

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Renzulli :  
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 v. : No. 934 C.D. 2007  
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 Zoning Board of Adjustment and :  
 City of Philadelphia : Submitted: October 19, 2007  
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 Appeal of: City of Philadelphia :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
 HONORABLE ROBERT SIMPSON, Judge  
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
 BY SENIOR JUDGE KELLEY

FILED: March 19, 2008

The City of Philadelphia (City) appeals from an order of the Court of Common Pleas of Philadelphia County (Trial Court) that granted the appeal of John Renzulli. The Trial Court's order reversed an order of the Philadelphia Zoning Board of Adjustment (Zoning Board) which denied Renzulli's request for a zoning variance. We reverse.

Renzulli is the owner of a single-family dwelling (the Property) located in a C-2 Commercial District within Philadelphia, PA. Approximately ten years ago, Renzulli's father completed an addition, used as a bedroom, upon the roof of the Property, essentially creating a fourth story upon the three-story building. Renzulli's father did not secure any permits for the addition. The

addition runs for the approximate width of the building, and approximately six feet short of the building's length.<sup>1</sup>

On January 25, 2005, Renzulli applied to the Department of Licenses and Inspections (Department) for a zoning permit and/or use registration for the legalization of the pre-existing addition. Renzulli's application was denied, due to a lack of dimensional compliance with the Philadelphia Code. R.R. at 7-9.

On March 7, 2005, Renzulli filed an appeal from the Department's denial to the Zoning Board. A hearing was held thereafter, at which Renzulli appeared and was represented by counsel. Following the hearing, the Zoning Board voted to deny Renzulli's requested variance, and issued an order and opinion with brief findings of fact and conclusions of law.

Subsequently, Renzulli appealed the Zoning Board's order to the Trial Court, which heard oral arguments without receiving any additional evidence. By order dated June 26, 2007, the Trial Court reversed the Zoning Board's denial. In its brief opinion, the Trial Court concluded, *inter alia*, that if Renzulli were forced to remove the addition, he would face the unnecessary hardship of the expense of that removal. The Trial Court further concluded that since Renzulli had submitted into evidence a letter of support from a City Councilman, and a letter of non-opposition from a neighborhood business association, and since Renzulli had

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<sup>1</sup> The exact dimensions of the addition appear to have been misstated in the Zoning Board of Adjustments' Findings on the matter; the undisputed testimony of record, as well as the photographic evidence within the record, establish the approximate dimensions as stated above. See Reproduced Record (R.R.) at 41-42; Original Record (O.R.), unmarked photographic exhibits. As the exact dimensions of the undisputedly non-complying addition are of no moment

(Continued....)

expressed a willingness to construct a façade on the addition to match with the surrounding properties, the proposed changes were not contrary to the public interest. The Trial Court concluded that the variance thusly should have been granted, and reversed the Zoning Board's order. The City now appeals from the Trial Court's order.

In an appeal from the grant or denial of a zoning variance where, as here, the trial court has not taken any additional evidence, this Court's scope of review is limited to a determination of whether the zoning hearing board committed an error of law or abused its discretion. Hill District Project Area Committee, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 638 A.2d 278 (Pa. Cmwlth.), petition for allowance of appeal denied, 538 Pa. 629, 646 A.2d 1182 (1994). An abuse of discretion will be found where the zoning board's findings are not supported by substantial evidence. Id. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Teazers, Inc. v. Zoning Board of Adjustment of the City of Philadelphia, 682 A.2d 856 (Pa. Cmwlth. 1996).

When seeking a dimensional variance within a permitted use, an applicant is asking only for a reasonable adjustment of zoning regulations in order to utilize property in a manner consistent with applicable regulations; thus, a grant of a dimensional variance is of lesser moment than a grant of a use variance, since the latter involves a proposal to use property in a manner that is wholly outside

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to the instant appeal, the imprecision within the record does not affect our appellate review.

zoning regulations. Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998). The applicant for a use variance must show that unnecessary hardship will result if a variance is denied, and that the proposed use will not be contrary to the public interest. Id. Numerous factors – none of which are singularly dispositive - should be considered when evaluating whether an applicant for a dimensional variance has established unnecessary hardship, including the economic detriment to the applicant if the variance is denied, financial hardship created by any work necessary to bring a building into strict compliance with zoning requirements, and the characteristics of the surrounding neighborhood. Id.

The City first argues that Renzulli failed to preserve any issues for review in that the theories presented by Renzulli to the Trial Court were not expressly raised before the Zoning Board. Most generally stated, the City argues that the Hertzberg standard for the variance at issue was not expressly raised by Renzulli prior to argument before the Trial Court. The City further asserts that Renzulli's characterization of hardship evidence and neighborhood approval evidence as argued to the Trial Court in satisfaction of the Hertzberg burden constitute other arguments not expressly raised before the Zoning Board, and are thusly also waived. We disagree.

The Hertzberg standard was applied to this matter – properly, under the facts and under Renzulli's application herein – by the Zoning Board itself. R.R. at 25-26. Notwithstanding a reviewing Court's inherent obligation to address the controlling law in any matter before it, the City's waiver argument on this point

is without merit. As to the City's assertion of waiver regarding Renzulli's hardship and neighborhood approval arguments, we note that these are matters of the evidentiary record,<sup>2</sup> and we will address them as such in our following analysis. We emphasize that our standard of review herein is directed towards the Zoning Board's potential errors of law, and/or an abuse of discretion thereby, which abuse may potentially include a lack of substantial evidence in support of the Zoning Board's findings. Hill District Project Area Committee.

The City next argues that Renzulli failed to satisfy his burden of establishing that an unnecessary hardship will result if the variance sought is denied. The City asserts that the Trial Court erred in reversing the Zoning Board, in that the Trial Court deduced, impliedly and without evidentiary support, that "[if Renzulli] were denied the variance, he would face unnecessary hardship from the expense of having to completely remove the ten-year old addition from the roof." R.R. at 75. We agree that the record herein contains no evidence whatsoever of any hardship.

Before the Zoning Board, Renzulli entered no evidence of any hardship that would result in the face of the denial of the sought variance.

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<sup>2</sup> Although Renzulli's elaboration upon the cited evidence is minimal, it is beyond dispute that Renzulli entered before the Zoning Board evidence of neighborhood approval or non-opposition, and evidence of the pre-existing nature of the addition. R.R. at 38, 40. While we agree that Renzulli offered no specific evidence or argument regarding the removal of the addition or of any hardship associated therewith, that potential removal/rehabilitation itself is an inherent consequence within the legal concept of the variance sought, and hence was not waived. As such, these "theories," as labeled by the City, were not waived in this matter, notwithstanding the independent concept of the sufficiency of any evidence of record in support thereof.

Additionally, the transcript of proceedings before the Zoning Board reveals that, notwithstanding the complete lack of such evidence, Renzulli did not even make any assertions – unsupported or not – of any real or potential hardship.<sup>3</sup> As such, Renzulli failed to satisfy this burden under Hertzberg, and the Zoning Board thusly correctly denied his application.

Renzulli emphasizes that the Trial Court found hardship impliedly established by the fact that the addition would have to be removed if the variance were denied. We disagree that any such implication satisfies Hertzberg's substantial evidence burden under the instant facts. First, we note that an *economic detriment* associated with a variance denial has been treated and acknowledged as a separate factor from any *financial hardship* created by any necessary compliance or rehabilitation work that a variance denial may occasion, which factors both impact an analysis of unnecessary hardship. See generally, Hertzberg. Simply put, no authority exists for the proposition that an economic detriment is, without further evidentiary support, a financial hardship.

Secondly, such rhetorical bootstrapping – that any compliance expenses inherent in a variance denial are impliedly a hardship sufficient to satisfy Hertzberg's burden – would eviscerate the very burden that Hertzberg establishes in every variance matter. It is axiomatic that Hertzberg's burden requires actual,

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<sup>3</sup> We note that Renzulli's counsel's unsupported assertion before the Trial Court, that it "would be economically infeasible" to remove the addition, and that "the costs are extremely prohibitive in destroying that existing structure", are of no moment in our appellate review of the evidentiary record and the Board's actions. R.R. at 66. Additionally, no evidence of record exists supporting even those bare assertions of counsel before the Trial Court.

not implied, evidence of economic detriment and/or financial hardship, at least under the instant set of facts. Renzulli has offered no such actual evidence in this matter, notwithstanding any implications that may be gleaned from the scant record developed before the Zoning Board.

Renzulli's failure to satisfy his burden of showing an unnecessary hardship under Hertzberg is dispositive. Notwithstanding, we note that the City's next argument that the two community no-opposition letters were insufficient to establish that the proposed use will not be contrary to the public interest, is correct, when that evidence is viewed in the light of any lack of hardship. See R.R. at 38; O.R., unmarked exhibit of correspondence from Councilman Frank DiCicco. Although Renzulli did indeed address and enter this evidence before the Zoning Board, on its own it is insufficient as a matter of law. We have held that a lack of objection by community members to a dimensional use cannot be the sole basis for a variance grant. Christner v. Zoning Board of Borough of Mount Pleasant, 397 A.2d 30 (Pa. Cmwlth. 1979).

Accordingly, we reverse.

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JAMES R. KELLEY, Senior Judge

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**ORDER**

AND NOW, this 19th day of March, 2008, the order of the Court of Common Pleas of Philadelphia County dated June 26, 2007, at No. 2071, March Term, 2006, is reversed.

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JAMES R. KELLEY, Senior Judge