

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Center City Residents' Association	:	
(CCRA),	:	
Appellant	:	
	:	
v.	:	No. 858 C.D. 2010
	:	Argued: February 7, 2011
Zoning Board of Adjustment of the	:	
City of Philadelphia and City of	:	
Philadelphia and S.T.B. Investment	:	
Corporation	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER

FILED: March 11, 2011

The Center City Residents' Association (Association) appeals from the order of the Court of Common Pleas of Philadelphia County that affirmed the decision of the Zoning Board of Adjustment of Philadelphia (Board) to grant a use variance to the S.T.B. Investment Corporation (STB). We reverse.

STB owns two adult entertainment businesses on two adjacent blocks in Philadelphia. The first is the Forum Theater on the 2200 block of Market Street, an adult movie theater that is also licensed for the retail sale of adult movies and books. The second is Les Gals on the 2100 block of Market Street, an adult cabaret, where there is adult modeling on stage, video screening rooms, booths, an

adult book store, and sales of adult novelties. Both blocks are zoned C-4 Commercial, a classification which does not permit adult businesses. However, both businesses are preexisting nonconforming uses.

In 2008, STB applied to expand the Forum Theater. The proposal would raise portions of the building's roof two to three feet, allowing for the expansion of an existing mezzanine level into a full second floor, which would feature an adult cabaret and adult modeling, as well as the retail sale of adult periodicals, novelty items, videos, clothing and gift items. The application was denied by the Philadelphia Department of Licenses and Inspections because the proposed uses are not permitted at that location.¹ STB appealed to the Board, seeking a use variance.²

¹ Specifically, Section 14-1604(3) of the Philadelphia Zoning and Planning Code designates the following as regulated uses: adult book stores; adult mini-motion picture theaters; adult motion picture theaters; cabarets; adult video stores; adult modeling or photography studios; and adult entertainment stores. Section 14-1604(4) states that:

No regulated use shall be permitted:

(a) Within one thousand (1,000) feet of any other existing regulated use; and/or

(b) Within 500 feet of any residentially zoned district (regardless of the actual uses contained therein)

....

(d) Within any commercially zoned district, except for "C-6" Commercial in which regulated uses shall be permitted, unless a Zoning Board of Adjustment certificate is obtained ...

STB's application was denied because the Forum is within 1000 feet of another regulated use (Les Gals), it is within 500 feet of a residentially zoned district, and it is in a commercial district not zoned C-6.

² While the Forum has a valid preexisting use as an adult movie theater and adult book store, the proposed expansion includes the addition of a number of new uses, all of which are not allowed at that location for the reasons listed in footnote one. For that reason, a use variance is required if the plan is to go forward.

Before the Board, STB proposed that, in exchange for granting a variance allowing the expansion and new uses at the Forum Theater, STB would voluntarily close Les Gals. STB presented this as a consolidation of its adult businesses, which would be positive for the neighborhood. The Association opposed the appeal, arguing that Les Gals and the Forum were both struggling businesses which, left alone, would soon close. Granting the application, the Association argued, would give the Forum a new lease on life, allowing adult businesses to exist in the neighborhood longer than they otherwise would. In addition, the Association argued that STB had failed to show the hardship necessary to be granted a variance.

The Board granted the variance, reasoning that doing so would reduce the Forum's nonconformity by removing Les Gals, the other regulated use within 1000 feet. In addition, the Board found that reducing the number of properties hosting regulated uses would benefit the public health, safety and general welfare. The Association appealed to common pleas, which, citing its deferential standard of review, affirmed. An appeal to this court followed.

On appeal, the Association contends that STB has not met the legal requirements for a variance. STB challenges the Association's standing. Before this court, STB has, for the first time in these proceedings, challenged the standing of the Association. STB points to our Supreme Court's decision in *Spahn v. Zoning Board of Adjustment*, 602 Pa. 83, 977 A.2d 1132 (2009), in which the Court held that standing before the Board requires a person aggrieved, and that civic organizations do not have standing by themselves, unless they can show members who are aggrieved. The Association has asserted that it has members who

live nearby the property at issue and are aggrieved, but none of those individuals appears on the record.

We do not reach the merits of this argument, however, because it has been waived. STB did not put forward this argument when the Association appeared before the Board, nor when the Association took its appeal to common pleas. We cannot consider arguments which have not been preserved below. Pa. R.A.P. 302(a). We will therefore now consider the merits of the Association's appeal.

Variations in Philadelphia are governed by the Philadelphia Zoning and Planning Code (Code). Section 14-1801(1)(c) grants the Board the power to:

Authorize ... such variance from the terms of this Title as will not be contrary to the public interest, where owing to special considerations, a literal enforcement of the provisions of this title would result in unnecessary hardship ...

Section 14-1802 lists the criteria the Board must consider in granting variances, including:

(a) that because of the particular physical surrounding, shape or topographical conditions of the specific structure or land involved, a literal enforcement of the provision of this Title would result in unnecessary hardship ...

Despite the fact that this language is not identical to the language of the Pennsylvania Municipalities Planning Code (MPC),³ this court has previously held that "the requirements set forth in Section 910.2(a) of the MPC^[4] . . . are applicable to variances sought in Philadelphia pursuant to Section 14-1802 of the Philadelphia

³ Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10101 - 11202.

⁴ 53 P.S. § 10910.2. Section 910.2 was added by Section 89 of the Act of December 21, 1988, P.L. 1329.

Zoning Code.” *Manayunk Neighborhood Council v. Zoning Bd. of Adjustment*, 815 A.2d 652, 656 n.2 (Pa. Cmwlth. 2002) [citing *Soc’y Created to Reduce Urban Blight (SCRUB) v. Zoning Bd. of Adjustment*, 772 A.2d 1040 (Pa. Cmwlth. 2001)].

Under the MPC, the party seeking a variance must establish that:

(1) an unnecessary hardship will result if the variance is denied, due to the unique physical circumstances or conditions of the property; (2) because of such physical circumstances or conditions the property cannot be developed in strict conformity with the provisions of the zoning ordinance and a variance is necessary to enable the reasonable use of the property; (3) the hardship is not self-inflicted; (4) granting the variance will not alter the essential character of the neighborhood nor be detrimental to the public welfare; and (5) the variance sought is the minimum variance that will afford relief.

Taliaferro v. Darby Twp. Zoning Hearing Bd., 873 A.2d 807, 811-12 (Pa. Cmwlth. 2005). It is clear that under both the language of the MPC and the Code, the party seeking a variance bears the burden of proving that an unnecessary hardship will arise if the variance is not granted. *SCRUB*, 772 A.2d 1040.

In Philadelphia, as well as in jurisdictions governed by the MPC, unnecessary hardship must arise from the particular physical attributes of the property at issue. *Id.* In addition,

To establish unnecessary hardship, the applicant must demonstrate that due to the physical characteristics, the property cannot be used for any permitted purpose or could only conform to such purpose at a prohibited expense, or that the property has either no value or only a distress value for any permitted purpose.

Patullo v. Zoning Hearing Bd. of Twp. of Middletown, 701 A.2d 295, 300 (Pa. Cmwlth. 1997). “A property owner does not have a right to utilize his land for his

highest and best financial gain. Showing that a lot can be used in a more profitable fashion is insufficient; there must be no permitted use to which the land can feasibly be put.” *Twp. of E. Caln v. Zoning Hearing Bd. of E. Caln Twp.*, 915 A.2d 1249, 1253 (Pa. Cmwlth. 2007) (citations omitted).

The record reveals no evidence whatsoever of any physical attributes of the property at issue that prevent it from being used for a permitted purpose. In fact, the property is currently being put to a lawful (though non-conforming) use as an adult theater, and there is no contention that the property could not be used for any of a number of alternate, conforming, uses. The opinion of the Board does not identify a particular hardship. In fact, it does not even include a factual finding that a hardship exists. The opinions of the Board and common pleas all emphasize the arguably common-sense nature of the proposal, as well as its alleged benefits to the community. These arguments, however, even if true, do not make up for the fact that STB has failed to meet the requirements for a receiving a variance.⁵

Approving the variance without the existence of unnecessary hardship was error on the part of the Board, and it was similarly error for common pleas to affirm. For this reason, we reverse.

BONNIE BRIGANCE LEADBETTER,
President Judge

⁵ STB also argues that the variance would reduce the non-conformity of the neighborhood, by reducing the number of non-conforming properties. As it would do so by increasing the size and number of non-conforming uses in the other property, however, it is debatable whether the plan can fairly be characterized as a reduction. Regardless, absent unnecessary hardship, reduction in non-conformity is not legal grounds for a variance.

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ORDER

AND NOW, this 11th day of March, 2011, the order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is hereby REVERSED.

BONNIE BRIGANCE LEADBETTER,
President Judge