IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 157 C.D. 2008

MANAYUNK NEIGHBORHOOD COUNCIL, INC. AND KEVIN SMITH

v.

ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA

And

CITY OF PHILADELPHIA

And

RECTOR STREET ASSOCIATES, L.P.

BRIEF OF APPELLEE RECTOR STREET ASSOCIATES, L.P.

On Appeal from the Order and Opinion Entered December 12, 2007, by the Court of Common Pleas of Philadelphia County, Pennsylvania, December Term, 2006, Docket Number 3448.

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Where, as here, the Court of Common Pleas has not taken any additional evidence, this Court's review is limited to determining if the zoning board manifestly abused its discretion or committed an error of law. *Allegheny W. Civic Council, Inc. v. Zoning Bd. of Adjustment*, 547 Pa. 163, 166, 689 A.2d 225, 227 (1997). An abuse of discretion may be found only if the board's findings are not supported by substantial evidence. *Larsen v. Zoning Bd. of Adjustment,* 543 Pa. 415, 421, 672 A.2d 286, 288-89 (1996). "Substantial evidence" is relevant evidence that a reasonable person might accept as adequate to support the board's conclusions. *Valley View Civic Ass'n v. Zoning Bd. of Adjustment*, 501 Pa. 550, 555, 462 A.2d 637, 640 (1983). Thus, where the zoning board's findings of fact are supported by substantial record evidence, and its conclusions of law are without error, this Court is constrained to affirm the zoning board's decision.

Furthermore, the zoning board is the fact finder, with exclusive power to decide matters of credibility and weight to be afforded the evidence. *Nettleton v. Zoning Bd. of Adjustment*, 574 Pa. 45, 58, 828 A.2d 1033, 1041 n.10 (2003); *Manayunk Neighborhood Council v. Zoning Bd. of Adjustment*, 815 A.2d 652, 658 (Pa. Commw. Ct. 2002), *appeal denied*, 574 Pa. 777, 833 A.2d 145 (2003). A reviewing court may not substitute its judgment for that of the zoning board, the local agency with daily responsibility for overseeing the application of the zoning code in a particular municipality. *Zoning Hearing Bd. v. Board of Supervisors*, 804 A.2d 1274, 1278 (Pa. Commw. Ct. 2002). All evidence presented at the zoning board must be viewed in the light most favorable to the parties in whose favor the board ruled and the Court must credit all reasonable inferences that can be drawn from the testimony in favor of the appellees. *Lewis v. Civil Serv. Comm'n*, 518 Pa. 170, 173, 542 A.2d 519, 522 (1988).

COUNTER STATEMENT OF QUESTIONS INVOLVED

I. Did the Zoning Board of Adjustment Properly Grant Variances for a Residential Development on a Property Zoned for Industrial Use Where the Applicant Proved That The Property Was Unusable for Industrial or Commercial Use?

Answered in the affirmative by the court below.

Suggested Answer: Yes.

II. Did the Trial Court Enter New Findings of Fact?

Not answered by the court below.

Suggested Answer: No.

III. Were the Findings of the Zoning Board Insufficient In Order to Warrant Reversal of the Zoning Board's Decision?

Not answered by the court below.

Suggested Answer: No.

COUNTER STATEMENT OF THE CASE

This appeal arises out of the November 30, 2006 decision of the Philadelphia Zoning Board of Adjustment (the "Zoning Board") granting variances to Appellee, Rector Street Associates, L.P. ("Appellee"), to construct a five-story roof addition to a vacant and obsolete but historic warehouse structure in the Manayunk area of the City of Philadelphia, located at 3 Rector Street, Philadelphia, PA (the "Property").

Form of Action and Procedural History

Appellee obtained a formal agreement to purchase the Property from the Owner, Raymond Labov in 2004. The Property was historic, and under the jurisdiction of the Philadelphia Historic Commission (the "Commission"). Appellee sought approval from the Commission for the development, and after several revisions, obtained an "in concept" approval for the addition on February 10, 2006 from the Commission. The vote of the Commission was unanimous. Appellee then obtained final approval for the development proposal from the Commission on June 6, 2006. The vote of the Commission was again unanimous. The Appellants, a local community group and its President, appealed the final approval decision of the Commission to the Philadelphia Board of Building Standards, which unanimously affirmed the decision of the Commission after a public hearing. The Appellants, again unhappy with the result, appealed the decision of the Board of Building Standards to the Philadelphia Court of Common Pleas, which also affirmed the decision of the Commission.[1]

Concurrently to the above appeals from the decision of the Commission, Appellee moved forward with the proposal and presented plans for the addition to the Philadelphia Department of Licenses and Inspections, which issued a Zoning Refusal on June 11, 2006 for the project. Appellee appealed the Refusal to the Zoning Board, which held a public hearing on October 4,

[1] The Appellants did not appeal that decision to this Court.

2006. After a full hearing, the Zoning Board unanimously granted the requested variances for the project. Appellants again took an appeal from the Zoning Board's decision to the Court of Common Pleas.

After briefing and oral argument, the Honorable Jane C. Greenspan of the Court of Common Pleas affirmed the decision of the Zoning Board. Her opinion is attached hereto as Addendum 1. Appellants appealed her decision to this honorable Court.

Statement of Facts

The Property is zoned G-2 Industrial, one of the heaviest industrial zoning districts in the City. The uses permitted in the G-2 Industrial District include lumber and coal yards, machine shops, heavy manufacturing (of items such as guns and military ordinance, cars and locomotives, *inter alia*), trucking and railroad and freight terminals, etc. Most, if not all, of these uses are incompatible with a small commercial and residential community such as Manayunk. The Property is located on an infrequently traveled small street, off of the main business corridor of Main Street in Manayunk. It also sits along the historic and scenic "tow path"[2] and the Manayunk Canal. See Supplemental Reproduced Record ("S.R.R."), 29a.[3] The industrial zoning of the Property is an anomaly, since there is no history of industrial use for this Property for at least the last sixty (60) years, dating as far back to the 1940s, when it was first operated as a plumbing supply business by the current owner, Raymond Labov ("Labov").

Labov and his family operated a plumbing supply business from the location beginning in 1946. By the late 1980s it was clear to Labov that the building on the Property, an old two story warehouse structure, was not large enough or modern enough for the business to survive due to changing market conditions in which smaller businesses like the business operated by Labov

[2] The Manayunk "tow path" is considered a scenic bike and jogging trial.
[3] Appellants never filed a Designation of the Contents of the Reproduced Record pursuant to Rule 2154 of the Rules of Appellate Procedure, and the contents of their Reproduced Record were completely lacking the critical evidence in the case. Thus, Appellee has submitted concurrently with this Brief a Supplemental Reproduced Record.

could not compete with larger volume, lower priced stores (i.e. Home Depot). S.R.R. 33a-34a.

Thus, in the early 1990s the plumbing business was sold to Victor Croes, who continued to operate it from the Property under the Labov name. In 2001 however, Croes relocated the plumbing business away from the Property since he found it increasingly difficult to remain there due to the building's age, mounting maintenance costs and lack of loading area and parking for customers and deliveries, and isolated location. Unable to attract any replacement tenants, Labov ultimately decided to place the Property on the market for sale. S.R.R. 33a-34a.

Between 2001 and early 2004, Labov was unable to obtain any serious offers for the Property and get it under an agreement of sale. While interest in property in Manayunk was high for residential development, Labov found that there was little interest in the Property for commercial use (or industrial use) since it lacks frontage on Main Street, which is extremely important for retail, commercial and restaurant users. The Property and structure also have no capacity for off-street parking. The cost of converting the structure, which was historically designated, to a viable commercial or industrial use was deemed impractical since any of these possible users would demand massive exterior (and interior) changes in order to even consider using the Property, which also lacked any accessory parking. Such changes would involve punching holes in the roof and walls in order to provide windows and skylights, and demolishing walls to accommodate loading areas and parking, which would compromise the integrity of the historic structure. S.R.R. 34a.

Despite the real estate broker for the Property's best efforts, no legitimate offer was made until the late summer/fall 2004 – when Labov entered into negotiations with representatives of Appellee to acquire the Property and an agreement of sale was executed in February 2005. The agreement of sale was made contingent on Appellee's ability to obtain all necessary approvals for a certain number of residential units.

At first, Appellee made a proposal to the community and the Commission for the complete demolition of the existing building and development of new residential units on the Property. Due to opposition from the Commission and other considerations, Appellee scrapped the proposed full demolition of the building, retained a new architecture firm, and began work on a revised plan that saved the existing historic building, incorporated the addition concept, and provided as much parking as possible given the constraints of the building and Property (the "Project"). The revised plan involved a five-story addition to the structure on the Property in order to convert it into a condominium building. The revised plan was prepared with input from the Philadelphia Preservation Alliance.

On February 10, 2006, the Commission approved the Project "in concept." The Commission's deliberations during the February 2006 hearing reflected the truism regarding the Property, i.e., that the developers were faced with certain economic and physical constraints regarding the Property, and that the proposed Project was a good compromise between preserving the historic elements and allowing the Property to be developed feasibly and economically. S.R.R. 37a-40a.

Appellee returned to the Commission for final approval for the five-story addition and on June 9, 2006, the Commission voted *unanimously* to give final approval for the Project. At the June 9, 2006 meeting of the Commission, Appellant Kevin Smith stated that the project "was the most promising design he had seen to date". S.R.R. 45a. Then Councilman Michael A. Nutter testified in support of the proposal. John Gallery, Executive Director of the Preservation Alliance agreed that the Project should be approved and mentioned that Appellee "made a sincere effort to accommodate the recommendations [of the preservation community] and work with the building." S.R.R. 44a-45a. However, despite the unanimous decision of the Commission, and the support of the Preservation Alliance, the Appellants appealed the decision

of the Commission to the Board of Building Standards, which unanimously affirmed the Commission. Undeterred, the Appellants appealed the Board of Building Standards to the Philadelphia Court of Common Pleas, which also upheld the decision of the Board of Building Standards and the Commission. Appellants did not appeal that decision to this Court.

After obtaining the unanimous decision of the Commission in June of 2006 for the Project, Appellee presented plans to the Department of Licenses & Inspections, which issued a Zoning Refusal dated June 11, 2006. S.R.R. 49a. The Project was refused for the use change, since the residential use was prohibited in the G-2 Industrial district. The other refusals were dimensional in nature, one for side yard (9" provided where 6' required),[4] and the other for proposed parking (34 spaces required where 21 provided).[5] *Id.*

A hearing was scheduled for October 4, 2006 before the Zoning Board. Appellee presented numerous exhibits to the Board, including the above-cited affidavit of owner Raymond Labov, showing the lack of industrial use for the property dating back to the 1940's, and the lack of feasibility of the commercial use for the Property as demonstrated by the failure of the commercial business at the Property and the physical constraints of the building. S.R.R. 33a-34a. The affidavit of Raymond Labov also stated that since 2001, the Property had sustained an economic loss of $34,119 per year for a total loss of $170,594. *Id.*

During the testimony presented to the Zoning Board, Appellant Kevin Smith was challenged by the Zoning Board members regarding previous statements he made in support for the concept of saving the historic building by building over it. He stated:

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[4] L&I considers any piece of land, no matter how slim, a "side yard." Once a "side yard" is proposed, it must be 6 feet in width. See Zoning Code Section 14-508(4)(c)(.2). Thus, a nine-inch sliver of land on one side of the Property was considered a "side yard" and refused.

[5] This refusal was based on the parking requirements of the G-2 Industrial Zoning District. The Zoning Code, however, require new residential construction to have one off street parking space for each unit, so the Project complied with the residential zoning parking requirement.

> By Kevin Smith: At the Board of Building Standards I did suggest that they could consider, rather than demolishing the building, modifying it. *We suggested some form of expansion of overbuild might be preferable to demolition.* But I have to say, in no way is that a pre-approval of an obligation to approve whatever—
> Board Member Sam Staten Jr.: They're talking to the president of the association.
> Mr. Smith: What's that?
> Mr. Staten: They're talking to the president of the association. If you make a suggestion that you are putting out—
> Mr. Smith: And in fact, we have never rejected overbuild or modification of the building on some sort of principle that the building cannot be touched.
> Chairman David L. Auspitz: So why are you here today?

(Emphasis Added) S.R.R. 53a-54a. Mr. Smith then went on to contradict himself by stating that even though he was not opposed to an "overbuild" residential concept as proposed by Appellee, he thought that the Property could be reused for commercial uses.[6] S.R.R. 54a.

Appellee also presented the testimony of John Gallery, Executive Director of the Philadelphia Preservation Alliance, with whom Appellee worked closely with in developing the scope and extent of the Project in order to obtain approvals from the Commission. Mr. Gallery, an ardent and well-respected preservationist and community leader, testified as follows:

> John Gallery: I always like to see buildings reused. And some of you know my own professional background, in addition to being a preservationist, an economic developer, I look very carefully anytime a developer says: It's not economically feasible to preserve a historic building. I'm very suspicious of those statements.
>
> In this case, I really feel that the information that was presented early on to the Historical Commission was quite clear that it actually met the standards that are in the Ordinance; that is, you have to demonstrate that you've tried to sell it. You have to demonstrate that you tried to lease it. You just can't say: It's impossible.
>
> And I was strongly convinced *that this building did not have the opportunity to be preserved in its current form*, and that's why we

[6] Of course, this position ignores the fact that a business had failed at the property several years ago and there was no interest in the building for commercial use.

> were very interested when the developer decided to take this approach. The developers will tell you I have looked at this project with them many times. I have told them what I have disliked about previous designs, so has the Historical Commission. *These people have bent over backwards to try to design the best project that could design that keeps as much of this historic integrity as possible.*
>
> I would also like to point out that this is on the canal. It's on the towpath. It will bring residential development into the area. It will really make a contribution to making this part of Manayunk a really important public recreational area. *I think residential use here is vastly superior to any industrial expansion of the adjacent manufacturer or something of that use.* It just has an opportunity to really make a strong contribution to the neighborhood, and would really strongly endorse the applications that have been made for the variances. I think it is an important project to go ahead.

(Emphasis added) S.R.R. 55a. Mr. Gallery's objective testimony recognized and emphasized the hardship to this Property, more specifically, that industrial use was no longer viable and residential use was the highest and best use of the property. Even the Zoning Board Chairman concurred, as evidenced by the following statements:

> Chairman Auspitz: I know exactly where Mr. Smith is coming from. But on the other hand, I think we're at a point where we're all realizing that this kind of thing [the Project] is a use for this. You're not going to get them to leave it just as it is, or somebody would have bought this thing a long time ago. During the height of the economic real estate boom, nobody touched this piece, you follow me, except for this group.

S.R.R. 56a. Chairman Auspitz later acknowledged the compelling evidence of hardship to the Property when he stated as follows in response to the protestants' testimony that industrial use was feasible at the Property:

> Chairman Auspitz: As a manufacturer, I just put this on the table in case the Judge reads this, there's a functional obsolescence, and we don't even have to go through this. *If you're trying to tell me this is a good building for a current manufacturing operation, which I do, there's no loading zone, there's no parking, there's no nothing, other than a great view.*

(Emphasis added) S.R.R. 60a.

Appellee also presented the testimony of Julia Chapman, then Chief of Staff for Councilman Michael A. Nutter, the 4th District Councilman for the area who at that time had recently resigned to run for Mayor. She stated, with great knowledge of the Manayunk area, as follows:

> Julia Chapman: It's zoned industrial. *As the Board knows, industry is not going to come back to that part of Manayunk.* We are seeing a lot of residential conversion. And what I wanted to clarify is the reason that our office and the Councilman, at the time, had supported residential over other uses is it's known residential creates the least amount of trip generation. This is right off of Main Street. It's a challenge to get down Rector Street. It dead ends right there at the canal and tow path. So I think that this kind of use is going to have the least amount of impact on Main Street, other than a restaurant or a retail-type establishment. I would also note I drive down Main Street almost every night on my way home. The retail is not thriving right now. It is challenged, and we're seeing a lot of retail closing, and we're seeing restaurants with liquor licenses come in. And that's been a renewed battle that we have been having with the neighborhood council and voting those kind of changes and conversions. So I think this is the best reuse for this building at this location.

(Emphasis added) S.R.R. 68a. After Ms. Chapman testified, Paula Brumbelow, the designated representative for the Philadelphia Planning Commission, testified in support of the Project, emphasizing that the developer "diligently" worked with the Planning Commission on the Project. S.R.R. 68a.

The Zoning Board, after hearing the compelling hardship testimony and the overwhelming support from the local District Councilman, the Preservation Alliance, the Manayunk Development Corporation (S.R.R. 68a) and the Planning Commission, *inter alia*, unanimously voted to grant the requested variances on November 20, 2006. The Appellants appealed the Zoning Board's decision to the Court of Common Pleas.

Briefs were filed and oral argument was offered before the Court of Common Pleas. On December 4, 2007, the Honorable Jane Cutler Greenspan affirmed the decision of the Zoning

Board. Judge Greenspan found that the Appellee had proven unnecessary hardship. She stated in her Opinion:

> 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 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.

See Addendum 1, p. 4.

Despite the fact that the Appellants had previously lost a total of four (4) administrative agency hearings, and two (2) Court of Common Pleas appeals regarding this Project, Appellants stubbornly soldiered on and appealed the December 4, 2007 decision of Judge Greenspan to this Honorable Court. For the reasons that follow, this Court must deny the Appellants' isolated appeal and affirm the Zoning Board and Judge Greenspan.

SUMMARY OF ARGUMENT

This appeal is the fourth official appeal by the Appellants from their numerous unsuccessful protests of this development project. Due to its economic feasibility and respect for historic preservation concepts, the Project has earned the support of the following organizations and officials: then Councilman Michael A. Nutter (currently the Mayor of Philadelphia), the Philadelphia Preservation Alliance, the Manayunk Development Corporation, and the Philadelphia Planning Commission. None of the above organizations or officials offer their support lightly. The Project has also received unanimous approvals from the following boards and agencies: the Philadelphia Zoning Board, the Philadelphia Historical Commission, and the Philadelphia Board of Building Standards. Despite this overwhelming support for the Project, the Appellants continue to pursue isolated and misguided appeals in an attempt to prevent this Project from occurring. Their appeal must be denied.

In this case, the Zoning Board, and Judge Greenspan, properly found that the evidence proved hardship to the Property. The Property is zoned G-2 Industrial, and has not been used for an industrial use since 1946. Neutral and objective witnesses testified credibly that industry was not coming back to Manayunk, and that existing retail was struggling. The Project also protected the historic fabric of the structure and area, preserving an otherwise obsolete and deteriorating historic warehouse property, while developing it feasibly and economically. Furthermore, industrial use was not appropriate because of the aging facilities in the building, which would have needed major upgrades in order to function properly for industrial, or even retail use. Both the Zoning Board and the Court of Common Pleas thus appropriately found hardship.

With regard to the findings of the Zoning Board, while the Appellee would agree that they are not well drafted, they state clearly that the Appellee met its evidentiary burden. Furthermore, Courts of this Commonwealth rely on the contents of the record in reviewing the

lower court's decision and the sufficiency of the findings will not require a reversal where the record supports the Board's decision. The record in this matter is clearly sufficient to support the Zoning Board's decision.

Lastly, Appellee's legal argument regarding provisions of the agreement of sale between Appellee and the owner has been waived since it was not raised before the Zoning Board or the Court below. Additionally, the provisions of the agreement of sale are not statements by the Appellees, and are not relevant to the Project or the hardship to the Property.

ARGUMENT

I. The Zoning Board Properly Granted a Use Variance Since Appellee Proved That The Property Was Subject to Unnecessary Hardship.

In order to obtain a use variance, a zoning applicant must demonstrate unnecessary hardship. Unnecessary hardship is generally found when "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 cost." *Allegheny West Civic Council v. ZBA, City of Pittsburgh*, 689 A.2d 225, 227 (1997). However, it is not necessary to prove that a property is valueless without variances in order to prove hardship. *Hertzberg v. Zoning Board of Pittsburgh*, 721 A.2d 43 (1998). Valuelessness is all but one factor to consider. Other relevant factors include the prohibitive costs of developing the property without the variance, the configuration of the property, the surrounding uses, the state of disrepair, the length of vacancy, and the economic feasibility or the inability to covert or use the property. *Hertzberg v. Zoning Board of Pittsburgh*, 721 A.2d 43, 48-49 (Pa. 1998). Additionally, land need not be "one of kind" to be unique and peculiar in order to prove hardship. *Halberstadt v. Borough of Nazareth*, 687 A.2d 371, 373 (Pa. 1997). Furthermore, it is not necessary to prove that it would be impossible to develop a property in conformity with the applicable zoning ordinance. *Talkish v. Zoning Hearing Board of Harborcreek Township*, 738 A.2d 50 (1999).

But most importantly, hardship can be proven where the applicant can demonstrate that the property in question has practically no value or distress value if used for a permitted purpose. *Eighteenth & Rittenhouse Associates v. Zoning Board of Adjustment*, 26 Pa. Cmwlth. 554, 364 A.2d 973 (1976). The evidence submitted by Appellee to the Zoning Board regarding the Property proved exactly that.

In this case, since the 1940's until the present time *the Property was not used for any*

industrial use. Additionally, the Property became vacant in 2001 after the most recent business failed, and the owners received no interest in an industrial use (or commercial use) while the Property was up for sale for over three years. S.R.R. 33a-34a. If a property has no history of use consistent with its zoning for over sixty-five (65) years, it is safe to assume that the underlying zoning is no longer viable. Ms. Chapman's testimony also highlighted this fact in acknowledging that industry "is not coming back to Manayunk." S.R.R. 68a. Appellants' own exhibits acknowledged this fact. In the *Philadelphia Inquirer* article submitted by the Appellants to the Zoning Board regarding one of the lone remaining industrial uses in Manayunk, Richard Apex, it was stated:

> When you think of Manayunk these days, you think of smart retail shops, upscale restaurants, and a lively main drag where parking is often hard to find. You don't think of heavy industry in this Philadelphia Neighborhood anymore. That would be a throwback to its days as a blue-collar factory town on the Schuykill.

S.R.R. 82a-83a. Appellants' article proves exactly the point, that heavy industry is a "throw back" and it is no longer viable in Manayunk. Indeed, many of the older Manayunk industrial structures along the Schuykill River and along the Manayunk Canal have been converted to residential development (for instance-Venice Island residential development). Additionally, the Property is certainly not compatible with industrial use, since it lacks parking and loading areas, two things vital to a successful industrial business. Furthermore, the Property's history of never having been used for industry since at least the 1940's compounds this fact. Thus, clearly Appellee proved hardship since it proved unequivocally that an industrial use is not viable at the Property.

The Zoning Board, as the finder of fact, was in the best position to judge credibility and make factual determinations, and the courts should be reluctant to overturn them, having not heard the evidence first hand. *Cohen v. Zoning Board of Adjustment*, 276 A.2d 352 (Pa. Cmwlth.

1971). Since the Zoning Board properly found hardship from the testimony and documentary evidence, this Board must allow this decision to stand on appeal.

II. Appellants' Argument That the Court of Common Pleas Improperly Made Additional Findings of Fact Can Be Dismissed Outright Since the Court Below Never Made Any New Findings of Fact.

Appellants make an incomplete and confusing argument that the Court of Common Pleas improperly made additional findings of fact. This argument is baffling, since the Court of Common Pleas *never issued any new findings of fact.* A review of the docket entries in the Court of Common Pleas do not indicate any filing by Judge Greenspan other than her Order and Opinion dated December 4, 2007. R.R. 1a-4a. The only findings of fact entered in the court below were the Findings of Fact and Conclusions of Law of the Zoning Board (the "Findings"), which were filed on April 30, 2007. R.R. 3a. There are no other "findings" entered. Furthermore, a simple review of Judge Greenspan's Opinion shows clearly that no new findings were included in the Opinion. See Addendum 1. The findings that Appellants complain of simply do not exist.

Appellants' argument regarding these phantom findings is also incomplete, since they do not point to any actual alleged new findings by Judge Greenspan in their brief. They merely make the statement that Judge Greenspan made new findings of fact, and state that making new findings of fact is error. Then, Appellants leave the argument alone *and never specifically point to these alleged new findings.* Thus, Appellants' argument is both incomplete and not supported by the record and docket entries in this case. Thus, this argument can be dismissed outright.

III. While the Zoning Board's Findings Were Poorly Drafted, There Was Substantial Evidence Presented to the Zoning Board to Support the Variances.

Appellants argue that the Findings are inadequate to support the grant of variances in this matter. Admittedly, the Board's Findings recite some of the testimony at the hearing and do not

provide a lot of insight into their decision. However, Courts of this Commonwealth have placed a very relaxed standard on the form and content of the Zoning Board's findings. Indeed, many decisions have upheld the general principle that it is the *factual and evidentiary record* that is determinative of the sufficiency of the Board's decision rather than the written findings. See *Ad Hoc Committee for the Betterment of Port Richmond v. Zoning Board of Adjustment*, 518 A.2d 614 (Pa. Cmwlth. 1986) (Commonwealth Court found that, even though Board's decision was merely a summary of the testimony, it's decision was sufficient for appellate review). In the case of *Silar v. Zoning Board of Adjustment of Spring Garden Township*, 407 A.2d 74 (Pa. Cmwlth. 1979), the Commonwealth Court held that the failure of a zoning board to consider and make findings on every facet of hardship did not render their decision inadequate. *Silar*, 407 A.2d at 76. The *Silar* Court held that as long as the factual record supports the Board's decision, the decision will be upheld even where the Board's findings failed to fully address the legal principles of hardship. *Id.*

In this matter, it is agreed that the Board's findings do not provide a full and detailed insight into their decision. However, it is clear from the case law that the Zoning Board's findings do not have to fully address their reasoning and finding of hardship, so long as the record supports their decision. In this case the record was clearly sufficient to support the granting of the variance.

First, Appellee demonstrated through the testimony of the owner Raymond Labov that the Property was used for non-industrial use since 1946, was vacant since 2001, and was listed for sale for over three years without any interest in commercial or industrial use. S.R.R. 33a-34a. This evidence alone is proof of unnecessary hardship.[7] But in addition to this compelling

[7] Recent history supports Appellee's argument that the property was not suitable for industrial or commercial use since Mr. Labov continues to grant extensions to the Appellee on the agreement of sale since no other buyers are interested in the Property.

hardship testimony, Appellee presented the testimony of Julia Chapman, Chief of Staff to then Councilman Michael A. Nutter (and current Mayor of Philadelphia), who offered testimony that industry "is not coming back to Manayunk," and that the existing retail in Manayunk was struggling. S.R.R. 68a. Also, John Gallery testified at the Zoning Board that he felt that he "was strongly convinced that this building did not have the opportunity to be preserved in its current form." S.R.R. 55a. Mr. Gallery also praised the efforts of the Appellee in trying to save the historic fabric of the Property while developing it economically and feasibly. *Id.* These witnesses were unbiased and neutral witnesses who were very knowledgeable about both the building on the Property and the Manayunk neighborhood, and they both agreed that the Property was unlikely to survive solely as a warehouse, and that industrial and commercial use was not appropriate for the Property. There is thus plenty of sufficient evidence that supports the decision of the Zoning Board.

Yet even though the Findings are not well written, Conclusion of Law Number 12 states clearly that the Board decided, "after a review of the record and the consideration of the evidence presented", that the applicant "met its burden in support of the variance." That Conclusion of Law also states that the applicant has "provided ample indicia of hardship." As argued *supra*, the evidence presented to and considered by the Zoning Board fully supported its finding of hardship and entitlement to the variances. Thus, this Court may not reverse the Board's decision for failure to make certain specific technical findings, since their overall decision was correct and supported by the factual record.

Appellants would have this Court reverse the Zoning Board's decision not based on the adequacy of the record, but based on alleged inadequacies of the technical findings of the Zoning Board. This is understandable since Appellants would rather avoid the compelling evidence of hardship presented to the Zoning Board. Appellants gloss over this evidence or ignore it in their

brief, and understandably so. When neutral, credible and respected witnesses like John Gallery of the Preservation Alliance and Julia Chapman of the Councilperson's office agree that the property is unusable as zoned, it is hard for the Appellants to ask this court to focus on the record and testimony before the Zoning Board. However, this Court must look to the testimony of these witnesses, the owner's testimony and the factual record before it, which is filled with evidence supporting hardship to the Property. In reviewing this record, it is clear that the Zoning Board's decision must be upheld.

IV. Appellants' Argument Regarding Alleged Statements in the Agreement of Sale is Waived Since it was Not Raised at the Zoning Board or the Court Below, and the Argument is Frivolous Since the Provisions Were Not Statements of Appellee but Sellers' Warranties.

Appellants make a thoroughly irrelevant, misleading and unsupported argument in their Brief at pages 22-23, 24, 27. They cite the agreement of sale (the "Agreement") for the Property between Mr. Labov and Appellee, arguing that certain sections of the Agreement indicate that the Property is usable for industrial use. First, this argument is waived since Appellants failed to raise this argument at the Zoning Board, and also failed to raise it at the Court of Common Pleas. It is well-settled that any legal issues, which are not raised by a party at the Zoning Board level, are not preserved for appeal and are deemed waived. See *Myers v. State College Zoning Hearing Board*, 530 A.2d 526 (Pa. Cmwlth. 1987) (Property owners' vested rights theory was rejected on appeal since it was not presented to the Zoning Board and was thus waived); *Moses v. Zoning Hearing Board of Borough of Dormont*, 487 A.2d 481 (Pa. Cmwlth. 1985) (Matters not raised at the hearing below are not permitted to be considered on appeal); *Pfeffer v. Hopewell Township*, 431 A.2d 1149 (Pa. Cmwlth. 1981) (Defense that use was a permitted use was waived by property owner who failed to raise it to the local agency). Yet even if not waived, Appellants' argument is frivolous because the provisions they are referring to in the Agreement are part of

the Sellers Warranties, which are not attributable to the Appellee, and they are also not contrary to the hardship evidence presented by Appellee.

The provisions of the Agreement that Appellants are referring to-Section 4(f)-state only that the Property's G-2 Industrial zoning classification allows/permits industrial use at the Property. R.R. 13a-14a. This is admitted, and in no way contradicts Appellee's arguments regarding hardship. The problem with Appellants' argument is that industrial use is no longer viable at the Property. Appellants also argue that Section 18 of the Agreement-in which Mr. Labov reserved the right to continue to store plumbing supplies at the Property-means that the Property was still viable as a plumbing supply business. This is not a logical conclusion to reach from this provision. Moreover, this Section cannot be read to mean that the plumbing supply business is still viable since 1) Mr. Labov is selling the Property; 2) no one has operated a plumbing supply business at the property since the business folded in 2001; and 3) the mere storing of plumbing supplies does not mean the plumbing business is operating. In fact, the property is vacant and no business is transacted there. There is also no evidence in the record that Mr. Labov ever took advantage of this provision. This argument is thus unsupported by the record and again does not disprove the hardship evidence presented by the Appellee. Therefore, this argument must be dismissed outright by this Court.

V. This Court Should Not Disturb the Zoning Board's Decision on Appeal.

Courts reviewing local zoning decisions must be guided by the principle that zoning decisions are best made by the local zoning boards, as they are in the best position to make decisions on zoning matters. This Court has stated:

> The Court acts as judicial overseer, drawing the limits beyond which local regulation may not go, but loathing to interfere, within those limits, with the discretion of local governing bodies. Every court reviewing a decision of a local zoning board should demonstrate modest reluctance in trying to measure and assess the

> multitude of factors and considerations which combine to effect the final decision of such board. Where no additional testimony was received in judicial proceeding, both the lower court and this court must exercise self-restraint as to substituting our opinions far removed from the particular zoning hearing for the well-considered decision of the local officials. (citations omitted)

Cohen v. Zoning Board of Adjustment of Philadelphia, 276 A.2d 352, 354-55 (Pa. Cmwlth. 1971). In this matter, the Zoning Board weighed the evidence presented and determined that the use variance requested was justified. Judge Greenspan agreed. This Court should thus be reluctant to interfere with both of these well-reasoned decisions, which were both supported by substantial evidence.

CONCLUSION

Appellants have unsuccessfully protested this Project before three administrative agencies and two Common Pleas Court judges. The Project, through considerable efforts and concessions by the Appellee, has earned the support of ardent preservationists, urban planners, development organizations and elected officials. Only the isolated Appellants have failed to admit to the tremendous benefits offered by this Project. Since Appellee proved through substantial evidence (which the Zoning Board and the Court below found credible) that the Property suffered from hardship, and Appellee respectfully requests that this Court affirm the decision of the Court of Common Pleas and the Zoning Board, and allow this exciting and beneficial development to move forward finally.

Respectfully submitted,

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Dated: May 23, 2008

ADDENDUM 1

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

MANAYUNK NEIGHBORHOOD COUNCIL, Inc. and KEVIN SMITH	:	**COURT OF COMMON PLEAS PHILADELPHIA COUNTY**
Appellants	:	
v.	:	
ZONING BOARD OF ADJUSTMENT, CITY OF PHILADELPHIA, and RECTOR STREET ASSOCIATES, L.P.	:	**DECEMBER TERM, 2006 No.: 3448**
Appellees/Intervenors	:	

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.

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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, Richard C. DeMarco, certify that on May 23, 2008 I mailed, by first class mail, two copies of the foregoing Brief upon the following parties:

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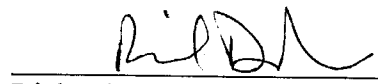

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