IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Theodore Stones,	:	
	:	
Appellant	:	
	:	
v.	:	No. 2260 C.D. 2010
	:	
Philadelphia Zoning Board of Adjustment	:	Submitted: May 27, 2011
	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: August 5, 2011**

Theodore Stones (Neighbor) appeals from the Order of the Court of Common Pleas of Philadelphia County (trial court), which affirmed the Decision of the Philadelphia Zoning Board of Adjustment (Board), granting Stanley Smith's (Landowner) request for variances on the property at issue (Property). Because Neighbor has waived each issue he raises on appeal to this Court, we affirm the Order of the trial court.

The Property is located at 4969 Wakefield Street, (Findings of Fact (FOF) ¶ 1), and consists of two lots (Lot 1 and Lot 2) with one building on each lot. "The Property is located partly in a district which is zoned R-5 Residential and partly in

a district which is zoned R-9A Residential." (FOF ¶ 3; Notice of Refusal, R.R. at 5a.) A vacant, 16,000 square foot building sits on Lot 1, a smaller building sits on Lot 2, and the buildings have "been almost built on top of each other." (Hr'g Tr. at 3-5, R.R. 10a-12a; FOF ¶¶ 9, 12.) The Property is also situated "basically right across the street from a playground" and there are "vacant properties all around." (Hr'g Tr. at 10-11, R.R. at 17a-18a; FOF ¶¶ 19, 21.)

Landowner applied to the Department of Licenses and Inspections (Department) for a Zoning/Use Registration Permit (Permit), which sought the relocation of lot lines to create one lot by combining Lot 1 and Lot 2, to turn the vacant building on Lot 1 into a private penal facility, and for the building on Lot 2 to be used as accessory storage space for the private penal facility. (Notice of Refusal, R.R. at 5a.) The Department denied the Permit on June 25, 2009, stating that "the proposed regulated use, private penal facility, is not permitted within 500' of a public playground, not permitted within 500' of residential homes, not permitted within 500' of any residentially zoning district and is not permitted in this zoning district." (Notice of Refusal, R.R. at 5a (citing Section 14-1605(4)(b) of the Philadelphia Code[1]).) In addition, the Board cited Section 14-205 and Section 14-113 of the Philadelphia Code,[2] stating that the Permit was denied

[1] Section 14-1605(4)(b) of the Philadelphia Code states, "[n]o regulated use shall be permitted . . . [w]ithin 500 feet of any residentially zoned district (regardless of the actual uses contained therein), Institutional Development District or any of the following residentially related uses."

[2] Section 14-205 of the Philadelphia Code provides that multiple buildings per lot are not allowed in zones R-5 and R-9A. Section 14-113 of the Philadelphia Code states, "[u]nless otherwise specified under the provisions of this Title, only one principal structure or use shall be permitted on a lot."

because "the proposed building 1 and building 2 on the same lot create a condition of multiple structures on a lot and is not permitted." (Notice of Refusal, R.R. at 5a.)

Landowner filed a Petition of Appeal to the Board seeking two variances in order "to allow [a] private penal facility at this location." (Petition of Appeal, R.R. at 6a.) A public hearing was held on the matter on September 23, 2009. (Hr'g Tr. at 1, R.R. at 8a.) The panel for the hearing consisted of the Chairwoman and three other panel members. (Hr'g Tr. at 1, R.R. at 8a.) In support of the requested variances, Landowner presented testimony from the developer of the Property (Developer); the Executive Director of New Directions for Women (Executive Director); and the attorney for New Directions for Women. (Hr'g Tr. at 3, R.R. at 10a.) In opposition to the variances, Neighbor and others living near the Property testified. (Hr'g Tr. at 11, R.R. at 18a.)[3]

Landowner proposes to develop the Property as "an alternative incarceration for women from the Riverside County Prison System." (Hr'g Tr. at 7, R.R. at 14a.) The 16,000 square foot building on Lot 1 of the Property would be used to house between twenty-five to thirty-six women who are nonviolent offenders, most commonly charged with drug offenses, and deemed appropriate for the facility. (Hr'g Tr. at 2, 7-8, 17, R.R. at 9a, 14a-15a, 24a; FOF ¶¶ 13, 28.) Eighteen of the prospective residents are presently located a block and a half away from the

[3] The hearing transcript is unclear as to which party is testifying and collectively refers to Developer, Landowner, and the Executive Director as "the witness." In addition, Neighbor and others who live near the property presented testimony in opposition to the variance request and are collectively referred to as "party of interest." Although the transcript does not delineate who is testifying, this Court is able to reasonably discern who is speaking.

Property. (Hr'g Tr. at 7, 9, R.R. at 14a, 16a; FOF ¶ 14.) The building on Lot 1 would also be used for administrative and program space, and would house a full-service kitchen. (Hr'g Tr. at 8-9, R.R. at 15a-16a; FOF ¶ 15.)

The New Directions for Women "program is fully accredited and has been in existence for 20 years." (Hr'g Tr. at 9, R.R. at 16a; FOF ¶ 17.) The program's components include job readiness and life skills training. (Hr'g Tr. at 9, R.R. at 16a; FOF ¶ 16.) The current New Directions for Women property has a security system, which will be placed in the proposed facility at the Property with a "pass key system for gaining entrance and exit out of the building." (Hr'g Tr. at 18, R.R. at 25a; FOF ¶ 30.) The Wakefield 49ers Community Improvement Association (Wakefield 49ers), a civic group within the community, requested video monitoring and driveway fencing, which the Executive Director promised to provide. (Hr'g Tr. at 18-19, R.R. at 25a-26a; FOF ¶ 30.) The Executive Director also testified that she has a close relationship with the Police District Captain and that the New Directions for Women program has a close relationship with the community because the women perform community service and visit businesses. (Hr'g Tr. at 22-23, R.R. at 29a-30a; FOF ¶¶ 35, 36.) A member from the community stated that the building has been vacant for at least a decade; the program proposed was well run; and has been in a number of communities that have not been damaged. (Hr'g Tr. at 20, R.R. at 27a; FOF ¶¶ 31, 32.) Further, the Developer testified that he had spent the last four years trying to develop the Property but that the lack of access to public transportation, the amount of vacancies, and empty lots near the Property made it hard to find a tenant. (Hr'g Tr. at 21, R.R. at 28a; FOF ¶¶ 33, 34.)

In opposition to the variance request, Neighbor testified that there are already group homes, facilities, other programs for the disabled and the impaired in the area, and that the neighborhood is not in favor of them. (Hr'g Tr. at 11-14, R.R. at 18a-21a; FOF ¶ 21.) Neighbor also testified that he does not want the traffic in the neighborhood to grow. (Hr'g Tr. at 12-13, R.R. at 19a-20a.) In addition, Neighbor stated that the neighborhood does not want the penal facility across the street from a playground. (Hr'g Tr. at 11, R.R. at 18a, FOF ¶ 21.) Another neighbor opposing the variances commented that there are already problems with drug activity at the playground and the neighbors do not want any more harm at the playground. (Hr'g Tr. at 15, R.R. at 22a; FOF ¶ 26.) A representative of the City Planning Commission stated that the Property is for residential use and the City Planning Commission recommended that the request for the variances be denied. (Hr'g Tr. at 24, R.R. at 31a; FOF ¶ 39.)

Based on the evidence of record, the Board granted the requested variances. The Board found the Property "unique in its size, location, and former use for light industrial purposes,"[4] and that the structures on the Property make it "not feasible for use as a single-family dwelling as required by R-5 and R-9A Residential zoning." (FOF ¶¶ 40, 41.) In addition, the Board found that "literal enforcement of the [Philadelphia] Code would create an unnecessary hardship." (FOF ¶ 42.) Because there were no complaints made about the existing New Directions for Women facility and program at the hearing, the Board found the variances would

[4] The Board has previously granted variances in 1968 and 1976 for storage and repair of "washing machines (coin operated), reconditioning and" assembly of sporting goods equipment and component parts for televisions, radios, and the like. (Notice of Refusal, R.R. at 5a; FOF ¶ 5.)

"not endanger public safety or otherwise adversely affect the public health, safety, or general welfare." (FOF ¶ 43.) On the contrary, the Board found that the rehabilitation and use of two vacant buildings would "promote the public health, safety, and general welfare" and would not increase congestion in the area. (FOF ¶¶ 46-48.)

The Board concluded that based "on the record as a whole, including but not limited to the size and shape of the existing buildings and lots, their location, and the unsuccessful efforts that have been made to find another use for the Property," the variances "are the minimum necessary to provide relief to the [Landowner]." (Board Conclusions of Law (COL) ¶ 21.) The Board concluded that Landowner sustained his burden of proving hardship unique to the Property and that the variances would not substantially injure the adjacent conforming properties. (COL ¶¶ 17-18.)

Neighbor appealed the Decision of the Board to the trial court, which held that Landowner had established the Property was unique and that attempts to develop the Property for four years had been unsuccessful. (Trial Ct. Op. at 4-5.) The trial court held that New Directions for Women had a long history with no problems or complaints, specifically in the area in question, and the City of Philadelphia has an "overwhelming need for this type of facility." (Trial Ct. Op. at 5.) Even though Neighbor and others in the neighborhood signed a petition objecting to the variances because the penal facility may negatively impact the safety of the community, the trial court held that the Board's findings are supported by substantial evidence and establish that the variances would not have

an adverse effect on the community. (Trial Ct. Op. at 5.) The trial court held that the variances are the minimum relief necessary to afford relief to Landowner and agreed that the Board did not err in granting the variances. (Trial Ct. Op. at 5-6.)

Neighbor now appeals to this Court.[5] On appeal, Neighbor agues that: (1) the Board did not comply with the Philadelphia Code because a majority of the Board members present, constituting the quorum, did not vote; (2) Landowner failed to show unnecessary hardship because he did not prove that he made efforts to secure a buyer or lessee for the Property; (3) Landowner failed to show the variances granted were the minimum variances necessary to make use of the Property; and (4) the Board erred in granting the variances without adding the agreed-upon recommendations for safety and security. Landowner argues that the issues Neighbor raises on appeal are waived.

Before this Court may address the substantive arguments on appeal, we must first ensure that Neighbor has preserved these arguments before the Board and the trial court. "[W]here a full and complete record was made before a zoning hearing board, a party in an appeal to a trial court may not raise issues not raised before the board." 8131 Roosevelt Corporation v. Zoning Board of Adjustment of the City of Philadelphia, 794 A.2d 963, 968 (Pa. Cmwlth. 2002); see, e.g., Myers v. State College Zoning Hearing Board, 530 A.2d 526, 527 (Pa. Cmwlth. 1987) (stating "an

[5] "Our scope of review, where the trial court took no additional evidence, is limited to a determination of whether the Board abused its discretion, committed an error of law or made findings of fact which are unsupported by substantial evidence." Moses v. Zoning Hearing Board of the Borough of Dormont, 487 A.2d 481, 483 (Pa. Cmwlth. 1985). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 555, 462 A.2d 637, 640 (1983).

appellant in a zoning case could not introduce a new theory of relief on appeal that was not presented to the zoning hearing board"). In addition, Rule 302(a) of the Pennsylvania Rules of Appellate Procedure provides that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa. R.A.P. 302(a). "[A]n issue is not reviewable on appeal unless raised or preserved below." Pa. R.A.P. 2119(e). "[T]he finality of the lower tribunals' determinations must not be eroded by treating each determination as part of a sequence of piecemeal adjudications." In re Farmland Industries, Inc., 531 A.2d 79, 82 (Pa. Cmwlth. 1987). "Appellate Courts render a disservice to judicial economy and the efficient operation of our court system where they freely accept issues that could have and should have been first presented to the courts below for their consideration." Commonwealth v. Mitchell, 464 Pa. 117, 124, 346 A.2d 48, 52 (1975). "Where parties below were not aware that a particular issue was being raised, it was quite likely that testimony germane to that issue would be overlooked or believed to be unnecessary and consequently not presented." Id. This Court cannot make a decision on an issue that was not preserved below because it is likely the record is incomplete. Id.

Neighbor's first argument is that the Board did not have a majority of the members in quorum to vote in favor of the variances because only two of the four members present at the hearing voted and another member, who was not present at the hearing, entered a vote. As such, Neighbor contends that the Board did not comply with Section 14-1805(3) of the Philadelphia Code, which provides that "[n]o action shall be taken by the Board unless at least three members of the Board, present at the time of the vote, concur." Neighbor could not raise this

argument before the Board because he did not know at the time of the hearing which members would be voting. Neighbor's first opportunity to raise this argument was before the trial court, which he failed to do. Neighbor raises this issue for the first time on appeal to this Court. Pursuant to Rule 302(a) and Rule 2119 of the Pennsylvania Rules of Appellate Procedure, this argument is, therefore, waived.

Secondly, Neighbor argues that Landowner failed to show unnecessary hardship because he did not prove that he made efforts to secure a buyer or lessee for the Property. We note that Neighbor failed to raise this argument before the Board and the trial court; therefore, it is waived. Pa. R.A.P. 302(a); 8131 Roosevelt Corporation, 794 A.2d at 968.

Neighbor next argues that Landowner failed to establish that the variances granted provided the minimum relief necessary. Neighbor also failed to raise this argument in front of the Board and before the trial court. As such, this issue is waived. Pa. R.A.P. 2119; 8131 Roosevelt Corporation, 794 A.2d at 968. We emphasize that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa. R.A.P. 302(a).

Lastly, Neighbor argues that the Board erred in failing to include any of the seven conditions or provisos that the Wakefield 49ers requested in order to provide safety and security to the surrounding neighbors and community. The Wakefield 49ers requested the Landowner and his tenants to comply with the following seven provisos: (1) "to be involved with block town watch efforts and School Safety

[thorough] fare"; (2) implement security or video security support to "notify neighbors of security issues that may effect the immediate neighbors and children"; (3) to provide "[m]irrored driveways, fences, and signage to allow safe traffic patterns"; (4) to mandate that all "[t]enants are of non-violent & non-child endangering criminal incarceration background"; (5) to "[t]imely notif[y] . . . residents for fencing and construction or structure changes"; (6) to consider saving as much green space as possible and use green products when able to; and (7) to "[c]onsider involvement in the community groups, block events and support [h]orticultural beautification." (Wakefield 49ers House and Land Use Update Report, Ex. E, R.R. at 68a.) While Neighbor could not raise this argument before the Board at the hearing because the Board's Decision had not yet been issued, we note that Neighbor's first opportunity to raise this argument was before the trial court and he failed to do so. Because this issue was "not raised in the lower court," it is waived "and cannot be raised for the first time on appeal." Pa. R.A.P. 302(a).

We acknowledge Neighbor's argument that the variances should not be granted because the Planning Commission was not in favor of it. (Appellant's Br. at 17.) However, this argument is also waived because Neighbor did not preserve it below. Pa. R.A.P. 2119.

For these reasons, we are constrained to affirm the Order of the trial court.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Theodore Stones,	:	
	:	
Appellant	:	
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v.	:	No. 2260 C.D. 2010
	:	
Philadelphia Zoning Board of Adjustment	:	
	:	

O R D E R

NOW, August 5, 2011, the Order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is hereby **AFFIRMED**.

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RENÉE COHN JUBELIRER, Judge