IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Manayunk Neighborhood Council, Inc., and Kevin Smith, Appellants	:	
v.	:	
	:	No. 1083 C.D. 2010
The Philadelphia Zoning Board of Adjustment and The City of Philadelphia	:	Argued: May 9, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: June 14, 2011

Manayunk Neighborhood Council, Inc. and Kevin Smith (collectively, the Neighborhood Council) appeal from an order of the Court of Common Pleas of Philadelphia County (trial court) affirming the decision of the Philadelphia Zoning Board of Adjustment (Board) granting Waterford Development Associates, LP's (Waterford) zoning permit application for a use/zoning variance for residential development of property to construct 205 apartment units. For the following reasons, we reverse the Board's decision.

In 1999, Waterford submitted an application to the Department of License & Inspection (L&I) for zoning and use permits to construct 270 apartment

units with accessory and public parking for property located on Venice Island.[1] The apartments were to be constructed one and one-half feet above the Schuylkill River's 100-year flood level while the proposed parking would be located partially below grade and entirely within the river's 100-year flood level. Initially, the application was refused because it would not comply with Section 14-508(3)(b) of the Zoning Code – requiring that construction of a building be at least 10 feet from another building; Section 14-605(5)(a) of the Zoning Code – controls regarding floodplains; and Section 14-404(4) of the Zoning Code – regarding area per parking space. An appeal was taken by Waterford to the Board, which granted its request finding that a hardship existed. The Neighborhood Council took an appeal to the trial court, which found in its favor and reversed the Board's grant of the zoning permit.

On appeal by Waterford to this Court, we reversed in a memorandum opinion, *Manayunk Neighborhood Council v. Zoning Board of Adjustment, et al,* (No. 2407 C.D. 2001, filed March 14, 2003), because Waterford proved that the property was in a flood zone and created a hardship as the Zoning Code prohibited any development. However, based on its compliance with FEMA's requirements, the grant of variances to Waterford was necessary to enable the reasonable use of the property. Our Supreme Court denied the Neighborhood Council's petition for allowance of appeal, *Manayunk Neighborhood Council, et al, v. Zoning Board of Adjustment, et al,* (No. 275 EAL 2003, May 26, 2004). In December 2005, by

[1] The property is bordered by the Schuylkill River to the west and railroad tracks and the Manayunk Canal to the east. The property was formerly the site of the Connelly Container Corporation but the buildings located on the property had fallen in a state of disrepair and were demolished by Waterford when they became in danger of collapse.

letter to the Board, Waterford sought "administrative permission" to the original plan to reduce the number of units from 270 to 205, to eliminate public parking, and to reduce accessory parking from 575 spaces to 250 spaces. The plan also sought to reduce the site coverage by 45%. By letter dated December 8, 2005, the Board approved the revised plans.

Sometime between 2005 and 2008, the zoning designation of the area in which the property was located changed from G-2 Industrial to RC-1 Residential. The area was also remapped by FEMA, which removed the property from a designated floodway. In August 2008, Waterford submitted a third application to L&I with some minor dimensional changes from the plan previously approved by the Board in 2005. The reasons given for the request were as follows:

> Applicant seeks reasonable adjustments to previously granted variances to allow minor dimensional reductions in a previously approved building project resulting in the construction of a four (4) story residential building with a mezzanine [from a 5-story building], 205 units, totaling 267,517 gross square feet and surface parking with 250 parking spaces including handicap spaces, a maximum height of 111.66', a pedestrian bridge over railway tracks for flood emergency evacuation, a generator at a platform above the first floor, a fence six (6) feet in height and all previously approved uses as illustrated in the application.

(Reproduced Record at 85b.)

L&I refused the application because: 1) the lowest proposed floor elevation was 30.68 feet and 39.29 feet was required; 2) the proposed distance between the face of the building and the adjacent railroad track ranged from 32 to

54 feet with a required distance of "equal the height of the building" or 81'2"; and 3) the proposed minimum width between the building wings was 10'2" and 28' was required.

Waterford filed an appeal to the Board arguing that L&I should "have evaluated the application against the ZBA's previous grant of relief as distinguished from the current regulations. Since the application is for a smaller building within the footprint and massing allowed by the ZBA, approval should have been granted without further appeal." It also argued that minor dimensional reductions should have been allowed because they would facilitate the reductions in the size of the building.

Before the Board, architect David Ertz (Ertz) testified for Waterford regarding the project that was currently before the Board. He described it as a four-story apartment building with 205 residential units. He explained that while the current project had essentially the same footprint, the difference between the previously-approved applications was that this plan had one less floor due to the economics of the project. It had been designed as structural stud and concrete plank but that would have been too expensive for the project so it was changed to wood and that caused the reduction by one floor due to the building code. He also testified regarding the flood elevation requirements, the necessity in the reduction of the setback from 81 feet to 32 to 54 feet from the railroad track, and the inability to have an eight-foot wide walking trail along the river.

The Board concluded that Waterford had not complied with:

- Section 14-1606(5)(b)(.2) of the Zoning Code (allowing for construction of dwellings within the floodway fringe only if the lowest floor elevation including basements and cellars was one foot about the regulatory flood elevation);

- Section 14-1606(5)(b)(.3) of the Zoning Code (allowing for construction of non-residential structures only if the structure was flood proofed to one foot above the regulatory flood elevation); and

- there was no testimony that Section 14-211(2)(a)(.2) of the Zoning Code (requiring every point on a structure which faces a river, stream, canal, railroad right-of-way or street having a minimum horizontal distance from the centerline or the combined centerlines of said river, stream, canal, railroad right-of-way or a street equal to the height of that point above the mean ground level at the base of said structure), required that the setback should be calculated by adding together the centerlines of the railroad tracks and the canal, and there was no testimony that following that course would result in the proposed setback being sufficient.

Despite those findings, the Board granted the requested variance with provisos.[2] It noted that the proposed development required less of a variance than the development for which the Board granted variances in 2000 and that there was no evidence to show any material change in the conditions found sufficient to justify the variance that the Board granted in 2000, which this Court affirmed. Specifically it made the following finding of fact:

[2] Those provisos included that the riverside path had to be eight feet wide and required the approval of the Planning Commission, the Street's Department and the railroad; a permit had to be obtained from L&I within one year from the date of the Board's decision; all construction had to be in accordance with plans approved by the Board; and a new application and new public hearing would be required for failure to comply with the foregoing conditions.

> 12. Having once found that a variance is justified for a particular development, the Board may not refuse a second application in the absence of relevant evidence showing that conditions have changed so that a variance is no longer warranted. *Grace Building Co. v. Hatfield Twp.*, 329 A.2d 925 (Pa. Cmwlth. 1974).

The Neighborhood Council appealed to the trial court arguing that the Board erred in its decision because its decision was based solely on its prior decision in 2000. The trial court affirmed the Board's decision finding that Waterfront's application sought only minor dimensional changes from the plan approved by us and those changes were all reductions in the overall usage. This appeal followed.[3]

The Neighborhood Council first contends that the Board erred by relying on *Grace Building Company v. Hatfield Township*, 329 A.2d 925 (Pa. Cmwlth. 1974), to find that a prior variance established the right to a current variance because it was overruled by *Omnivest v. Stewartstown Zoning Hearing Board,* 641 A.2d 68 (Pa. Cmwlth. 1994). In *Omnivest,* a subdivision had been approved for construction of multi-family dwellings in 1980. No construction occurred, and the variance expired because the applicant did not obtain a use certificate or building permit within six months from the date the variance was granted. Eleven years later, the developer sought a variance from the right-of-way frontage requirement which was denied because it was self-created, not the minimum variance, and was financial in nature. The trial court determined that

[3] Where the trial court takes no additional evidence, our scope of review is limited to determining whether the Board committed an abuse of discretion or an error of law. *In re Appeal of Realen Valley Forge Greens Associates,* 576 Pa. 115, 838 A.2d 718 (2003).

absent any change of circumstances, the Board was bound by its 1980 decision granting the variance and "the clear import of the prior decision is that it was permissible to build the apartment units under *all* of the provisions of the Ordinance." 641 A.2d at 418. On appeal, we stated that "the zoning ordinance clearly establishes that the variance expired if not acted upon in a specified manner within a specified period of time."[4] 641 A.2d at 421. Further, because each variance application was a new application, "the applicant must prove all elements necessary to the variance. To hold otherwise would negate the ordinance provisions limiting the duration of the variance authorization and would create confusion in zoning matters involving expired variances." 641 A.2d at 423. *See also 8131 Roosevelt Corp. v. Zoning Board of Adjustment of City of Philadelphia*, 794 A.2d 963 (Pa. Cmwlth. 2002).

In this case, the original zoning permit application was made in 1999, ultimately approved by this Court in our 2003 decision, and later substantially

[4] Section 14-1703(4) of the Philadelphia Zoning Code provides:

> Zoning and/or Use Registration Permits issued after the effective date of this ordinance with respect to construction and use of a property, or where interior alterations are involved, shall expire one year after the date of issuance, unless construction work is begun prior thereto and is carried on to completion without voluntary interruption except that the Department of Licenses and Inspections shall extend, in writing, the expiration date of a zoning and/or use registration permit, for one (1) year, upon written request of the permittee, provided the proposed construction is the same as that authorized under the permit. No permit shall be extended by the Department more than once. Use Registration Permits, where no construction or interior alterations are involved, shall expire three months from the date of issuance unless the approved use has begun.

modified by administrative action in 2005. Ignoring that §14-1703(4) of the Zoning Code provides that an approval of a zoning permit expires at the latest two years after issuance, between 1999, when the application was made to amend the original application, the zoning of the property changed from a G-2 industrial to a RC-1 residential and the flood plan provisions also changed. Waterford had to prove that its project met the criteria from the zoning provisions in the RC-1 residential district because the variances that were previously granted were from zoning regulations that are no longer applicable.

Accordingly, because the Board relied on this Court's decision in 2003 in granting the variances requested, the order of the Board is reversed.[5]

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DAN PELLEGRINI, JUDGE

[5] Based on how we have decided this issue, we need not address the Neighborhood Council's other arguments.

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O R D E R

AND NOW, this 14th day of June, 2011, the order of the Court of Common Pleas of Philadelphia County, dated April 26, 2010, is reversed.

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DAN PELLEGRINI, JUDGE