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Manayunk Neighborhood Council et al.,	: COURT OF COMMON PLEAS
Appellants	: PHILADELPHIA COUNTY
v.	:
Zoning Board of Adjustment et al.	: DECEMBER TERM, 2007
Appellees	: NO. 20382

APPELLANT'S BRIEF IN SUPPORT OF THEIR APPEAL

I SCOPE OF REVIEW

The scope of review for a court reviewing a local agency action is limited to the theory of relief submitted by the variance applicant at the Zoning Board, 2 Pa.C.S. §753; Wing v. Commonwealth, 496 Pa. 113, 436 A.2d 179 (1981), as framed by the applicant before the Zoning Board, Commonwealth v. Katze, 658 A.2d 345, 349 (Pa. 1995).

II STANDARD OF REVIEW

The standard of review for the dispositions of zoning appeals in Philadelphia is found in Section 754 of the Local Agency Law, 2 Pa. C.S. § 754. Under Section 754(b) a Common Please Court is to exercise appellate review, which consists of analyzing the Board's decision for violations of constitutional rights, errors of law, abuse of discretion and violations of agency procedure. Section 754(b) instructs, in essence, that a trial court may not affirm the decision of the local agency when the local agency has failed to provide necessary findings of fact to support the Board's adjudication. 2 Pa. C.S. § 754(b); SCRUB(Callowhill) v. ZBA, 804 A.2d 147, 150 (Pa. Cmwlth. 2002). The most common forms of review under the Local Agency Law are review for an error of law, e.g. have all necessary findings of fact been made, and review for an abuse of discretion, e.g. are all findings of fact supported by evidence in the record.

First, under the error of law standard, the Court checks to see whether the Board has made all the necessary findings of fact. Simply put, the court reviews the decision to see if any findings of fact are missing. A large number of findings does not guarantee that the Board has actually made the necessary findings of fact. Township. of E. Caln v. Zoning Hearing Bd. , 915 A.2d 1249 (Pa. Cmwlth 2007)(making over fifty findings of fact does not establish hardship). If the Court finds that the Board failed to make a necessary finding of fact, the grant of the variance represents an error of law. Sweeney v. ZHB of Lower Merion, 626 A.2d 1147, 1153 (Pa. 1993).

Next, under the abuse of discretion standard, the Court reviews whether the individual findings of fact are supported by substantial evidence. Id. The Board's findings of fact must be supported by evidence in the record[1], a decision based on evidence which is not in the record must be overturned. Doris Terry Trust v. Zoning Bd. of Adjustment, 873 A.2d 57 (Pa. Cmwlth. 2005). The Board may not grant a variance based on unsworn statements, North Chestnut Hill Neighbors v. Zoning Bd. of Adjustment, 928 A.2d 418 (Pa. Cmwlth 2007), nor on argument by the applicant's attorney. Id.; Rees v. Zoning Hearing Bd., 315 A.2d 317 (Pa Cmwlth 1974).

III STATEMENT OF THE QUESTIONS PRESENTED

When the Board fails to make a finding of unnecessary hardship, must the variance be reversed? YES

When the Board fails to make required findings of fact regarding uniqueness of the hardship, lack of public harm and minimum relief, must the variance be reversed? YES

When the Board fails to make findings of fact on any of the twenty criteria set forth by the Philadelphia Code, must the variance be reversed? YES

[1] Under the Local Agency Law, if the Zoning Board fails to make necessary findings of fact, the Philadelphia Court of Common Pleas does not review the record to find facts. In the suburbs, a Common Pleas Court may act as a fact finder and "make factual findings, even if it takes no additional evidence, when the zoning board failed to do so." SCRUB(Callowhill), 804 A.2d at 150 n.3. Suburban Courts are governed by the Pennsylvania Municipalities Code (MPC), 53 P.S. § 11005-A.; SCRUB(Callowhill), at 150 n.3. However, the Commonwealth Court has retained the distinction that Philadelphia Courts operate under Section 754 of the Local Agency Law and do not directly review the record or make findings of fact. SCRUB(Callowhill).

IV FACTUAL BACKGROUND

The subject property, known as 1 Leverington Street, is in the Manayunk section of Philadelphia. The property is informally known as the Arroyo Grill site after a successful restaurant operated on the property. The property actually consists of two tax parcels or lots for zoning purposes; it is clear from the record that the Arroyo Grill building sits entirely on one lot, however it is unclear whether the parking lot occupies one or both lots.

The site is currently zoned RC-1 and is subject to the Venice Island Overlay, FOF #2. The Venice Island overlay zoning permits dwellings, recreational and cultural uses by right. Phila. Code §14-1615(3)(.c). The applicant's proposal to construct 288 apartments was rejected by the Department of Licenses and Inspections because it violates multiple zoning provisions. The applicant sought variance relief, primarily regarding the height limit (55' feet) and density limit (Floor Area Ratio or FAR) to construct 288 apartments.

On October 24, 2007, the Philadelphia Zoning Board of Adjustment ("Board") held a hearing on the application for variance relief regarding the property known as 1 Leverington Street. The Board heard the applicant's case for variances and the protestants case against variances. The Board granted the variances by decision dated November 14, 2007.

Upon appeal the Board issued findings of fact and conclusions of law on October 20, 2008; the Board made rudimentary findings of fact identifying three of applicant's fact witnesses, architect Varenhorst, engineer Weggle and owner Neducsin. The Board made similar basic findings of fact for protestant's witnesses and neighbors who testified at the hearing. The Board made no findings of fact on the issues of hardship.

V SUMMARY OF ARGUMENT

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

This entire case fits in one paragraph. The Zoning Board failed to make the threshold finding of fact that the property was subject to an unnecessary hardship. Without a finding of fact on the issue of unnecessary hardship, the variances represent an error of law and must be reversed. Richman v. Zoning Board of Adjustment, 137 A.2d 280 (Pa. 1958)[2].

[2] The Pennsylvania Supreme Court has noted that "Richman is still applicable in Philadelphia since the Pennsylvania Municipalities Planning Code, … Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §§ 10101-

Here, the Board made no relevant findings of fact and gave no reason for its decision. The findings of fact which the Board did make are useless, irrelevant or wrong. The majority of the findings simple recite undisputed facts such as the date of the hearing, the contents of various written documents and the identity of the persons who spoke at the hearing.

Unfortunately, some findings of fact are patently wrong, e.g. Finding of Fact #36, inexplicably states that the Zoning Board's November 14, 2007 decision was made on March 19, 2008. The findings of fact that are not clearly wrong are generally irrelevant to the primary focus of a variance hearing, e.g. the criteria and facts which support the decision to grant a variance, that explain the reasoning of the Board, and define the hardships to the site.

Years of caselaw have established a long list of criteria and basic findings of fact which are needed to support the grant of a variance:

a finding that there is an unnecessary hardship,
a finding identifying what the unnecessary hardship is,
a finding identifying that the hardship is unique to the property,
a finding discussing whether the requested relief imposes a detriment on the public,
a finding discussing whether the hardship is self inflicted,
a finding explaining why the relief granted represents the minimum relief necessary,
a finding that all dimensionally compliant uses of the property have a hardship,
a finding explaining why the hardship is due to the property and not the person.

Although the Board managed to include the word "hardship" in one conclusions of law, this is insufficient to support the variances. Richman at 285 ("Significantly, the Board, although it concluded as a matter of law that a denial of the variance 'would cause an unnecessary hardship and would place an unreasonable restriction on his use of these properties', made no finding of fact as to unnecessary hardship."). When there are no findings of fact regarding unnecessary hardship, the grant of a variance is an error of law. Id. at n.15 (citing Imperial Asphalt Corporation of Pennsylvania Zoning Case, 59 A.2d 121 (Pa. 1948)(" Neither the officer nor the board gave any facts pertinent and material in any inquiry into possible reasons for the conclusion reached.")).

The Board's complete failure to make ANY of the required findings of fact means that the Board has not justified its action as the law requires. The failure to make any findings about hardship requires that this appeal be sustained on the basis of an error of law.

11202, does not govern cities of the first class, and Philadelphia is a city of the first class." West Torresdale Civic Ass'n v. Zoning Bd. of Adjustment, 576 A.2d 352 (Pa. 1988).

VI ARGUMENT

A The Zoning Board failed to make the basic making findings of fact and therefore the variances must be reversed.

The modification of a zoning ordinance by the issuance of a variance is itself a form of legislative power, H.A. Steen Ind., Inc., v. Cavanaugh, 241 A.2d 771, 775 (Pa. 1968), this power is only delegated to the Zoning Board for the narrow purpose of alleviating unnecessary hardship, and the Zoning Board oversteps its authority when it grants a variance without making the required findings of fact, Id, or when this legislative power is used for political or personal reasons, Doris Terry Trust v. Zoning Bd. of Adjustment, 873 A.2d 57 (Pa. Cmwlth. 2005).

The fundamental requirements for a variance are stated in somewhat different terms by different courts. However for our purposes, the Supreme Court in East Torresdale Civic Ass'n v. Zoning Bd. of Adjustment, 639 A.2d 446 (Pa. 1994) has identified a three prong test to explain and define the relationship between an unnecessary hardship and a request for variance relief : (1) a unique hardship, (2) no detriment to the public and (3) a minimum variance. In North Chestnut Hill Neighbors v. Zoning Bd. of Adjustment, 928 A.2d 418 (Pa. Cmwlth. 2007), the Court reviewed and applied the three pronged test from East Torresdale, and held that the Philadelphia Zoning Board erred[3] when it failed to make any findings of fact explaining why the variance represented the minimum relief required to assuage the hardship. The Board has repeated that error and this appeal should be sustained.

In Appeal of Boyer, 2008 Pa. Commw. LEXIS 511 (Oct 22, 2008) the Commonwealth Court provides clarification on how to review the grant of a variance. In Boyer the court outlined the steps taken when evaluating a finding of unnecessary hardship. The Court first reviews whether there is the necessary findings of hardship under the applicable caselaw ,[4] here East Torresdale, then the Court goes on to review the particular legislative criteria required by the specific municipal ordinance or code, here the Philadelphia Zoning Code at 14-1800 *et seq*.

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[3] "the ZBA erred in failing to make any findings of fact with respect to whether the proposed variance was the minimum that would afford relief. In fact, neither the ZBA nor the trial court even addressed the matter, completely omitting that required element from their analyses."

[4] The Supreme Court in Wilson v. Plumstead Twp. Zoning Hearing Bd., 594 Pa. 416 (2007) noted that the threshold variance criteria under the Philadelphia Code and the MPC are similar, however in Philadelphia the grant of a variance must also consider the requirements of the Philadelphia Code 14-1802.

In Wilson v. Plumstead Twp. Zoning Hearing Bd., 936 A.2d 1061, 1065 (Pa. 2007) the Supreme court clarified that a variance in Philadelphia must address both the "short form" East Torresdale criteria as well as any applicable criteria from §14-1800 of the Philadelphia Code.

Applying the recent Boyer and Wilson decisions to the elements established by Richman, East Torresdale, and the Philadelphia Code, the necessary finding of fact for Philadelphia can be organized into a three prong test:

The first prong is the question presented by Richman, is there a finding of unnecessary hardship?

The second prong is the question presented by East Torresdale, did the Board make the fundamental findings of fact necessary to explain and define the unnecessary hardship, (1) a unique hardship, (2) no detriment to the public and (3) a minimum variance?

The third prong is the issue addressed by Wilson, that specific findings are required based on the particular variance (e.g. use or dimensional) as well as the multiple criteria found in the Philadelphia Code. See Conclusion of Law #2 listing all twenty (20) criteria.

Given this list of necessary findings, the Board failed to make any of the findings of fact identified in controlling caselaw: the Board did not make the threshold determination that there was an unnecessary hardship, thus pursuant to Richman, the variance must be overturned. The Board did not make the fundamental findings of fact about the hardship which are required by East Torresdale, unique hardship, lack of detriment to the public, and minimum variance, thus under North Chestnut Hill the grant of the variance must be overturned. Finally although the Board identified twenty (20) criteria in the Philadelphia Code, the Board failed to consider or discuss ANY of these criteria, thus under Boyer and Wilson the variance must be overturned.

B THE BOARD FAILED TO MAKE FINDINGS OF FACT REGARDING HARDSHIP BECAUSE THERE IS NO UNNECESSARY HARDSHIP

The likely reason for the complete omission of findings of fact regarding hardship is not surprising: the fifty five foot height limit and FAR limits do not impose any unnecessary hardship on the property at 1 Leverington Street, the zoning law simply limits the height and density to a reasonable size. While the owner *wants* to expand, that is not a hardship. In Yeager v. Zoning Hearing Bd. of the City of Allentown, 779 A.2d 595, 598 (Pa. Cmwlth. 2001), the Court noted that the desire to have a building which is larger than zoning allows is not an

unnecessary hardship. The ONLY evidence presented as to hardship is that the Architect intentionally designed a building that violated zoning limits in order to grab "additional square footage" N.T. p25 6-21, and put in "an additional 69,000 square feet". N.T. 19 6-9. Simply put, the inability to build larger than zoning allows is not a hardship. Yeager. The architect has been instructed to design a bigger building to obtain more square footage. The applicant did not present any evidence that it was not possible to design a conforming building, and there is no evidence why the Applicant, HAS to build a bigger building, the only evidence is that he WANTS a bigger building.

Further, there is no suggestion that there is any hardship on all "dimensionally compliant uses," Yeager; Hoffman Mining Co. v. Zoning Hearing Bd., 958 A.2d 602 (Pa. Cmwlth 2008). Simply put, there is nothing in the record which identifies something unique about this site that dictates that using the site for a permitted use, (dwellings, recreational uses and cultural uses)[5], requires structures that must be 89 feet tall. The inability to build an 89' building may be seen as a hardship by the Applicant, but the height and FAR limits are simply a uniform rule which applies throughout the zoning district. Thus, contrary to Applicant's arguments, preventing 89' buildings is not an unforeseen and unnecessary side effect of the 55' height limit, it is for this exact purpose that a 55' height limit was enacted, for the express purpose of limiting the size of all buildings, including the Applicant's. Complying with the uniformly applicable provision of the zoning law is not an unnecessary hardship. Yeager, Hoffman.

Given the existing caselaw, Mr. Neducsin's desire to exceed the zoning to construct an 89' building in an area that permits 55' structures is not an unnecessary hardship. One Meridian Partners, LLP v. Zoning Bd. of Adjustment, 867 A.2d 706 ("In the present case, Mariner has proven nothing more than adherence to the ordinance imposes a burden on Mariner's desire to build a 50 story, luxury, high-rise, condominium on the premises."); Boyer (desire to build a larger swimming pool is not a hardship when it is possible to construct a smaller swimming pool); N. Pugliese (cited in COL#11)(holding the desire to construct a larger building is not a hardship where is it possible to construct a smaller building that conforms to the zoning limits).

Thus, when it is possible to construct a building within the zoning limits, One Meridian Partners, Boyer, N. Pugliese, there is a reasonable use of the property and variance relief is not available.

[5] Permitted uses at the site are listed in Phila. Code §14-1615(3)(.c).

C THERE IS NO HARDSHIP BECAUSE THERE IS A PRE-EXISTING DIMENSIONALLY COMPLIANT USE

The Board itself cites the SCRUB(Eller) v. ZBA of Philadelphia, 814 A.2d 847 (Pa. Cmwlth 2003), COL #12, wherein the court considered the inability of the owner to build a structure with the exact dimensions he wished, however the Court found the issue was irrelevant to the question of unnecessary hardship because the property had a pre-existing use. SCRUB(Eller) at 114.("Eller's argues that the Property is too small for the zoned permitted use as a residence. This argument is irrelevant in light of the valid nonconforming use on the Property.") Given the Board's own citation to this case, the obvious question is whether there are any uses[6] of the property that are dimensionally compliant? Under controlling caselaw, this is a crucial question, because to grant a variance, "a substantial burden must attend all dimensionally compliant uses of the property, not just the particular use the owner chooses." Yeager, (cited in Bower, Hoffman). In plain English, is an 89 feet really the minimum height needed for the reasonable use of the property? If it is possible to use the site within the 55' height limit and the FAR limit, then the site does not have a hardship and variance relief is not available.

It is undisputed that the 1 Leverington property is the site of a pre-existing restaurant and parking use. The testimony establishes that the site is eminently suitable for this restaurant and parking use. The record contains statements by Mr. Neducsin that the property is well suited for the previously existing "Arroyo Grill" use, a restaurant and parking area. That building and parking lot are not 89' tall, they are clearly less than 55' tall. The success of the pre-existing restaurant establishes that there is no hardship for all dimensionally compliant uses- e.g. you do not have to build a 89' tall structure to have a reasonable use of the property, the existing building and parking lot are not 89' tall, yet they provide a reasonable use of this property.

In the analysis under One Meridian Partners, Boyer, and N. Pugliese *supra,* the court deals with hypotheticals- what *could be built?* Here, there is no hypothetical question, there is already a building and parking lot on site which conform to the height and FAR requirements. The actual use of the property in conformity with zoning ordinance establishes that there is no hardship. O'Neill v. Zoning Bd. of Adjustment, ("[Applicant] failed to prove two necessary

[6] A pre-existing nonconforming use continues until there is an official determination of abandonment. Arter v. Philadelphia Zoning Board of Adjustment, 916 A.2d 1222, n.15 (Pa. Cmwlth. 2007). See also North Chestnut Hill (reviewing Arter, Pelligrini dissent.)

elements in his case: first, he failed to prove that the property cannot continue to be utilized profitably in its present state as a public parking lot; second, [Applicant] failed to prove that, even if a parking lot is no longer desirable, the property could not profitably be used for some purpose which comports with the zoning requirements.").

VII CONCLUSION

When the Board is unable to make the single finding of fact regarding threshold issue of unnecessary hardship as expressly required by Richman, the appeal must sustained.

When the Board is unable to make the findings of fact on the fundamental issues of unique hardship, lack of public harm and minimum variance, the appeal must sustained.

When the Board identifies twenty (20) criteria that it is required to consider, yet fails to make findings of fact on any of these issues, the appeal must sustained.

When it is clearly possible to construct a building within the zoning limits, a reasonable use of the property is possible and variance relief is not available.

When there is already a pre-existing dimensionally compliant use of the property a reasonable use of the property is established and variance relief is not available.

The action of the Zoning Board in granting variances to a property merely to allow one lucky developer to build higher and bigger than the law allows is an improper use of the variance power by the Zoning Board which should be overturned.

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

RESPECTFULLY SUBMITTED

/s *Henry L. Schirmer Jr.*

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