IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Tacony Civic Association, Tacony Community Development Corporation, Peter A. Naccarato, Laura T. Naccarato, and Frederick Donnelly, Appellants | : | |
| v. | : | |
| Philadelphia Zoning Board of Adjustment and City of Philadelphia, and Sandmeyer Building & Development, LLC and 6954 Keystone LLC | : | No. 98 C.D. 2010<br>Submitted: November 24, 2010 |

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: February 2, 2011

Tacony Civic Association, Tacony Community Development Corporation, Peter A. Naccarato, Laura T. Naccarato, and Frederick Donnelly (Protestors) appeal from the order of the Court of Common Pleas of Philadelphia County (common pleas court) which affirmed the Philadelphia Zoning Board of Adjustment's (Board) grant of a use variance to Sandmeyer Building & Development, LLC and 6954 Keystone, LLC (Developer).

This dispute concerns what is historically a large single-family Victorian-style residence located in the historic neighborhood of Tacony (Property). At some point in time prior to 1959, the Property was converted to a six-family dwelling.

In 1959, a permit was issued that authorized the erection of a rectangular three-story brick addition to the front of the Property and its increased development into a twelve-family dwelling. The neighborhood consists of both multi-family dwellings and single-family dwellings. However, the Property is unique because it is the only building in the neighborhood which has a three-story rectangular brick addition to the front of the original house.

The use of the Property as a multi-family was abandoned in 1999.

Developer acquired the Property in February 2007. Prior to Developer's acquisition, the Property was dilapidated, vacant, and had received multiple code citations.

On March 17, 2008, Developer applied for a zoning/use permit to use the Property again as a twelve-family dwelling. The application was denied because a twelve-family dwelling was not a permitted use in an R-5 District.[1]

Developer appealed to the Board and was met with strong community opposition. Witnesses from the Tacony Civic Association and Tacony Community Development Corporation testified that the community was making an effort to return the neighborhood to predominantly single-family homes. There was concern about lack of parking in the neighborhood because it was highly congested

[1] There was no dispute that more than three years elapsed since the building was used as a twelve-family dwelling and that Section 14-1-4(5)(b) of the Philadelphia Zoning Code provides that "a non-conforming use has been discontinued for a period of more than three consecutive years shall be considered abandoned and may not be resumed." Therefore, Developers could not

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given the number of rental units already on the block. Several neighbors testified regarding the conversions they had undertaken from multi-family dwellings back to single family homes in keeping with the rest of the architecture on the block. Protestors believed that it was feasible to "remove" the front addition and restore the rear Victorian property. Notes of Testimony, May 21, 2008, (N.T.) at 13; Reproduced Record (R.R.) at 110a. Other neighbors testified that the Property was a nuisance, in danger of falling down, and at times occupied by "vagrants and squatters." N.T. at 19; R.R. at 112a.

A representative of the Philadelphia City Planning Commission testified that the 1959 addition to the Property made it "unreasonable" to convert the Property to a singe-family dwelling and that use of the Property for a maximum of eight units might be permissible, subject to the Planning Commission's review of plans for such use. N.T. at 36-37; R.R. at 116a.[2]

At the close of the hearing the Board asked Developer to submit a written rebuttal statement and plans for eight units instead of twelve. Developer submitted the requested information and asserted that the cost of converting the Property to a single family dwelling was "cost prohibitive" and unfeasible.

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resume the multi-family use without receiving a variance from the Board and a new zoning permit.

[2] Later, after reviewing the proposed plans, the City Planning Commission recommended that the request for eight units was "excessive" for this location. Memorandum from Philadelphia City Planning Commission, June 25, 2008, at 1; R.R. at 102a.

Subsequently, Protestors hired an attorney who wrote to the Board on May 29, 2008, and asked permission to submit evidence at an "additional hearing." The Board denied Protestant's request. Protestors submitted a written statement and additional legal argument which the Board found was untimely.

On July 8, 2008, the Board granted a use variance for eight units. Protestors appealed to the common pleas court which affirmed the decision of the Board on December 15, 2009.

On appeal[3], Protestors argue that the Board and common pleas court erred in finding that the Developer met its burden of proving unnecessary hardship because there was no live testimony that the Property could not be developed as a single family dwelling. The only evidence was a written statement from one of Developer's principals that it was unfeasible and cost prohibitive. Protestors argue that they, on the other hand, presented substantial evidence that many large multi-family dwellings on the same block were recently converted to single-family homes.

An applicant seeking a variance bears a heavy burden of proof. Polonsky v. Zoning Hearing Board of Mount Lebanon, 590 A.2d 1388 (Pa. Cmwlth. 1991). In order to prove the entitlement to a variance, the applicant must prove unnecessary hardship. Jacobs v. Philadelphia Zoning Board of Adjustment,

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[3] Where the court of common pleas has not taken any additional evidence, this Court's review is limited to determining if the Board manifestly abused its discretion or committed an error of law. Allegheny W. Civic Council, Inc. v. Philadelphia Zoning Board of Adjustment, 547 Pa. 163, 689 A.2d 225 (1997). An abuse of discretion may be found if the Board's findings

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273 A.2d 746 (Pa. Cmwlth. 1971). To show unnecessary hardship, the applicant must show the physical characteristics of the property are such that it cannot be used for a permitted purpose or that it cannot be used for a permitted purpose without prohibitive expense, or that the property is valueless or has only distress value without variances. Laurento v. Zoning Hearing Board, 638 A.2d 437 (Pa. Cmwlth. 1994). The applicant must also prove that the variance is not contrary to the health and safety of the area, and that the variance is the minimum necessary to alleviate any hardship. North Chestnut Hill Neighbors v. Philadelphia Zoning Board of Adjustment, 928 A.2d 418 (Pa. Cmwlth. 2007).

Here, the Board concluded that Developer "sustained its burden of proving that literal enforcement of the provisions of the zoning code would create an unnecessary hardship **in light of the size and shape of the structure which was erected legally on the Property in 1959**." Board Opinion, July 8, 2008, at 8 (Emphasis added). Protestors concede that photographs and plans submitted at the hearing showed "a very large Property, which had a very large front addition."

This Court has reviewed the record, including the photographs and schematics, and it must conclude that the Board's conclusions were lawful and supported by substantial evidence. The record demonstrates that the area of the Property is approximately 6,700 square feet. Clearly, in order to convert the Property to a single-family home, the large three story brick addition would need to be demolished and the Property extensively reconstructed.

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of fact are not supported by substantial evidence. Larsen v. Philadelphia Zoning Board of Adjustment, 543 Pa. 415, 672 A.2d 286 (1996).

This Court has previously held that a property owner will not be required to demolish and reconstruct a property to make it conforming regardless of the financial burden incident thereto.

In Logan Square Neighborhood Association v. Philadelphia Zoning Board of Adjustment, 379 A.2d 632, 634 (Pa. Cmwlth. 1977), the owner of a two-story garage type structure applied for a use variance to operate a printing business. The application was denied. On appeal, the Philadelphia Zoning Board of Adjustment concluded that the property could not be converted to a residential use permitted within the zone without demolition and extensive reconstruction. It held that the owner proved unnecessary hardship. The common pleas reversed since the only hardship proved was that the owner could not bring the building to conformance as a residence without making expenditures to effectuate the change and that this constituted "mere economic hardship." Logan, 379 A.2d at 634.

On appeal, this Court reversed and held that the owner's burden was unique given the practical difficulties and inordinate burden of the required demolition and conversion. "Where premises cannot be converted into a permitted use without demolition and extensive reconstruction, more than 'mere economic hardship' exists." Logan, 379 A.2d at 634. See also, O'Neill v. Philadelphia Board of Zoning Adjustment, 384 Pa. 379, 120 A.2d 901 (1956).

Similarly, demolition of the three story structure and extensive reconstruction would be required to bring the Property to a conforming use. Removal of the vast brick structure would not only be costly it would be inordinately burdensome. The common pleas court did not err when it affirmed

the Board's conclusion that Developer met its burden of proving unnecessary hardship.

Next, Protestors argue that the Board committed an error of law when it refused to afford them an additional hearing, after they retained an attorney, to present additional factual evidence. Protestors contend that this evidence included "critical evidence that many single-family zoned homes, previously used for multi-family dwellings, had successfully been converted to single family usage. Protestor's Brief at 21.

This issue is also without merit.

First, a review of the hearing transcript reveals that Protestors did present several witnesses at the hearing who testified that they had converted duplexes and tri-plexes to single family homes.[4] Therefore, the Board already heard this evidence. Second, the record was very clear that the Property was unique in that there were no other buildings in the neighborhood with a three-story brick apartment building appended to the front. Evidence concerning conversions of homes which did not require demolition and extensive reconstruction was irrelevant and duplicative.

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[4] Protestors were afforded every opportunity to present evidence at the hearing. In fact, Protestors used the entire hearing time to present their opposition. By the time Protestors presented their evidence, there was no time remaining for Developer to present its case. Because of this, the Board left the record open for Developer to submit a written rebuttal statement and a plan delineating eight units. Protestors did not object or indicate that they needed additional time. It was only after consulting with an attorney after the hearing that Protestors requested another hearing.

Protestors also argue that the Board failed to consider the health, safety and welfare of the community if the variance was granted. Again, this Court must disagree. The Board specifically found that the variance would not substantially increase parking and traffic congestion to adversely affect or endanger public safety. The Board also specifically considered the Property's poor condition and the fact that it was abandoned. "By enabling the rehabilitation and reuse of the presently vacant building, the grant of a variance for an eight-family dwelling will [actually] promote the public health, safety, and general welfare and reduce the danger of fire and crime." Board Opinion, July 8, 2008, Finding of Fact 50, at 6.

Finally, Protestors argue that the Board erred because they were prevented from cross-examining Developer with regard to its written statement that conversion of the Property would be "cost prohibitive." As Developer points out, Protestors failed to raise this issue before the Board and common pleas court. Therefore, it is waived. Hertzberg v. Philadelphia Zoning Board of Adjustment, 554 Pa. 255, 721 A.2d 46 (1998).

The common pleas court is affirmed.

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BERNARD L. McGINLEY, Judge

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**ORDER**

AND NOW, this 2nd day of February, 2011, the Order of the Court of Common Pleas of Philadelphia County in the above-captioned case is hereby affirmed.

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BERNARD L. McGINLEY, Judge