Philadelphia Zoning Board of Adjustment and reverse the order of the Common Pleas Court without leave to remand.

RESPECTFULLY SUBMITTED

HENRY L. SCHIRMER
ID. No. 92090
315 North Main Street
P.O. Box 247
Telford, Pennsylvania 18969
(215) 530-8274

Attorney for Appellants,
Manayunk Neighborhood Council, Inc.