

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

SFH Properties, LLC and :
SF Master Properties, LLC, :
Appellants :
 :
v. :
 :
Zoning Board of Adjustment of :
the City of Philadelphia and the : No. 128 C.D. 2011
City of Philadelphia : Argued: October 17, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge¹
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: January 4, 2012

SFH Properties and SF Master Properties, LLC, (Owners), appeal the Order of the Court of Common Pleas of Philadelphia County (court of common pleas) which affirmed the decision of the Zoning Board of Adjustment (Board) and denied Owners request to authorize the leasing of single family dwellings in a zoning overlay district to students.

On November 12, 2008, Christopher F. Stouffer, Esquire, as agent for Owners filed essentially identical applications with the Department of Licenses and Inspections (“Department”) for Zoning/Use Registration Permits to continue using the existing structures at 1230 Jefferson Street and 1020 West Oxford Street (owned by SFH Properties LLC), and 1100 Master Street (owned by SF Master Properties LLC) (all referred to hereinafter as the “Properties”) as residential

¹ This case was decided before Judge Butler’s term ended on January 2, 2012.

dwellings for “a single family; that is, a group of persons, one or more of whom are students, living as a single household unit using household facilities in common, but not to include more than 3 persons unrelated by blood, marriage or adoption.” See Applications for Zoning/Use Registration Permits ## 187766, 187765 and 187767, Owners’ Ex. 1.

The Department denied Application # 187766, and issued a Notice of Refusal that is dated 10/15/08 on the signature line but 11/20/08 under “Date of Refusal” at the top of the page. See Owners’ Ex 1. The Department denied Application # 187765 on November 12, 2009. See Notice of Refusal dated 11/12/08, Owners’ Ex. 1. The Department denied Application # 187767 on November 13, 2009. See Notice of Refusal dated 11/13/08, Owners’ Ex. 1.

The Properties are located in a district zoned R-9A Residential. See Notices of Refusal. The Properties actually lie within the district boundaries where the North Central Philadelphia Special District Controls (Ordinance)² applied. See Notices of Refusal; Zoning Code § 14-1629(3).

² (1) *Legislative Findings.* The Council finds that:

- (a) In recent years, North Central Philadelphia has been the target of speculators seeking to create multi-family student housing by converting single family dwellings into rooming or boarding houses;
- (b) The conversion of single-family dwellings into boarding/rooming houses changes the character of this community and over-burdens local blocks with excess vehicles and limited parking spaces;
- (c) Major public and private investments have been made and continue to be made in and around the North Central section of the City to enhance visual

(Footnote continued on next page...)

(continued...)

aesthetics, to sustain single-family residential uses, to prevent declining property values, and to protect and promote the economic vitality of this area of Philadelphia;

- (d) Public expenditures have included street and sidewalk improvements and improvements to the Broad Street Subway and stations;
- (e) The higher density development and non-residential parking as main use in the area has burdened local streets with additional vehicular traffic and decreased parking spaces previously available to the homeowners, lowering the quality of life for existing homeowners in the North Central Philadelphia community;
- (f) Therefore, special land use and zoning controls providing for controls on any proposed conversions are required to protect the existing residential properties, which are within this district and are critical to the vitality and stability of this section of the City as a stable community of single-family dwellings.

(2) *Purpose of the District.* This special district is established in order to preserve and protect this area of the City through the enactment of the North Central Philadelphia Community Special District Controls. It is recognized that this section of the City is unique and is a vital, single-family residential district. This pattern contributes to the distinctive atmosphere of this area. Council recognizes the need to establish special land use and zoning controls, to protect this community from the conversions of houses into apartments, tenements, and multi-family dwellings which would destabilize the community by taking on the transient character inherent in apartment and tenement living, to sustain and promote single-family residential uses, to prevent declining property values, to discourage non-residential parking as main use in the community, and foster the preservation and development of this section of the City in accordance with its special character.

....

(4) *Prohibited Uses.* Within the area subject to the Girard Avenue Special District Controls, and notwithstanding any other Chapter of this Title, the following uses shall be prohibited:

- (a) Multiple-family dwellings;
- (b) Apartment Houses;

(Footnote continued on next page...)

On November 13, 2008, the Owners filed essentially identical appeals from all three Notices of Refusal on the grounds that § 14-1629 was unconstitutional, both on its face and as applied; that the use described in the Application was a single-family use as defined by the Zoning Code; that the term “student housing” was too vague to be valid and was inconsistent with the Department’s consistent application of single family use; and that the Owners were entitled to variances under the criteria set forth in the Zoning Code.

Under cover of a letter dated December 8, 2008, Joseph Beller, Esquire, (Mr. Beller) attorney for the Owners, filed with the Board a Petition for Stay of Enforcement of adverse action by the Department, and attached a copy of a Notice of Intent to Cease Operations which was received from the Department with regard to 1020 West Oxford Street.

Pursuant to § 14-1705(4) of the Zoning Code, the Board granted the requested stay on December 15, 2008.

(continued...)

- (c) Tenement houses;
- (d) Student housing not owner-occupied;
- (e) Fraternity/ Sorority houses.

Philadelphia Code § 14-1629. (emphasis added).

The Zoning Board consolidated these three appeals with sixteen others that challenged the Ordinance for the purposes of hearing. Public hearings on the nineteen appeals were held on January 28, April 1 and May 20, 2009.

Andrew Ross, Esquire, appeared on behalf of the City of Philadelphia and requested a continuance of the January 28 hearing, and asked the Board to await the outcome of a challenge to the Ordinance which was pending in common pleas court. Notes of Testimony, January 28, 2009, at 2-8, 13-15.

Richard DeMarco, Esquire, (Mr. DeMarco) appeared on behalf of other Owners and stated that the City forced his clients to file actions in court by threatening to evict their student tenants before the December holidays. N.T. 1/28/09, at 8-10.

Although the Petitions of Appeal filed by the Owners in the present cases included variance claims among their grounds of appeal, Mr. Beller disclaimed any request for variances in these cases. N.T. 1/28/09, at 11-12. Mr. Beller argued that correct interpretation of the Zoning Code permitted his clients to rent their houses to up to three students. N.T. 1/28/09, at 12.

Pam Pendleton-Smith testified that she was a member of the Yorktown community who lived at 1205 W. Oxford Street and joined in Mr. Ross' request for a continuance on the ground that she learned about the hearing only about a week earlier. N.T. 1/28/09, at 17-18.

William Carter, Esquire, (Mr. Carter) Director of Legislative Affairs for City Council member Darrell Clarke (Council member Clarke), also requested a continuance because the Council member learned the day before “that there was a possible continuance,” so they contacted some community members and told them not to appear. N.T. 1/28/09, at 20.

The Board ruled that there was adequate notice and that it would commence the hearing for a half hour and continue it until a later date. N.T. 1/28/09, at 21.

Mr. DeMarco introduced an Affidavit given by Michael Scales (“Scales Affidavit”), who stated that he was Assistant Vice President and Director, University Housing and Residential Life for Temple University and was familiar with student housing issues for Temple University.³ N.T. 1/28/09, at 28-29; Exhibits related to 1312 North 12th Street, #8.

Mr. DeMarco also introduced Minutes of a meeting of the City Planning Commission on December 14, 2004, at which the Commission considered and voted to disapprove the City Council Bill containing the Ordinance. N.T. 1/28/09, at 29-30; Exhibits relating to 1312 North 12th Street, #10.

³ Mr. Scales averred that Temple University does not guarantee housing for Temple students who were not first- or second-year undergraduates, and the University provided limited housing for graduate and professional school students. Scales Affidavit at 1. Although Temple would continue to explore options to increase the number of housing options available to its students, undergraduate students beyond the second year must generally seek housing outside the University. Scales Affidavit at 1.

According to the Minutes, the Commission believed that the Ordinance would “serve no purpose other than to unnecessarily add redundant controls to the existing zoning code.” The Executive Director of the Commission stated the bill would use zoning in lieu of enforcement. Exhibits relating to 1312 North 12th Street, #10.

Michael Parkhill (Mr. Parkhill) testified to various facts about his ownership of the properties at 1544 North 13th Street, 1115 West Jefferson Street, 1034 West Oxford Street, 1512 Guilford Place, 1514 Guilford Place, 1521 Guilford Place, 1517 North 12th Street, 1105 West Thompson Street, and 1137 West Jefferson Street. N.T. 1/28/09, at 30 *et seq.* Mr. Parkhill testified that he spoke with Bill Kramer, a member of the staff of the City Planning Commission, on three separate occasions, the first of which was a year or a year and a half before the hearing, and Mr. Kramer told him that there would be no problem with renting to a maximum of three individuals unrelated by blood. N.T. 1/28/09, at 37-38. Mr. Parkhill testified that the Ordinance became effective on December 2004. N.T. 1/28/09, at 46. He also testified that about a year and a half after that, some inspectors visited the houses and raised a question about whether students were living there, but he did not receive any notice of violation at that time. N.T. 1/28/09, at 41-42.

The first time Mr. Parkhill received any notice of violation from the City was in April or May 2008. N.T. 1/28/09, p. 42. Mr. Parkhill testified that the only advertising he did for his properties was to list them on Craig’s List, and the only responses he received were from students. N.T. 1/28/09, at 56, 65.

On April 1, 2009, as the Board convened the second hearing.

Mr. DeMarco and Mr. Beller stipulated specifically that the Owners before the Board were not disputing the Ordinance's prohibition on rooming houses, and their dispute was only with the prohibition on student housing as a single family use within the definition of the Zoning Code, in a group of no more than three unrelated individuals living together and sharing living facilities as a family. N.T. 4/1/09, at 6-8.

Ernestine Burks gave testimony regarding property she owned at 34 1312 North 12th Street. N.T. 4/1/09, at 12-15. After her testimony, Ms. Burks supplied additional documents concerning her property. Supplemental Exhibits, Exs. B, C.

Mr. DeMarco produced a copy of Bill No. 080656, introduced in City Council on September 18, 2008, which he said never received a hearing. N.T. 4/1/09, at 18.

Mr. Beller reiterated that his clients were not seeking variances. N.T. 4/1/09, at 20-21. Mr. Beller stated his contention that three unrelated students living together constituted single-family use, so the prohibition on renting to students did not apply to them. N.T. 4/1/09, at 21-23. Further, Mr. Beller contended that the prohibition on student housing was ineffective because the Zoning Code did not define it. N.T. 4/1/09, at 23.

Stephen Fox (Mr. Fox) testified that he owned the properties at 1230 Jefferson Street, 1020 West Oxford Street, and 1100 Master Street, which he bought in May and June 2008. N.T. 4/1/09, at 27, 29. When he bought the Properties, he did not know that renting them to students was prohibited. N.T. 4/1/09, at 29. Nevertheless, Mr. Fox, after consulting with counsel, specified that the renters were students when he applied for Zoning/Use Registration Permits. N.T. 4/1/09, at 27-28, 29-30. Each Property was used by three students sharing living quarters, and they were all suitable for use by a normal family. N.T. 4/1/09, at 30. Two of the three Properties have a driveway and a garage, and the third had on-street parking. N.T. 4/1/09, at 31.

In response to the question of what efforts he made to determine the applicable zoning before he purchased the Properties, Mr. Fox said he “assumed that it was single family, residential,” and he could rent to whomever he chose. N.T. 4/1/09, at 32. Mr. Fox testified that he purchased the Properties through a realtor, who assured him they were single-family residential. N.T. 4/1/09, at 36.

Anthony Fratianne, Esquire, (Mr. Fratianne) appeared on behalf of the Resolute Alliance in Yorktown, which he described as an organization comprised of approximately sixty area homeowners. N.T. 4/1/09, at 37. Mr. Fratianne presented a petition apparently signed by sixteen individuals who observed problems with students living in Parkhill properties. N.T. 4/1/09, at 38.

Mr. DeMarco and Mr. Beller objected to the petition of the protestants on the ground that their observations did not establish that three student tenants

created a different situation from three unrelated tenants who were not students. N.T. 4/1/09, at 38-39.

Several individuals⁴ testified that they observed problems with students living in the Properties and that the Ordinance was enacted because of the activities of students who lived without supervision in the community.

Mr. Carter appeared on behalf of City Council member Clarke to state strong opposition to any variance that would contradict the Ordinance. N.T. 4/1/09, at 72. Mr. Carter read Council member Clarke's letter which stated that he introduced the bill to create the Ordinance after being "inundated with residents' complaints of negative quality of life conditions created by unruly students." N.T. 4/1/09, at 72; Letter dated April 1, 2009, from Darrel L. Clarke to Susan Jaffe.

Council member Clarke's letter also stated that the Owners suffered no hardship within the meaning of the Code, and any hardship was self-inflicted when some Owners ignored the law. N.T. 4/1/09. at 73; Letter dated April 1, 2009, from Darrell L. Clarke to Susan Jaffe.

Mr. Carter testified that the same sentiment were shared by State Senator Shirley Kitchen, who was unable to be present at the hearing. N. T. 4/1/09, at 74. Mr. Carter testified that Council member Clarke submitted the

⁴ Constance Taylor, Mary McRae, Pam Pendleton-Smith, Katie Atkins, Charles E. Rainey, Senior, James Brian Johnson, and Ruby Miller, were among these individuals. Additionally, at least 60 persons stood in the hearing room when asked to stand if they would have testimony that corroborated that of the protestants' witnesses. N.T. 5/20/09, pp. 20-21.

proposed Ordinance to the City Law Department before it was enacted, “and they considered that it was Constitutional.” N.T. 4/1/09, at 77. Mr. Carter was not aware of whether Council member Clarke did an investigation concerning Mr. Beller’s clients. N.T. 4/1/09, at 77.

Roberta Faison (Ms. Faison) testified that she was president of the Jefferson Manor Homeowners Association (Association) and that the Association unanimously supported the Ordinance, which was amended in July 2005 to include Jefferson Manor. N.T. 4/1/09, at 82. The Association sent a petition to Council member Clarke signed by more than 75% of Jefferson Manor homeowners which stated that they did not want students living in Jefferson Manor except where the owner(s) also lived there. N.T. 4/1/09, at 82-83; Letter dated June 7, 2008 from Ms. Faison to Honorable Darrell Clarke and petition signed by approximately 88 persons.

Ms. Faison also stated the Association sent a copy of the Ordinance to Owners before any student moved into the property at 1020 West Oxford Street. N.T. 4/1/09, at 83.

Ms. Faison introduced a copy of a form letter dated June 4, 2008, from Mr. Fox, offering to “pay **cash**” (emphasis in original) to “purchase a home in your neighborhood.” Ms. Faison also introduced a copy of a letter dated June 13, 2008, from her to Mr. Fox, which stated an intent to enforce the Ordinance and a copy of the Ordinance. Ms. Faison also provided a copy of a certified mail

receipt indicating that Owners received the letter at the address in Huntingdon Valley.

Ms. Faison took issue with the behavior of the students because they are unsupervised. N.T. 4/1/09, at 86.

Arthur Haywood, Esquire, appeared for the Yorktown Community Organization and adopted the Exhibits, numbered 1 through 10, submitted by the Resolute Alliance in Yorktown. N.T. 4/1/09, at 88.

Rochelle Johnson (Ms. Johnson) testified that she lived at 1202 West Oxford Street, which her family owns, and that she was president of the Yorktown Community Organization, a position which she held for two years. N.T. 4/1/09, at 102. Ms. Johnson testified that she had prepared Exhibit #8 in the exhibit packet of the Resolute Alliance in Yorktown, that listed homes in Yorktown purchased by individuals from 2000 to 2009 and used for family living. N.T. 4/1/09, at 103. The two most recent purchases on the list were bought in December 2008 and January 2009 for \$120,000 and \$160,000, respectively. N.T. 4/1/09, at 103-4; Resolute Alliance Ex. #8.

Ms. Johnson also prepared Resolute Alliance Exhibit #9, which showed properties in Yorktown owned by absentee landlords. N.T. 4/1/09, at 104-5; Resolute Alliance Ex. 9. Ms. Johnson testified that the community's experience has been that there was not a problem with students living in the community in the same house with the owner. N.T. 4/1/09, at 111.

State Representative Curtis Thomas (Representative Thomas) testified that he was the State Representative for Yorktown, Jefferson Manor, and most of the persons in the hearing room. N.T. 5/20/09, at 21. Representative Thomas remembered when Yorktown was built and when Jefferson Manor changed to homeownership, and that he was aware that those who bought homes there were looking for community, stability, and quiet enjoyment. N.T. 5/20/09, at 21-22. Representative Thomas noted that students interfered with that quiet enjoyment and he complained repeatedly to City authorities, and the eventual adoption of the Ordinance was “the only thing that has provided some relief.” N.T. 5/20/09, at 22.

Representative Thomas noted there were a number of large lots available in the area where Temple University could build dormitories to help satisfy the need for student housing. N.T. 5/20/09, at 25-27. Previous Commissioners of Licenses and Inspections have been reluctant to enforce the Ordinance. N.T. 5/20/09, at 27.

In response to a question from the Board, Representative Thomas responded that some homeowners called the police, but the police were short of manpower, and there were not resources to address these quality of life issues when compared with the more serious problems of violence that arose in nearby parts of the city. N.T. 5/20/09, at 28.

Barbara King (Ms. King) testified that she lived at 1611 North 10th Street and is a “block captain.” N.T. 5/20/09, at 36. Ms. King experienced problems with another student house, at 1630 North 13th Street, and the neighbors

were upset about the change in the façade of 1624, and the rude behavior of the workers who renovated the house. N.T. 5/20/09, at 36-37.

Mr. Beller introduced a copy of the Complaint filed in the court of common pleas that challenged the Ordinance and its enforcement. N.T. 5/20/09, at 39-40.

In addition to the letters which were in exhibits presented by the parties, the Board received letters in opposition to student housing in Yorktown from State Senator Shirley M. Kitchen, Allen Harberg, The Frater Heru Institute, Progress Investment Associates, Inc., and Elouise K. Edmonds *dba* Urban Strategists Associates.

The Board made the following Findings of Fact and Conclusions of Law:

....
111. Although the legislative findings and statement of purpose refer to multi-family uses and do not make reference to use by three students sharing living facilities, the Board finds that City Council's concern that use of properties as dwellings for students living on their own, without the supervision of the owner of the house, is well-substantiated, and such use has had a strong adverse effect on the quality of life of the families in the neighborhood.

112. On the basis of the evidence presented to it, the Board finds that student housing, even in groups as few as three, tends to create traffic, parking and noise problems which derogate from the quality of life of families in the neighborhood.

113. The Board also finds that it is hard to maintain a three-person limit among students because tenants tend to acquire partners who share their residences for short or long periods, so houses with three tenants may actually house more than three persons for extended periods.

114. The Board finds that the Properties owned by the SF entities [Owners] are used both as single-family housing and as student housing.

115. Inasmuch as Mr. Fox testified as if he personally were the owner of the Properties, and did not mention the names of the entities which purportedly hold title to the Properties, the Board finds that whatever information was known to him was known to the entities which hold titles to the Properties.

116. Based on all the evidence in the record, the Board finds that the Yorktown Overlay ordinance [Ordinance] was no secret, but rather it was well-known in the community at the time when Mr. Fox or the SF entities [Owners] purchased the Properties in May and June 2008.

117. There was no evidence of any irregularity in the Department's refusal of the Applications filed by SF entities [Owners].

Conclusions of Law

....

10. Contrary to the Applicants' [Owners'] claims, there is no ambiguity in the term "student housing." It means what it says, housing occupied by students.

11. The fact that the Code generally allows housing of students in properties zoned for single-family use does not preclude City Council from carving out an exception for a certain area of the City, where it determines that student housing needs to be treated differently from other single-family use.

12. The Zoning Board (Board) concludes that the legislative findings recited in Philadelphia Code § 14-

1629 and the purpose of the ordinance, as borne out by the testimony before the Board, demonstrate that City Council rationally, purposely and clearly carved out an exception to the general rules applicable to single-family dwellings and prohibited use of such dwellings for student housing except when they are owner occupied.

13. The Board concludes that the Properties are used for student housing, not owner-occupied in violation of Philadelphia Code § 14-1629(4)(d).

14. The Board finds no evidence of any justification for Mr. Fox's claimed ignorance of the Yorktown Overlay (Ordinance) at the time when he bought the Properties.

Board Opinion, 7/9/09, Findings of Fact Nos. 111-117 and Conclusions of Law Nos. 10-14, at 13-15; Reproduced Record (R.R) at 46a- 48a.

The court of common pleas issued its Opinion and Order denying Owners' consolidated appeals and sustained the decisions of the Board.

Owners contend⁵ the Board and the court of common pleas erred in failing to recognize the Ordinance was illegal and the City's actions amounted to a bald deprivation of Owners' Fifth and Fourteenth Amendment property rights without due process of law. The Ordinance did not affect owners' rental operations for three reasons: (1) the phrase "student housing" neither displaced nor limited "family" as defined in the Philadelphia Zoning Code; (2) it failed to meet

⁵ When the common pleas court takes no additional evidence, this Court's scope of review is limited to whether the ZHB committed an error of law or manifestly abused its discretion. *Nascone v. Ross Township Zoning Hearing Board*, 473 A.2d 1141 (Pa. Cmwlth. 1984). An abuse of discretion occurs when the ZHB's findings are not supported by substantial evidence. *City of Pittsburgh v. Zoning Board of Adjustment of City of Pittsburgh*, 522 Pa. 44, 559 A.2d 896 (1989).

any of the standards set forth in *Farley v. Zoning Hearing Board of Lower Merion Township*, 636 A.2d 1232 (Pa. Cmwlth. 1994) regarding the regulation of student housing; and (3) the Ordinance unlawfully differentiated among uses on the basis of a user's underlying legal interest in the real estate.

This Court has reviewed the court of common pleas' Opinion and the cases cited therein and concludes that it adequately addressed these issues and applied sound legal reasoning. Accordingly, the Court adopts in full the Opinion of the court of common pleas and affirms on the Opinion at *SFH Properties, LLC, et al., v. Zoning Board of Adjustment of the City of Philadelphia, et al.*, Court of Common Pleas of Philadelphia County, Nos. 0610, 0615, and 0623 (filed December 22, 2010).

BERNARD L. MCGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

SFH Properties, LLC and	:	
SF Master Properties, LLC,	:	
Appellants	:	
	:	
v.	:	
	:	
Zoning Board of Adjustment of	:	
the City of Philadelphia and the	:	No. 128 C.D. 2011
City of Philadelphia	:	

ORDER

AND NOW, this 4th day of January, 2012, the order of the Court of Common Pleas of Philadelphia County is affirmed.

BERNARD L. McGINLEY, Judge