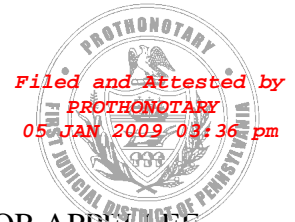


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ATTORNEY FOR APPELLEE
 DANIEL NEDUCSIN

**MANAYUNK NEIGHBORHOOD COUNCIL, INC.,
 ET AL.**

Appellants.

v.

**CITY OF PHILADELPHIA ZONING BOARD
 OF ADJUSTMENT, ET AL.**

Appellees.

:
 :
 :
 : PHILADELPHIA COUNTY
 : COURT OF COMMON PLEAS
 : TRIAL DIVISION
 :
 : DECEMBER TERM, 2007
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 : NO. 002382
 :
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BRIEF OF APPELLEE DANIEL NEDUCSIN

Appellee Daniel Neducsin (“Appellee”) respectfully submits this Brief in opposition to the appeal taken by Appellants Manayunk Neighborhood Council and Kevin Smith (collectively, “Appellants”) from the decision of the Zoning Board of Adjustment of the City of Philadelphia (the “Zoning Board”) granting Appellee’s Application for variance relief (the “Application”).

For the reasons set forth herein and based upon the extensive evidentiary record created before the Zoning Board, Appellee respectfully requests that this Court affirm the decision of the Zoning Board.

I. COUNTER-STATEMENT OF THE QUESTION INVOLVED.

Based upon the extensive record of evidence created on Appellee’s Application, did the Zoning Board abuse its discretion or commit an error of law by granting Appellee the requested variance and thereby allowing him to develop his property as proposed?

Suggested Answer: No.

II. COUNTER-STATEMENT OF THE CASE.

1. Statement of the Form of Action.

This is an appeal taken by Appellants Manayunk Neighborhood Council, Inc. (“MNC”) and Kevin Smith from the decision of the Zoning Board of Adjustment of the City of Philadelphia (the “Zoning Board”) granting Appellee’s Application for variance relief. *See* Findings of Fact and Conclusions of Law of the Zoning Board of Adjustment, filed with the Court on or about October 16, 2008.

2. Condensed Chronological Statement and Brief Procedural History.

a. The Subject Property.

The subject property is located at 1 and 1R Leverington Avenue (the “Property”). The Property is situated on Venice Island, between the Leverington Avenue Bridge and the Green Lane Bridge (October 24, 2007 Notes of Testimony (“NT”) page 13). It is also bordered by the Manayunk Canal and the Schuylkill River (NT page 13). The Property is in the RC-1 zoning district, and it is also subject to the Main Street/Manayunk and Venice Island Special District Controls (Philadelphia Code §14-1615).

The entirety of Venice Island is located within the floodway of the Schuylkill River and is therefore subject to City and Federal flood plain regulations which limit the size and type of construction and the uses that can be placed on properties on the Island. (Philadelphia Code §14-1605(1)(u)).

The Property is across the Leverington Avenue Bridge from “Venice Lofts”, a multiple dwelling unit property that is also on Venice Island. Venice Lofts received a variance from the Zoning Board to construct those its buildings and improvements in 2002. (See *Manayunk Neighborhood Council, et al. v. Zoning Bd. of Adjustment, et al.*, 815 A.2d 652 (Pa. Commw. 2002).)

b. The Requested Relief and L&I’s Refusal.

On August 15, 2007, Stephen Varenhorst, architect for Appellee, submitted an Application for Zoning and/or Use Registration Permit to the Department of Licenses and Inspections (“L&I”) for its proposed improvements on the Property. The Application sought to relocate lot lines to create one (1) lot from two (2) lots; to demolish all structures on the Property and erect four (4) structures for 280 dwelling units with accessory fitness center; and to create

360 off-street parking spaces.¹ (Notice of Refusal, dated August 31, 2007).

The Department of Licenses and Inspections issued a Zoning/Use Refusal on August 31, 2007. The Department refused zoning for the following reasons: (1) the lowest floor elevation proposed (34') is below the required level (40.2'); (2) the proposed height of the buildings (89') exceeds the permitted height for the zoning district (55'); and the proposed Gross Floor Area (178% of the lot) exceeds the permitted Area (135% of the lot).

Appellee filed a Petition of Appeal on September 26, 2007. The Petition requested a variance on several grounds, including that: (1) the proposed height and scale of the buildings are consistent with the larger Manayunk community; (2) the project will create a residential presence on Venice Island that will enhance and protect the recreational use of the remainder of the Island; (3) the project will allow continuous public access to the Schuylkill River and the Manayunk Canal; (4) and that literal enforcement of the Philadelphia Code would result in unnecessary hardship, and the spirit of the Code would be observed and substantial justice done, if a variance is granted (Petition of Appeal).

The Board held a hearing on the Appeal on October 24, 2007 (Finding of Fact No. 9). On November 14, 2007, the Board issued its Notice of Decision granting Appellee the requested variance (Finding of Fact No. 36)². The instant appeal challenging the Board's decision was filed by Appellants within 30 days thereafter.

Appellee submits that he has satisfied the criteria for obtaining variance relief pursuant to § 14-1802 of the Zoning Code of the City of Philadelphia ("Zoning Code"), and that Appellee's proposed development plan is compatible with nearby existing land uses. *See* Petition of Appeal to Board dated September 26, 2007.

c. Public Review of Appellee's Variance Application.

Stephen Varenhorst, the owner's architect, met with the City of Philadelphia's office of Emergency Management on a number of occasions (NT page 24). Officials asked Varenhorst to include bridges between the buildings so that the Property can be evacuated in the event of a flood or other emergency (NT page 24).

¹ The Application also included a request for 40 stacked parking spaces. However, this request was withdrawn at the time of the Zoning Board hearing.

² Finding of Fact No. 36 actually states that the Application for a zoning/use variance was granted on 3/19/08. That date is in error, and there is no dispute that the Zoning Board's Notice of Decision was dated 11/14/07. The Board's error is thus immaterial to the consideration of this appeal.

Appellee also met with the Manayunk Development Corporation (“MDC”), a neighborhood organization, at least six (6) times (NT pages 16-17). The MDC is comprised of 21 directors, four (4) of whom are from the neighborhood (NT page 117). They requested some changes to the site plan for the Property, including creating a green area to increase open space and provide a setback to limit the project’s visibility from Main Street (NT pages 119-120). The MDC also requested a foot bridge (NT page 17 and 118-119). Appellee made the requested changes (NT page 17).

MDC also agreed to allow Appellee to exceed the 55-foot height limit so that more space would be left open (NT page 120). The full MDC Board of Directors voted in favor of supporting the project as it was finally designed (NT page 121).

Appellee’s plans for the Property were also approved by the City Historical Commission (NT page 56).

The Philadelphia City Planning Commission (the “Planning Commission”) approved Appellee’s initial plans for the Property with certain conditions (Planning Commission Fact Sheet dated June 18, 2007; Planning Commission Minutes of Meeting June 19, 2007). However, the Planning Commission was not able to furnish the Zoning Board with a recommendation on the day of the hearing because it was not updated about the last-minute changes agreed to by Appellee after negotiations with the MDC (NT page 10).

d. The Hearing Before the ZBA and The Evidence of Record.

At the Zoning Board hearing on October 24, 2007, substantial evidence was presented by Appellee confirming that the proposed development fulfilled all of the criteria for granting variance relief. The expert testimony introduced relating to architecture, planning and site design, as well as the testimony of experts regarding traffic and the floodway, clearly confirm that a variance is warranted, and that the proposed development will not create a negative impact on the health, safety and welfare of the community.

(1) Architectural Evidence.

The Zoning Board was provided with expert testimony from Appellee’s architect, Stephen Varenhorst of Stephen Varenhorst and Associates (NT page 13). Mr. Varenhorst provided uncontroverted evidence about the project improvements as proposed. In the early 20th Century the Property was filled with mill buildings and industrial buildings (NT page 15). The site now contains one (1) building built for a restaurant, which has not been in operation for

several years (NT page 15). That building will be removed (NT page 15).

Appellee proposes to construct 280 condominium units in four buildings on the Property (NT page 13). Each building will be six stories high above the base, the top being 89 feet, the low at 78 feet. The maximum height allowed in the zoning district is 55 feet (NT page 14). The height will be comparable with other buildings in the neighborhood. The Venice Lofts at 4601 Flat Rock Road (a/k/a the Dranoff Property) is 60 feet high; the Watermill residences building at 100 Leverington Avenue is 85 feet high (NT at 23-24).

The architect sought to provide as much open space as possible as part of the project (NT page 16). The Property will have 28 percent building coverage, 72 percent of the Property will be open to the sky, and 42 percent will be landscaped area (NT page 16). The other 42 percent of the Property will be paved and used for parking (NT page 16). The Property will feature public access to the Schuylkill River from Leverington Avenue and a path along the river (NT page 16).

In response to requests from the Manayunk Development Corporation (“MDC”), Appellee created a green area near Green Lane, which is available for public access (NT page 17). Appellee also agreed to construct a foot bridge for area residents to have a faster way to get to Main Street by foot (NT page 17).

The architect provided for separations between the buildings on the Property to allow for visibility to the Schuylkill River, in addition to the public path (NT page 18).

The Floor Area Ratio (“FAR”) allowed in this zoning district is 5.3 area site; Appellee proposes 10.7 times area site, for an additional 69,000 square feet (NT page 19). The additional space is required so enough units may be developed to pay for the cost of developing the Property, including infrastructure improvements, the foundation, environmental cleanup, bridges, and parks (NT page 19).

The lowest floor elevation is at 34 feet (Notice of Refusal dated 8/31/07). This is required due to the floodplain (NT page 22). The lobbies will be below the permitted lowest floor elevation (NT page 23).

(2) Testimony of the Traffic Expert.

The Zoning Board received the uncontroverted evidence of a traffic expert who confirmed that the proposed project on the Property will not create any adverse traffic impact. The Zoning Board reviewed the Traffic Impact Study prepared by Pennoni Associates, Inc., and

also heard the expert testimony of Mr. Walter Bright, a professional traffic engineer (NT page 30-31; Finding of Fact No. 10). Both the report and the testimony provided to the Zoning Board established that the traffic generated by the Property could be handled within the existing cartway with minor changes of the traffic signals (NT pages 31-32). Bright testified that the Traffic Impact Study did not consider that some residents of the Property would use public transportation, which could lessen the actual traffic impact (NT pages 32-33). Normally about 15-20% of residents would use public transportation (NT pages 32-33).

(3) Testimony of the Hydrologic Expert.

The Zoning Board received the uncontroverted evidence of a hydrologic expert who confirmed that the proposed project on the Property would not increase the risk of flooding. The Zoning Board received the Flood Hazard Analysis prepared by J. Richard Weggel, Ph.D., P.E., and also heard the expert testimony of Dr. Weggel (NT pages 36-39; Finding of Fact No. 10).

The Analysis and Dr. Weggel's testimony demonstrated that the development as proposed would not in any way aggravate flooding along the stretch of the Schuylkill River adjacent to the Property (NT page 39). This is because the new buildings will be elevated on stilts, and some of the existing obstructions currently on the Property will be removed (NT page 39).

(e) Appellants' Testimony and Evidence.

During the Zoning Board hearing, the Appellants had amply opportunity to present substantive evidence in opposition to the proposed development. However, Appellants offered no expert testimony or reports, offering only old reports prepared for zoning hearings held years earlier, and unsubstantiated assertions of Appellants' attorney and persons living in the Manayunk area and elsewhere that the project would create harm to the community (NT pages 56-117; Find of Fact No. 11). Most of the testimony consisted of unsubstantiated concerns about traffic and parking.

(f) Zoning Board Decision Granting a Variance.

On November 14, 2007, the Zoning Board granted the Application for a Zoning/Use Variance with provisios (Finding of Fact No. 36). The Zoning Board found that Appellee had provided evidence of hardship, and that Appellee met his burden in support of a variance (Conclusion of Law No. 13).

III. SUMMARY OF ARGUMENT FOR APPELLE.

The Zoning Board properly granted variance relief, thereby recognizing that hardship exists due to conditions on the Property that make it unable to be properly developed under the strict terms of the Zoning Code. As set forth below, the Zoning Board found that the development as proposed is reasonable, that it does not exceed that which is necessary, and that it will in no manner adversely affect the surrounding neighborhood. This Court should affirm the Zoning Board's grant of the variance relief on these grounds. Particularly in light of the previous Court decisions finding hardship due to the unique physical conditions present on Venice Island, the record establishes that the Zoning Board committed no abuse of discretion or error of law in granting a variance sufficient to justify a reversal of its decision.

IV. ARGUMENT FOR APPELLEE.

1. Standard of Review.

In reviewing a zoning appeal, where additional testimony is not taken, the standard of review is limited. The Court must determine whether the Zoning Board abused its discretion or committed an error of law in granting the variance. *One Meridian Partners, LLP v. Zoning Board of Adjustment of the City of Philadelphia, et al.*, 867 A.2d 706 (Pa Commw. 2005) (quoting *Collier Stone Co. v. Twp. Of Collier Board of Commissioners*, 735 A.2d 768 (pa. Commw. 1999)). "An abuse of discretion is established where the findings are not supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *One Meridian Partners*, 867 A.2d at 707.

"Questions of credibility and evidentiary weight are solely the province of the zoning hearing board" in the performance of its fact-finding function. *Whitpain Twp. Bd. Of Supervisors v. Whitpain Twp. Zoning Hearing Bd.*, 121 Pa. Commw. 418, 550 A.2d 1355, 1361 (1988). The Zoning Board may properly reject challenges consisting of suspicions, innuendo and unfounded fears unsupported by probative evidence. See *DeCristofo v. Phila. Zoning Bd. of Adjustment*, 427 Pa. 150, 233 A.2d 561 (1967).

2. The Zoning Board Properly, and Correctly, Found that Appellee is Entitled to a Variance; Appellee’s Proposed Development Fulfills the Criteria of Section 14-1802 of The Philadelphia Code.

The standards governing the grant of a variance are well settled:

The criteria can be boiled down into three key requirements, that of: 1) unique hardship to the property; 2) no adverse effect on the public health, safety, or general welfare; and 3) the variance will represent the minimum variance that will afford relief at the least modification possible.

North Chestnut Hill Neighbors v. Zoning Bd. of Adjustment of the City of Phila., et al., 928 A.2d 418, 425 (Pa. Commw . 2007). The hardship must be shown to be unique or particular to the property as distinguished from a hardship arising from the impact of zoning regulations on an entire district. *Valley View Civic Assn. V. Zoning Bd. of Adjustment*, 501 Pa. 550, 462 A.2d 639, 640 (1983). In evaluating hardship, the use of adjacent and surrounding land is unquestionably relevant. *Id.*

Appellee clearly and fully established his entitlement to variance relief. In his Application for a Zoning/Use Permit, supporting materials and the evidence submitted to the Zoning Board, Appellee established the requisite elements for variance relief before the Zoning Board.

a. Unique Hardship Was Proven; in Fact, Unique Hardship Affecting this Property Has Been Recognized in Prior Court Decisions.

The Zoning Board recognized that Appellee needed to prove a hardship in order to secure a variance. In its Findings of Fact and Conclusions of Law, the Board concluded that “Evidence in support of the variance must be presented showing a hardship unique or peculiar to the property” (Conclusion of Law No. 10); “the hardship ... must not be self-created” (Conclusion of Law No. 11); and “After a review of the record and the consideration of the evidence presented, the Zoning Board finds that the Applicant has met its burden in support of a zoning/use Variance(s) ... Applicant has provided evidence of hardship.” (Conclusion of Law No. 13).

The Zoning Board made these Conclusions after reviewing extensive testimony of hardship. The Board recognized that the Property is in a RC-1 Residential Zoning District, and is subject to Flood Plain Controls (Finding of Fact No. 5). Concerning these Flood Plain Controls, the Board cited Section 14-1606 of The Philadelphia Zoning Code (Finding of Fact

No. 6). This law states that no new encroachment, including any development or new construction, is permitted within the Schuylkill River's floodway. (Section 14-1606(a)(5)).³ Specifically, that section provides (in relevant part):

(5) *Special Controls*. The following special controls are imposed to regulate setbacks in the flood plain, construction, and earth-moving activity along watercourses subject to flooding. These controls are in addition to the requirements of the Pennsylvania Department of Environmental Resources:

(a) *Within the Floodway*.

(.1) No encroachment (including fill, new construction, or any development) is permitted except that public utilities are permitted as long as they cause no increase in the One-Hundred (100) Year Flood level.

(14-1606(5)(a)(.1)).

Appellee's Zoning/Use Application includes new construction and development in the floodway, in contravention of this Zoning Code provision. Obviously, no buildings could be built on the Property in compliance with this regulation. Thus complying with the Zoning Code would render the Property virtually useless.

This scenario has been previously considered by the Courts, which found the requisite hardship for a variance in two very similar cases. One case involved the immediately adjacent Venice Island property now known as "Venice Lofts" (a/k/a the "Dranoff Property"). In *Manayunk Neighborhood Council, et al. v. Zoning Bd. of Adjustment, et al.*, 815 A.2d 652 (Pa. Commw. 2002), the owner sought to develop 160 apartments in the Venice Island floodplain. The owner proposed to erect all buildings on columns to resist flooding, with first floors below the 100-year flood level. L&I rejected the owner's zoning/use application because it did not comply with RC-1 area and parking regulations.

³ Licenses & Inspections incorrectly identified the Property as being in the floodway fringe (L&I Notice of Refusal dated 8/31/07), as opposed to the floodway itself. However, this error is immaterial to the Zoning Board's decision or this appeal. Appellee provided the Zoning Board with evidence that the Property is actually in the floodway. (NT page 38-40, 45-49; City Planning Commission Fact Sheet dated 6/18/07). Appellants also acknowledged that the Property is located within the Schuylkill River floodplain and floodway (Appellants' Proposed Findings of Fact dated 11/5/07, No. 15; proposed Conclusion of Law No. D). In its written report of its decision, the Zoning Board correctly acknowledged that the Property is affected by the floodway (Conclusion of Law No. 5), and found hardship (Conclusion of Law No. 13).

After an appeal hearing before the Zoning Board, the Board found that an unnecessary hardship existed and granted variances for the property. The Manayunk Neighborhood Council – an Appellant in the instant action – appealed.

Commonwealth Court agreed with the Zoning Board that a variance should be granted. The Court cited the rule that “where an applicant demonstrates that compliance with a zoning ordinance would render the property virtually useless, the applicant demonstrates unnecessary hardship.” *Manayunk Neighborhood Council*, 815 A.2d at 656 (citing *Allegheny West Civil Council, Inc. v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 547 Pa. 163, 689 A.2d 225 (1997)). Commonwealth Court further stated that “where ... zoning regulations prohibit any reasonable use of the property absent variance relief, the requisite hardship is proven.” *Manayunk Neighborhood Council*, 815 A.2d at 657.

In that case, Commonwealth Court found that Section 14-1606 of the Philadelphia Zoning Code prohibited any development of the Venice Lofts property, which like Appellee’s adjacent Property is in the Schuylkill River floodway. The Court ruled that:

Requiring compliance with the Code’s prohibition on development in the floodway would render the Subject Properties virtually useless. Therefore, the Board correctly concluded [the] Applicant will suffer unnecessary hardship if the variance is denied.

Manayunk Neighborhood Council, 815 A.2d at 657. The Court also wrote that “Where an ordinance restricts virtually all use, hardship is present.” *Id.*

The facts of the instant matter as presented to the Zoning Board are virtually the same as those considered by Commonwealth Court in the *Manayunk Neighborhood Council* case. Appellee’s Property is just a few feet from Venice Lofts. Both properties are in the Schuylkill River floodplain, and are subject to the same flooding risks. Both properties also exceed the height limit allowed by the Zoning Code, and are designed so that their ground floors are below the lowest permitted floor elevation. Finally, much of the expert evidence presented to the Zoning Board in both cases was the same – both property owners presenting testimony of Dr. Weggel, the hydraulic engineer, and an architect.⁴

Commonwealth Court reached the same result in a second case, *Manayunk*

⁴ The facts of the two cases are so similar that Appellants attempted to present evidence to the Zoning Board that Appellants previously submitted in the Venice Lofts matter years earlier. The Board correctly rejected this approach (NT, pages 84-87).

Neighborhood Council, et al. v. 2001 Zoning Board of Adjustment, et al., (opinion not reported), filed March 14, 2003 (the “Cotton Street” appeal). That appeal involved another nearby residential complex on Venice Island, including 270 apartment units and 575 parking spaces.

As in the *Manayunk Neighborhood Council* case, Commonwealth Court in the *Cotton Street* appeal examined Section 14-1606 of the Zoning Code and determined that the zoning regulation prohibited any reasonable use of the property absent variance relief. The Court concluded that this proved the requisite hardship necessary for a variance. The *Cotton Street* decision referred to a third case, *Ruddy v. Lower Southampton Twp. Zoning Hearing Bd.*, 669 A.2d 1051 (Pa. Commw. 1995), which involved a different property location in a floodway but had a similar result.

Given these similarities, it is clear that case law supports a finding of undue hardship in this matter. Further, it is also apparent that sufficient facts were presented to the Zoning Board to support the grant of a variance. Appellants raise no arguments to distinguish the *Manayunk Neighborhood Council* case or the *Cotton Street* and persuade the Court that no undue hardship should be found in this appeal, where virtually identical facts are present.

b. The Relief Sought by Appellee Was the Minimum Necessary to Grant Relief.

Concerning the requirement that the variance be the minimum necessary to grant relief, the record of the Zoning Board’s hearing demonstrates that this element was considered. Appellee’s architect Varenhorst testified at the Zoning Board hearing that the proposed Floor Area Ratio (“FAR”) in excess of the maximum permitted is needed to obtain the number of residences necessary to overcome the obstacles to development on the Property, including cleanup of environmental conditions, the utilities infrastructure, foundation system, and public amenities (NT page 19). Varenhorst also testified that the additional height over the 55’ maximum allowed by the Code was needed to reach additional square footage and thereby reduce the buildings’ footprint (NT pages 25-26). The Zoning Board expressed its understanding that relaxing certain zoning requirements is necessary to make the project feasible. The Zoning Board Chairman stated:

... I think you are trying to obtain numbers. I totally understand why we are trying to obtain numbers. ... We have to do something here that works; we have a lot of space to do it.

(NT page 21).

Further evidence of the Zoning Board's consideration of the "minimum relief necessary" element of a variance is provided by the Board's handling of Appellee's request for stacked parking. Appellee initially sought zoning/use approval for 40 stacked parking spaces (Notice of Zoning/Use Refusal dated 8/31/07). This stacked parking is not permitted in an RC-1 zoning district, and thus a variance was required. At the Zoning Board hearing, the Board expressed its belief that stacked parking was not necessary for the project to work. The Board told Appellee that "there has to be a way" to design the project without stacked parking, and that "you are going to have to work on [it] a little bit. It is doable." (NT page 21). Appellee subsequently redesigned the project to eliminate the need for stacked parking, and thus variance relief for parking was no longer needed. (Notice of Decision dated 11/14/07). This is clear evidence of the Board satisfying the minimum relief necessary requirement.

Given this testimony, it is apparent that the Zoning Board considered whether the relief sought by Appellee was the minimum necessary, and that the Board decided to grant the requested variance only after Appellee adjusted its project to eliminate stacked parking and thereby reduce the extent of the required relief.

In sum, the Zoning Board was presented with evidence necessary to support findings of undue hardship and that the relief requested was the minimum necessary, as well as the other criteria for a variance. The Board's ruling to grant a variance should thus be upheld.

3. Appellants' Argument that the Zoning Board Did Not Make Necessary Findings of Fact is Wrong, and Irrelevant in Any Event Given Prior Case Law.

Appellants contend that the Zoning Board failed to make the threshold finding of fact that the Property was subject to an unnecessary hardship, and that the variances therefore represent an error of law and must be reversed. (Appellants' Brief, page 3). This argument ignores the substantial and expansive record of facts supporting the Zoning Board's decision. It also disregards the fact that the courts may look both to the Zoning Board's written explanation for its decision as well as the record before the Board.

The Zoning Board clearly recognized that it needed to find that an "unnecessary hardship" exists on the Property in order to grant a variance. Conclusion of Law No. 8 quotes the Pennsylvania Supreme Court's definition of a variance in *Brennen v. Board of Adjustment*, 409 Pa. 376, 187 A.2d 180 (1963), which includes the term "unnecessary hardship." (Conclusion of Law No. 8). Therefore the Board clearly recognized the requisite burden.

Further, the Board also explicitly concluded that the record and evidence in this matter showed undue hardship. The Board wrote that

After a review of the record and the consideration of the evidence presented, the Zoning Board finds that the Applicant has met its burden in support of a zoning/use Variance(s). ... Applicant has provided evidence of hardship.

(Conclusion of Law No. 13).

Appellants' argument seems to be that the Zoning Board failed to make the requisite finding of fact solely because it did not use the word "undue" before "hardship" in Conclusion of Law No. 13. This argument is wrong given the Board's clear statement in Conclusion No. 8 that it recognized that "unnecessary hardship" must be found. Absent some legal principle supporting Appellants' contention that the omission of the word "hardship" in each individual conclusion of law mandates reversal of the Zoning Board's decision, Appellants' argument should be rejected.

Appellants are also wrong that the Board made no Findings of Fact on the issue of unnecessary hardship. The Findings of Fact list numerous documents and other evidence submitted by the Appellee demonstrating that the Property sits in the floodway and thus cannot be developed without a variance. (*See* Findings of Fact Nos. 10, 35.) As stated in *Manayunk Neighborhood Council and Cotton Street, supra*, Commonwealth Court found that this fact without more constitutes undue hardship. Therefore no additional Finding of Fact or Conclusion of Law was needed.

Further, there is no law that requires every fact relied upon by the Zoning Board to be explicitly stated in the Board's Findings of Fact and Conclusions of Law. It is sufficient if the rationale for the Board's decision to grant a variance may be found in the entire record, including the testimony, reports, and other evidence presented to the Board. *See Silar v. Zoning Bd. of Adjustment of Spring Garden Twp.*, 46 Pa. Commw. 340, 407 A.2d 74 (1979); *West Whiteland Twp. v. Exton Materials, Inc.*, 11 Pa. Commw. 474, 314 A.2d 43 (1974). Courts have found Zoning Board decisions to be valid as long as the decision demonstrates that the Board recognized the elements necessary to grant a variance. *See North Chestnut Hill Neighbors v. Zoning Bd. Of Adjustment of the City of Philadelphia, et al.*, 928 A.2d 418 (Pa Commw. 2007).

Appellants' argument also ignores the standard of review applicable in this matter; i.e., that the court's role is only to determine whether the Board committed a manifest abuse of

discretion or error of law. *West Whiteland, supra*. The Board's failure to specify all the grounds for its decision, particularly when the record includes all of the pertinent information, certainly does not rise to the level of an abuse of discretion.

Finally, even if this Court were to find the Zoning Board's factual findings inadequate – a result that seems contrary to the extensive record in this matter -- overturning the Board's decision is not the usual consequence. Rather, “the absence of findings by the board usually results in the necessity of remanding the case to Board so that it can fulfill that duty.”

Jenkintown Towing Service, et al. v. Zoning Hearing Bd. Of Upper Moreland Twp., et al., 67 Pa. Commw. 183, 446 A.2d 716 (1982).

Remand would seem an unnecessary step given the facts of this matter, however. There is an extensive record from which the essential facts necessary to grant a variance are readily apparent. There is also recent case law from Commonwealth Court involving an immediately adjacent properties (*Manayunk Neighborhood Council, et al.* and *Cotton Street, supra*) in which the Court specifically ruled that the Zoning Code provision applicable here, and the location of the Property in the Schuylkill River floodway, render the Property virtually useless, thus proving unnecessary hardship. *Manayunk Neighborhood Council, et al.*, 815 A.2d at 656-57. While the Zoning Board could always issue a more extensive set of Findings and Conclusions in any matter, given the extensive information already in the record little in those Findings would likely be new. A remand would only delay disposition of this matter and cause the Zoning Board and this Court to expend additional resources.

4. Contrary to Appellants' Argument, The Zoning Board Specifically Found Unnecessary Hardship.

Appellants' Brief alleges that the Zoning Board completely omitted Findings of Fact regarding hardship (Appellants' Brief, page 6). The error in this allegation is discussed extensively above. Moreover, Appellants seriously mischaracterize the undue hardship that characterizes this Property.

Appellants focus on the height limits of the proposed buildings on the Property in an attempt to convince the Court that no hardship can be found (Appellants Brief, pages 6-7). However, this is not the hardship the Zoning Board found determinative in concluding that a variance is warranted. Rather, the testimony before the Board focused on the fact that the Property is in the Schuylkill River floodway (see, e.g., NT pages 22-23), and the Board

mentioned the severe limitations imposed by the Zoning Code when developing property in the floodway (Conclusion of Law No. 5).

The Zoning Board also heard testimony about the need for the buildings to exceed the permitted height limit. Appellee's architect testified that the height and other variances related to building area were required in order to preserve open space and make the project viable (NT pages 19-25). This testimony, accepted by the Board, mainly concerns the Board's finding that the variance granted was the minimum necessary to afford relief.

Appellants contend that there is no hardship because the owner could construct a building within zoning limits (Appellants Brief, page 7). This contention is wrong. Section 14-1606 of the Zoning Code clearly prohibits any development or new construction in the floodway. (*Manayunk Neighborhood Council*, 815 A.2d at 656; *Cotton Street*, *supra*).

Even if the Property were (incorrectly) considered part of the floodway fringe, that same section prohibits construction of dwellings in the floodway fringe unless the lowest floor elevation (including basements and cellars) is one foot (1') above the Regulatory Flood Elevation (Section 14-1606(5)(b)(.2)). Clearly any residential development could not occur even in the fringe under such circumstances, without a variance so that the entranceway could be constructed. Thus no construction could occur within zoning limits, and the Board's finding of hardship is supported by the evidence.

In sum, Appellants seek to ignore the judicial declaration of undue hardship relating to the floodway found in the *Manayunk Neighborhood Council* and *Cotton Street* cases, and the extensive testimony and record concerning hardship presented to the Board. Appellants' approach should be rejected, and the Board's determination of undue hardship should be upheld.

5. Appellants' Argument That No Hardship Exists Because of a Pre-Existing Dimensionally Compliant Use is Similarly In Error.

Finally, Appellants contend that there is no hardship because the Property is the site of a pre-existing restaurant and parking use, which could continue within zoning requirements (Appellants Brief, page 8). This is also wrong.

Appellants provided no evidence that the Property could have continued as a restaurant with parking without a variance from the Zoning Board. The restaurant on the Property ceased doing business about three (3) years prior to the Zoning Board's proceedings (NT pages 52, 55). Appellants stated that this restaurant predated the re-zoning of Venice Island (including the

Property) from Industrial to RC-1 Residential (NT, page 54), which rezoning occurred on or about December 1999. Once the Property was re-zoned, the restaurant use became a non-conforming use under the Zoning Code (The Philadelphia Code, §14-104(2); NT pages 53-54).

The Property is also subject to the Main Street/Manayunk and Venice Island Special District Controls (The Philadelphia Code §14-1615). Those Special Controls prohibit a restaurant use on Venice Island (Philadelphia Code §14-1615(3)(c)). Thus the restaurant use, which also pre-dated the implementation of the Special District Controls, was also a non-conforming use with respect to those Special District Controls.

Pursuant to the Zoning Code, this restaurant non-conforming use is considered abandoned could not be resumed on the Property once it was discontinued for more than three (3) years. (Philadelphia Code §14-104(5)(b)). Therefore, contrary to Appellants' contention, not even a restaurant and parking could be continued on the Property without a variance from the Zoning Board.

Appellants also seek to overturn the Zoning Board's hardship finding by arguing that there are "dimensionally compliant" uses for the Property (Appellants' Brief, pages 8-9). However, this is simply not true. Commonwealth Court wrote:

A variance, whether labeled dimensional or not, is appropriate only when the property, not the person, is subject to hardship.

One Meridian Partners, LLP v. Zoning Bd. of Adjustment, et al., 867 A.2d 706, 710 (Pa. Commw. 2005) (citing *Yeager v. Zoning Hearing Bd of the City of Allentown*, 779 A.2d 595, 598 (Pa. Commw. 2001)).

In this case there are no "dimensionally compliant" uses for the Property absent a variance. The former restaurant use is non-conforming and cannot be resumed without a variance. Further, irrespective of the cost, the Property cannot be developed without a variance due to the floodway restrictions in Section 14-1606. Thus a variance is warranted and the Zoning Board's decision is supported by the facts and applicable law.

V. CONCLUSION.

The Zoning Board considered this matter with a full and complete record, including testimony, expert reports, and voluminous documentation. The Board acted within the scope of authority by granting a variance to Appellant, and issuing Findings of Fact and Conclusions of Law based upon the record before it. The Board's decision also supports Commonwealth

Court's determination that undue hardship exists in a property zoned RC-1 within the Schuylkill River floodway.

In sum, the Zoning Board evaluated an extensive record and reached an appropriate conclusion. For this reason, Appellee Daniel Neducsin respectfully requests that this Court affirm the result reached by the Zoning Board of Adjustment.

Respectfully Submitted,

Dated: January 5, 2009

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CERTIFICATION OF SERVICE

I hereby certify that service of a true and correct copy of the foregoing Brief of Appellee Daniel Neducsin was made on January 5, 2009, to the following parties by email and/or regular United States Mail, postage prepaid:

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