

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kyle N. Thompson :
 :
 v. : No. 1696 C.D. 2007
 : Submitted: June 12, 2008
 Philadelphia Zoning Board of :
 Adjustment and City of Philadelphia :
 And Jeffrey White :

 Appeal of: Kyle N. Thompson, :
 John McHugh, Brian Belles, :
 Gregory Brown, Ann Hoskins-Brown :
 and Amber Best :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
 HONORABLE MARY HANNAH LEAVITT, Judge
 HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY JUDGE PELLEGRINI

FILED: July 8, 2008

Kyle N. Thompson *et al*¹ (Objectors) 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 Jeffrey S. White (White)² a three-year temporary use variance to run a commercial business on his

¹ Also appealing are John McHugh, Brian Belles, Gregory Brown, Ann Hoskins-Brown and Amber Best, who live in the vicinity of the proposed business.

² White is leasing the property from owner Gary Schwalb.

property in a residential neighborhood. We reverse because White has failed to establish that the property cannot be developed for a permitted use in the zoning district in which the property is located.

White applied to the Philadelphia Department of Licenses and Inspection for a zoning permit and/or use registration permit to use the property located at 2509 Grays Ferry Avenue in Philadelphia, Pennsylvania, as a Rita's Water Ice Stand which would serve custard, water ice, non-alcoholic beverages and soft pretzels. The property, which is at the intersections of Grays Ferry, South 25th Street and Christian Streets, is zoned R-10A Residential and is irregularly shaped in a triangle that is approximately 61 feet by 84 feet by 56 feet with an overall size of 1,700 square feet. Located on the property is a one-story building that is 34 feet 8 inches by 24 feet 9 inches which was last approved in 1987 for use as a take-out restaurant with a dispensing window.

Because the proposed use was not permitted in the R-10A Residential district, White filed an appeal to the Board requesting a use variance. Before the Board, architect Frank Cuthbertson (Cuthbertson) testified that building a functional residential use on the property was impractical due to the irregular nature of the lot and the privacy issues of building a home in that the lot was intersected by three streets.

In response, multiple Objectors testified against the proposed commercial use. Kyle Thompson objected to the grant of the variance stating that a commercial use would cause people to gather, making noise and more traffic. He

disagreed that a residential house could not be built because it was a big lot. Anna Hoskins-Brown testified that she lived across the street from the proposed Rita's and stated that there was a vacant lot at 2429 Grays Ferry which was a smaller footprint and was zoned for a house. She stated that the lot was for sale for over \$700,000 and construction was ready to commence. Brian Bellus testified that a neighbor's windows being blocked out should not have been an issue in deciding whether a home could be built on the lot because all the windows in the South Philadelphia rowhouse style were always blocked out by the accompanying lot. He also did not like the idea of people loitering in the neighborhood because they might sell drugs and fights would break out. Sharif Abdula speculated that the water ice stand would cause a lot of destruction to the point that people from other neighborhoods would come to rob the store after it was closed. Finally, Amber Best voiced concerns regarding the degradation of property values, especially after she had just purchased property in the community just one year ago and houses were being refurbished and selling for up to \$700,000.

The Board granted a temporary variance for three years noting that Section 14-205 of the Philadelphia Zoning Code contained a chart with the principle limits on the suitable uses within the various residential designations. "The provisions include the types of approved residential dwellings, basic lot dimensions and open space requirements. In this matter, the shape of the Subject Property lot does not allow for the ready conversion to a residential use without seeking variances." (Board's February 1, 2007 decision at 5.) It then determined that the rehabilitation of the existing structure would provide an opportunity for

local commerce, put an unused property to service and have a minimal physical impact to the adjacent properties.

Objectors filed an appeal from the grant of the variance, and White filed a cross-appeal arguing that the three-year temporary variance was unreasonable and should have been for an indefinite period of time. Without taking additional evidence, the trial court affirmed the Board's decision stating that the Board could impose restrictions to a proposed use in order to reduce any objectionable features. Objectors then filed this appeal still maintaining that a house could be built on the property regardless of its irregular shape. We agree.

An applicant for a use variance has the burden of establishing an unnecessary hardship to warrant the grant of a variance and does so by proving that (1) the physical features of the property are such that it cannot be used for a permitted purpose; or (2) the property can be conformed for a permitted use only at a prohibitive expense; or (3) the property has no value for any purpose permitted by the zoning ordinance. *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 554 Pa. 249, 257, 721 A.2d 43, 47 (1998).

White has failed to meet his burden for a commercial use variance in a residential neighborhood. Section 14-205 of the Philadelphia Zoning Code sets forth the lot dimensions for a single-family home: the minimum lot width is 16 feet, the minimum lot area is 1,440 square feet, and the building height limit is 35 feet. There is nothing in the record that indicates that a residential property could not be built on the subject property because the existing building footprint is more

than sufficient to build a residential structure within the 35-foot height limitation. The site plan reflects that the existing single story building on the property is 25 feet, 9 inches, by 34 feet, 8 inches, which is more than a sufficient building area to build a residential unit within the 35-foot high requirement – the first and second stories having approximately 1,800 square feet of living space and the third story having 2,700 square feet of living space. Because the minimum lot width requirement is met and the minimum lot area is 1,700 square feet and meets the square footage requirement, the lot is not so irregularly shaped that it cannot be used to build a house. Consequently, the Board erred in granting White a use variance.

Accordingly, because the Board improperly granted the use variance when the record established that the property could be used to build a residence, the order of the trial court is reversed.

DAN PELLEGRINI, JUDGE

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ORDER

AND NOW, this 8th day of July, 2008, the order of the Court of
Common Pleas of Philadelphia County, dated August 3, 2007, is reversed.

DAN PELLEGRINI, JUDGE