

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Manayunk Neighborhood Council, Inc. and Kevin Smith, Appellants :
v. : No. 157 C.D. 2008
Zoning Board of Adjustment, City of Philadelphia, and Rector Street Associates, L.P. : Argued: November 11, 2008

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: December 18, 2008

Manayunk Neighborhood Council and Kevin Smith¹ (hereinafter collectively referred to as “MNC”) appeal from an order of the Court of Common Pleas of Philadelphia County (trial court) which affirms the decision of the Philadelphia Zoning Board of Adjustment (Board) granting certain variances to Rector Street Associates, L.P. (Rector), to construct a residential addition to an historic industrial warehouse. We reverse.

The record in this matter shows that Rector has entered into an agreement to buy the subject property from the current owner, Raymond S. LaBov,

¹ Kevin Smith is President of the Manayunk Neighborhood Council. See Supplemental Reproduced Record (S.R.R.) at 53a.

which is contingent upon Rector being able to obtain all necessary approvals to develop the property for multiple residential uses. The property is zoned G-2 Industrial² and is currently vacant.

On April 28, 2006, Rector applied to the Department of Licenses and Inspection for a zoning permit and/or use regulation permit to allow the erection of a 5 story addition above an existing 2 story building (plus basement) to be used for a multi-family dwelling. The multi-family dwelling would have 22 single family dwelling units on floors 1 through 6 with accessory storage on each floor, 15 accessory parking spaces to be located at the basement level with 6 additional accessory parking spaces on the first level, a lobby to be included at the first floor, erection of a roof deck atop the 6th floor, newly constructed 7th floor addition housing elevator penthouse, and balconies at floors 2 through 6.

The application was refused on June 11, 2006 by the Department because the proposed use does not conform to the use designated for a G-2 Industrial District as governed by Section 14-508 of the Philadelphia Zoning Code. Specifically, that dwellings other than for a caretaker, watchman or custodian on the same lot as the main use are not permitted in the G-2 Industrial District; the required side yard under the Philadelphia Zoning Code is 6 feet minimum and the proposed side yard is 9 inches; and the use requires accessory parking of 34 spaces and the proposed accessory parking is only 21 spaces.

Rector appealed the denial to the Board on June 16, 2006. In its appeal, Rector stated that a literal enforcement of the Philadelphia Zoning Code would impose an unnecessary hardship and the limited demolition would not

² Section 14-508 of the Philadelphia Zoning Code governs the G-2 Industrial District. See Reproduced Record (R.R.) at 33a. Section 14-508 lists numerous uses that are permitted in

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adversely affect the public health, safety, welfare or traffic in the area. Thus, Rector requested variance relief. A hearing on Rector's appeal and request for variance relief was scheduled before the Board for October 4, 2006.

Prior to the October 4, 2006 hearing on Rector's appeal, MNC sent the Board a letter dated August 13, 2006 outlining potential uses of the property and also sent an August 23, 2006 letter of opposition with exhibits. On the day of the hearing, a letter in support of the variance application was submitted to the Board by the Fourth Council District.

At the hearing, Rector submitted an exhibit package into the record which included, *inter alia*: (1) photographs of the property and surroundings and interior; (2) Agreement of Sale; (3) Color Renderings; (4) Zoning Plan and Elevations; (5) Floor plans, Zoning Map/Arial Photos; (6) relevant Zoning Code Sections; (7) Hardship Affidavit of Property Owner, Raymond LaBov; (8) Letter of Support from City Council Fourth District to Board of Building Standards dated July 20, 2006; (9) August 22, 2006 Support Letter of Manayunk Development Corporation; (10) August 21, 2006 Support letter of the Preservation Alliance; (11) Historical Commission Approval Letter and Minutes dated June 21, 2006 and February 24, 2006; and (12) August 22, 2006 Manayunk Development Corporation parking availability letter.

The following individuals testified in favor of Rector's application: (1) David Waxman, a principal of Rector; (2) Julia Chapman, Chief of Staff for the Fourth Council District; (3) Jonathan Broh, project architect; (4) Bob Swarbrick, representative of the Manayunk Development Corporation; and (5) John Gallery,

the G-2 Industrial District.

executive director of the Preservation Alliance. Kevin Smith and neighbors Joy Griffin, John Hunter, and Jane Glenn, testified in opposition to the application.

By decision dated November 30, 2006, the Board granted Rector's application. In its decision, the Board set forth findings which consisted mainly of the variance relief being requested by Rector, the procedural history, a list of the exhibits submitted into the record, and a brief summary of the neighbors' testimony in opposition to the application. In its conclusions of law, the Board set forth the applicable sections of the Philadelphia Zoning Code, applicable principles of law, and the following statement:

After a review of the record and the consideration of the evidence presented, the Zoning Board finds that the Applicant [Rector] has met its burden in support of the variance. Granting a variance in the instant matter would not create an overuse of the property and overall not pose a threat to the health, safety and welfare of nearby residents in contravention . . . [of the Zoning Code]. Applicant has provided ample indicia of hardship. Therefore, the Zoning Permit and/or Use Registration Permit is granted.

Board Opinion at 6.

MNC appealed the Board's decision to the trial court which affirmed. In its decision, the trial court set forth certain facts that were not contained in the Board's decision. The trial court concluded that Rector established unnecessary hardship by presenting substantial evidence to the Board and that only after consideration of this substantial evidence did the Board grant the requested variance relief. This appeal followed.³

³ In an appeal from the grant or denial of a zoning variance where, as here, the trial court has not taken any additional evidence, this Court's scope of review is limited to a determination of whether the zoning hearing board committed an error of law or abused its discretion. Hill

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Herein, MNC presents the following issues on appeal:

1. Whether the trial court is permitted to make new findings of fact when it has received a complete record of the proceedings before the Board;
2. Whether a variance may be affirmed based on new findings of fact where the Board failed to make specific findings of fact on necessary issues; and
3. Whether this Court may overturn the variances without the need for a remand where the record lacks any support for a variance.

In order to qualify for a variance, an applicant must establish that (1) an unnecessary hardship stemming from unique physical characteristics or conditions will result if the variance is denied; (2) because of such physical circumstances or condition, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and a variance is necessary to enable the reasonable use of the property; (3) the hardship has not been created by the applicant; (4) granting the variance will not alter the essential character of the neighborhood nor be detrimental to the public welfare; and (5) the variance sought is the minimum variance that will afford relief. Ruddy v. Lower Southampton Township Zoning Hearing Board, 669 A.2d 1051 (Pa. Cmwlth. 1995), petition for allowance of appeal denied, 546 Pa. 651, 683 A.2d 887 (1996).

District Project Area Committee, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 638 A.2d 278 (Pa. Cmwlth.), petition for allowance of appeal denied, 538 Pa. 629, 646 A.2d 1182 (1994). An abuse of discretion will only be found where the zoning board's findings are not supported by substantial evidence. Id. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Teazers, Inc. v. Zoning Board of Adjustment of the City of Philadelphia, 682 A.2d 856 (Pa. Cmwlth. 1996).

An applicant seeking a variance bears a heavy burden of proof. Polonsky v. Zoning Hearing Board of Mount Lebanon, 590 A.2d 1388 (Pa. Cmwlth. 1991). The showing of unnecessary hardship is an indispensable requirement to the granting of a variance, and often the most difficult element to establish. Jacobs v. Philadelphia Zoning Board of Adjustment, 273 A.2d 746 (Pa. Cmwlth. 1971). To show unnecessary hardship, an applicant must prove that either (1) the physical characteristics of the property are such that it could not in any case be used for any permitted purpose or that it could only be arranged for such purposes at prohibitive expense, or (2) the characteristics of the property are such that the lot has either no value or only distress value for any purpose permitted by ordinance. Laurento v. Zoning Hearing Board, 638 A.2d 437 (Pa. Cmwlth. 1994). The applicant must show that the hardship is unique or peculiar to the property as distinguished from a hardship arising from the impact of zoning regulations on the entire district. Id.

The reasons for granting a variance must be substantial, serious, and compelling. Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983). Variances should be granted sparingly and only under exceptional circumstances. O'Neill v. Zoning Board of Adjustment, 434 Pa. 331, 254 A.2d 12 (1969). A variance should not be granted simply because such a grant would permit the owner to obtain a greater profit from the use of the property. A.R.E. Lehigh Valley Partners v. Zoning Hearing Board of Upper Macungie Township, 590 A.2d 842 (Pa. Cmwlth. 1991). Mere economic hardship is insufficient to justify a variance. Hill District Project Area Committee, Inc.

In support of its appeal, MNC first argues that the trial court improperly made findings of fact after the Board failed to support the grant of the variance with its own findings of fact. MNC contends that the Board's findings

contain no statements about unnecessary hardship, harm to the public, minimum variance and permitted uses of the property. MNC argues that a full and complete hearing was conducted by the Board on October 4, 2006; therefore, the trial court was prohibited from making its own findings based on that record. In doing so, MNC contends, the trial court exceeded its scope of review. MNC argues further that the trial court erred by relying on Rector's attorney's unsworn statements as support for its findings of fact.

Second, MNC argues that it is clear that the Board failed to make necessary findings of fact regarding unique hardship, public detriment, and minimum variance; therefore, its decision must be reversed. Moreover, there is no evidence that would support the necessary findings. MNC contends that the bulk of the testimony on behalf of Rector was simply argument by their attorney which is insufficient to establish facts. An attorney's unsworn statements are not evidence. MNC argues that it is clear that the Board and the trial court were swayed by argument and then constructed their decisions based on argument not evidence. As such, the trial court's decision affirming the Board's grant of the variances must be reversed as the Board's decision is not supported by substantial evidence.

Finally, MNC contends that this Court may overturn the Board's decision without a remand because the record in this matter clearly contains facts which only support the denial of a variance. MNC argues that Rector simply failed to present any witnesses with first hand knowledge or other evidence to support the grant of a variance.

Upon review of the record in this case, we agree with MNC that the trial court improperly made findings of fact. The facts set forth in the trial court's decision were gleaned from the hearing transcript and mostly were based on the

statements of Rector's attorney. Since the trial court did not take any additional evidence subsequent to the Board's decision, the trial court's scope of review was limited to determining whether the Board committed a manifest abuse of discretion or an error of law in granting the variance. As noted herein, an abuse of discretion will only be found where the Board's findings are not supported by substantial evidence. Hill District Project Area Committee, Inc.

By gleaning its own facts from the record to support the Board's decision, the trial court clearly exceeded its scope of review. However, because the trial court did not take any additional evidence, the foregoing scope of review is the same one that must apply to this Court's review of the Board's decision. See East Torresdale Civic Association v. Zoning Board of Adjustment of Philadelphia County, 536 Pa. 322, 639 A.2d 446 (1994) (Setting forth proper scope of review of zoning board decisions). Therefore, in the interest of judicial economy, we decline to reverse the trial court's decision on the basis that it exceeded its scope of review and will review the Board's decision accordingly.

Initially, we note that MNC is correct that the Board's findings are lacking in detail. While the Board did include the applicable sections of the Philadelphia Zoning Code and principles of law governing variance relief in its decision, the Board did not set forth detailed findings applying the foregoing to the facts or evidence presented in this matter. As stated previously herein, the Board only made one brief conclusory finding of fact in granting Rector's application. However, as the record fails to support the grant of the Rector's variance application by the Board in this matter regardless of the lack of detailed findings, there is no need to remand for additional findings. See Melwood Corporation v. Zoning Board of Adjustment of the City of Pittsburgh, 528 A.2d 668, 669 (Pa. Cmwlth. 1987) ("[W]here the fact-finder has failed to make necessary findings on

a specific issue essential to the determination of a case, and where the record as a matter of law would support only one legal conclusion with respect to that issue, rather than uselessly delaying the case by remanding, we will resolve the issue on appeal.”)

A review of the record in this matter reveals that Rector failed to prove the indispensable requirement of unnecessary hardship. During the hearing before the Board, Rector submitted documentary evidence. Included in this documentary evidence was a hardship affidavit of the current owner of the property, Raymond LaBov. See S.R.R. at 32a. Mr. LaBov’s affidavit sets forth the income/expenses for the property and outlines his unsuccessful efforts to sell the property as zoned between 2001 and 2003.

As pointed out by this Court in Rees v. Zoning Hearing Board of Indiana township, 315 A.2d 317, 319 (Pa. Cmwlth. 1974), an active, prolonged, and specific testing of the marketability of a lot can be used to show that it cannot be sold or used for the purpose zoned. This Court pointed out further in Rees that “this type of evidence, given by a disinterested real estate broker” has been accepted by our Supreme Court. Rees, 315 A.2d at 317 (citing Ferry v. Kownacki, 396 Pa. 283, 152 A.2d 456 (1959)).

As in Rees, the only evidence in this matter that the property is unmarketable as zoned is the statement of Mr. LaBov, the current owner. We conclude that Mr. Labov’s self serving statement is insufficient evidence of an active, prolonged and specific testing of marketability. Therefore, this evidence is insufficient to prove unnecessary hardship.

Rector also presented the brief testimony of 5 witnesses during the hearing before the Board in support of its application. However, the testimony of Rector’s witnesses in support of the requested variance relief is also insufficient to

prove unnecessary hardship. A review of the limited testimony of David Waxman, Julia Chapman, Jonathan Broh, Bob Swarbrick, and John Gallery, reveals that none of these witnesses testified regarding unnecessary hardship, specifically that either (1) the physical characteristics of the property are such that it could not in any case be used for any permitted purpose or that it could only be arranged for such purposes at prohibitive expense, or (2) the characteristics of the property are such that the lot has either no value or only distress value for any purpose permitted by ordinance.⁴ See S.R.R. at 55a; 57a-58a; 64a-66a; 68a. A review of the entire transcript of the October 4, 2006 hearing reveals that the bulk of the testimony on behalf of Rector was simply argument by their attorney which is insufficient to establish the required facts to prove unnecessary hardship.

Finally, we conclude that the documentary evidence submitted by Rector regarding the historical and preservation approval of the property is also insufficient to establish unnecessary hardship. The requirements for obtaining a zoning variance are completely different than the requirements for obtaining a historical designation or preservation status. In addition, the documentary evidence in the form of letters of support also fails to support a finding of unnecessary hardship.

Accordingly, as the Board's decision is not supported by substantial evidence, the Board abused its discretion and committed an error of law by

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granting Rector's application for variance relief. As such, the trial court's order affirming the Board's decision is reversed.

JAMES R. KELLEY, Senior Judge

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Manayunk Neighborhood	:	
Council, Inc. and Kevin Smith,	:	
Appellants	:	
	:	
v.	:	No. 157 C.D. 2008
	:	
Zoning Board of Adjustment, City	:	
of Philadelphia, and Rector Street	:	
Associates, L.P.	:	

ORDER

AND NOW, this 18th day of December, 2008, the order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is reversed.

JAMES R. KELLEY, Senior Judge