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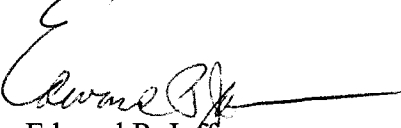
Henry Schirmer, Jr., Esquire
315 North Main Street
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RE: MANAYUNK NEIGHBORHOOD COUNCIL AND KEVIN SMITH
vs. ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA
AND DANIEL NEDUSCIN
December Term 2007, No. 2382

Dear Mr. Schirmer:

Relative to the referenced appeal, enclosed please find the Findings of Fact and Conclusions of Law which have been duly filed at the court.

Very truly,



Edward P. Jefferson
Senior Attorney

EPJ:vrđ

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

2007 OCT 16 11 24 AM
PROTROTNY

MANAYUNK NEIGHBORHOOD :
COUNCIL :
and :
KEVIN SMITH :
Appellants, :
vs. : December Term 2007
ZONING BOARD OF ADJUSTMENT : No. 2382
OF THE CITY OF PHILADELPHIA :
and :
DANIEL NEDUSCIN :
Appellees. :

FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE
ZONING BOARD OF ADJUSTMENT

This appeal is taken from a Decision of the Zoning Board of Adjustment of the City of Philadelphia (“Zoning Board”) at Calendar No. 3703. On October 24, 2007, a Public Hearing was held by the Zoning Board pursuant to which it granted a request(s) for a Use/Zoning Variance(s) at the property known as 1 and 1R Leverington Avenue, Philadelphia, PA (“Subject Property”). In granting the Use/Zoning Variance(s) request(s) with Provisos, the Zoning Board makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. On 8/15/07, Stephen Varenhorst, Stephen Varenhorst Architect, (hereinafter "Applicant") applied to the Department of Licenses and Inspection to use the Subject Property for dwelling units, property management/sales office, private health club for residents only and roof terraces. The Application was also amended to reduce the parking spaces, reduce the floor area and reallocate the mix of dwelling units (*See* Application for Zoning Permit and/or Use Registration Permit No. 86783 dated 8/15/07; Amendments to Application; and N.T. at 8-9)
2. Daniel R. Neduscin d/b/a Ned Green Partnership and Venice Island Realty, with an office address of 161 Leverington Avenue Philadelphia, PA, is the owner of the Subject Property (hereinafter "Owner"). *See* Application for Zoning Permit and/or Use Registration Permit No. 86783 dated 8/15/07)
3. The Subject Property is currently a vacant parcel with a closed restaurant. (*See* Application for Zoning Permit and/or Use Registration Permit No. 86783 dated 8/15/07)
4. On 8/31/07, the Application was refused by the Department of Licenses and Inspections. (*See* Notice of Refusal of Permit for Application No. 86783 dated 8/31/07)
5. The Subject Property is designated a RC-1 Residential District and the Main Street/Manayunk and Venice Island Special District and Flood Plain Controls. (*See* Notice of Refusal of Permit for Application No. 86783 dated 8/31/07)
6. The Refusal was issued for the following reasons: stacked parking is not permitted in this District, the proposed lowest floor elevation is deficient, the proposed height is excessive and the proposed gross floor area is excessive. (*See* Notice of Refusal of Permit for Application No. 86783 dated 8/31/07; and *see also* §§14-1402(1)(b), 14-1606(5)(b)(.2), 14-1615(8)(b) and 14-205 of the Philadelphia Zoning Code)
7. Applicant filed its Petition of Appeal to the Zoning Board on 9/26/07. (*See* Petition of Appeal in Calendar No. 3703)
8. The bases for the Appeal are manifold pursuant to the Petition. Additional off-street parking, maximizing green space, the lowest floor elevation was inaccurately reflected in the Refusal, the height and scale are consistent with the community, 24-hour activity would occur as a result of the additional residences, the project will allow continuous public access to the River and Canal and hardship exists. (*See* Petition of Appeal dated 9/26/07, in Calendar No. 3703)
9. A Public Hearing was held before the Zoning Board on 10/24/07. (*See* N.T. at 1).
10. Applicant/Owner, represented by Joshua L. Grimes, Esq., submitted an Exhibit Packet which included the following items: Refusal; Petition of Appeal; Petition in support of the Application; Site Plans; Philadelphia City Planning Commission,

Residential Commercial, working draft dated 9/26/07; Traffic Impact Study by Pennoni Associates, Inc., Flood Hazard Analysis by J. Richard Weggel, Ph.D., P.E., undated letters of support from neighbors to the Zoning Board, color proposal pamphlet by Applicant, color photographs of the Subject Property and surrounding area; proof of service email communication from counsel for Applicant to Andy Ross, Esq., dated 7/25/08; and undated email communication of support from Suzanne Larrimore, President, 21st ward Community Council to the Zoning Board. (See Applicant's Exhibit Packet)

11. The Protestant, Manayunk Neighborhood Council, represented by Henry L. Schirmer Jr., Esq., submitted an Exhibit Packet which included the following items: letters of opposition (10/23/07 letter from Alice McLaughlin to the Zoning Board, 10/23/07 letter from Daniel Seddon to the Zoning Board, 10/23/07 letter from Jeffrey Pustizzi to the Zoning Board, 10/19/07 letter from John Arnold to the Zoning Board, letter from Jonathan Sarubbi, FEMA, to the Zoning Board received 10/23/07, 10/23/07 letter from Carolyn Addis to the Zoning Board, undated letter from Ernest Volpe to the Zoning Board, 10/21/07 letter from Susan Greco to the Zoning Board, 10/23/07 letter from Gretjen Clausing to the Zoning Board, 10/23/07 letter from Daniel Seddon to the Zoning Board, 10/23/07 letter from Alice McLaughlin to the Zoning Board, undated letter from Josh Cohen, President, Wissahickon Interested Citizens Association, to the Zoning Board, 10/23/07 letter from Hillary J. Langer to the Zoning Board, undated letter from Michele Irwin to the Zoning Board, 10/21/07 letter from Joyce Finnen to the Zoning Board, 10/21/07 letter from Christa Black to the Zoning Board, 10/22/07 letter from Kate Casano to the Zoning Board; 10/24/07 email communication from Larry Flanagan to the Protestant, 10/23/07 email communication from Michele Irwin to Protestant, 10/23/07 email communication from David McCormick to Protestant); packet including comparisons and color photographs submitted by Kevin Smith, on behalf of the Protestant, to the Zoning Board with 10/23/07 enclosure letter; Protestant's Intervention Notice from Attorney Schirmer to the Zoning Board with 10/24/07 enclosure letter; Department of Record photographs; historical black and white photographs; U.S. Department of the Interior Survey; historical information including maps, site plans and rendering; July 2007 Historic Commission submission by Applicant; Indenture dated 5/5/95 for the Subject Property; Wendy Lathrop, Cadastral Consulting, LLC's report regarding Deed irregularities pertinent to the Subject Property; February 2000 Summary of Climatological and Hydrological Records for the surrounding area by G.C. Hendrickson, Jr., Consulting Meteorologist with Mr. Hendrickson's C.V.; Philadelphia City Planning Commission Report, Residential Commercial, Working Draft, 9/26/07; Philadelphia City Planning Commission River Greenway Design Guidelines; newspaper clippings; Stella Ling's plan for a public park circa 1998; color photographs showing flooding and the surrounding area; Excerpt from Zoning Board Hearing in Calendar Numbers 99-1284 and 99-1285; Green Lane Residences/Olde Manayunk Library plan; 7/25/07 from Kevin Smith, on behalf of the Protestant, to the Zoning Board, outlining its preliminary position regarding the Application; miscellaneous email communications; and City Planning Commission Fact Sheet (See Protestant's Exhibit Packet)

12. The Owner seeks to relocate lot lines to create 1 lot from 2 lots, the completion demolition of all structures on the lot, the erection of 4 structures for use as 280 dwelling units with accessory fitness center for residents only, a management/sales office and 350 off-street parking spaces (*See Applicant's Exhibit Packet; and N.T. at 7-12*)
13. The Applicant testified about the proposed design. (*See N.T. at 13-15 and 125-127*)
14. John Richard Weggel, with training in technology and pathologic water resources engineering, testified as an expert on the Owner's behalf. He concluded that the proposed development would not have a negative impact upon the river. (*See N.T. at 36-49*)
15. Daniel R. Neduscin, who resides at 2339 Delancy Street, Philadelphia, PA, s the individual owner of the Subject Property. He testified about the nature of the Application. (*See N.T. 49-56*)
16. Joyce Finnen, who resides at 46 Canton Street, Philadelphia, PA, testified about flooding and parking shortages, in opposition to the Application. (*See N.T. at 57-60*)
17. Keith Newman, who resides at 235 Rector Street, Philadelphia, PA, testified about traffic concerns, in opposition to the Application. (*See N.T. at 60-64*)
18. John Hunter, who resides at 4308 Terrace Street, Philadelphia, PA, testified in opposition to the Application. (*See N.T. at 64-83*)
19. Vincent Galtiarria, who resides at 4307 Main Street, Philadelphia, PA, voiced his support for the Application. (*See N.T. at 87-88; and 111-112*)
20. Kevin Smith, who resides at 293 Hermitage Street, Philadelphia, PA, testified on behalf of the Manayunk Neighborhood Council ("Appellant"), in opposition to the Application. He expressed flooding concerns. (*See 88-104*)
21. John Desper, who resides at 609 Hermitage Street, Philadelphia, PA and is an executive board member for the citizens' association, testified in opposition to the Application. (*See N.T. at 114-117*)
22. Tony Levenson, president of the Manayunk Development Corporation, testified in support of the Application. (*See N.T. at 117-121*)
23. Sandy Desorda, who lives at 340 State Street, Philadelphia, PA, testified at the Hearing and believes that modifications to the proposal are necessary. (*See N.T. at 122-123*)

24. Jennie Glenn, who resides at 219 Hermitage Street, Philadelphia, PA and is on the advisory board of the Schuylkill River Project, testified at the Hearing and believes that modifications to the proposal are necessary. (See N.T. at 123-126)
25. Sue Watson, who resides at 111 Ripka Street, Philadelphia, PA, testified in opposition to the Application. (See N.T. at 127)
26. Michael Tostoff, who resides at 278 Lyceum Avenue, Philadelphia, PA, testified in opposition to the Application. (See N.T. at 128)
27. Cindy Mogel, a non-Philadelphia resident, who resides at 17 Overhill Road, Bala Cynwyd, PA, testified in opposition to the Application. (See N.T. at 128-129)
28. Edna Amotto, who resides at 4560 Silverwood Road, Philadelphia, PA, testified in opposition to the Application. (See N.T. at 130)
29. Edna Amotto, who resides at 4560 Silverwood Road, Philadelphia, PA, testified in opposition to the Application. (See N.T. at 130)
30. Renee Randolph, who resides at 142 Wright Street, Philadelphia, PA, testified in opposition to the Application. (See N.T. at 130-131)
31. Alecia Crickley, who resides at 236 Osborn Street, Philadelphia, PA, testified in opposition to the Application. (See N.T. at 131-132)
32. Margaret Minnis, who resides in the neighborhood, testified in opposition to the Application. (See N.T. at 132-134)
33. Karen Myer, who resides at 232 Dupont Street, Philadelphia, PA, testified in opposition to the Application. (See N.T. at 134-135)
34. Paula Brumbelow of the Philadelphia Planning Commission stated that a recommendation was not possible on the day of the Hearing. (See N.T. at 10)
35. Post-Hearing, the Applicant and Protestant submitted Findings of Fact and Conclusions of Law. The Applicant objected to Protestant's Findings to the extent there were references materials and testimony not presented at the Hearing (See Findings with enclosure letter from Applicant's counsel, Joshua L. Grimes, Esq., dated 11/2/07; letter of objection to the Zoning Board dated 11/8/07)
36. On 3/19/08, the Application for a Zoning/Use Variance(s) was granted *with provisos* by the Zoning Board. (See Official Votes; Notice of Decision dated 11/14/07)

Conclusions of Law

1. Pursuant to §14-1801(1)(c) of the Philadelphia Zoning Code, the Zoning Board of Adjustment may, after public notice and public hearing authorize, upon appeal, in specific cases, such variance from the terms of this Title as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of this Title would result in unnecessary hardship, and so that the spirit of this Title shall be observed and substantial justice done, subject to such terms and conditions as the Board may decide. (See §14-1801 of the Philadelphia Code)
2. Pursuant to the Zoning code §14-1802(1) and (2), the Zoning Board is required to consider twenty (20) separate criteria prior to granting a variance including, but not limited to, whether a literal enforcement of the provisions of this Title would result in unnecessary hardship; that the conditions which the appeal for a variance is based are unique to the property; that the variance will not substantially or permanently injure the appropriate use of adjacent conforming property; that the special conditions or circumstances forming the basis for the variance did not result from the actions of the applicant; that the grant of the variance will not substantially increase congestion in the public streets; that the grant of the variance will not impair an adequate supply of light and air to the adjacent property; and that the grant of the variance will not adversely affect the public health, safety or general welfare. (See §14-1802 of the Philadelphia Code)
3. §14-205 of the Philadelphia Code enumerates permissible uses in the RC-1 Residential District. (See §14-205 of the Philadelphia Code)
4. The proposed gross floor area, 178% (352,050) does not comport with the 135% requirement, 266,717 in the RC-1 Residential District. Hence a variance is required for the proposed uses. (See §14-205 of the Philadelphia Code)
5. §14-606(5)(b)(.2) of Philadelphia Code, which addresses Flood Plain Controls, provides that “(b) *Within the Floodway Fringe* (.2) Construction of dwellings is permitted if the lowest floor elevation (including basements and cellars) is one foot (1’) above the Regulatory Flood Elevation.” 34’ has been proposed and yet 40.2’ is required. Hence a variance is required. (See §14-606(5)(b)(.2) of the Philadelphia Code)
6. §14-1615(8)(b) of the Philadelphia Code provides the pertinent height regulations, more specifically that “the maximum height shall be 6 stories and no more than 55 feet above average ground level.” The instant Application calls for 89’, which exceeds the 55’ mandate. Therefore a variance is required. (See §14-1615(8)(b) of the Philadelphia Code)
7. §14-1402(1)(b) of the Philadelphia Code governs parking in residential districts in the City and does not permit stacked parking in the applicable District. As stacked parking is proposed, a variance is required. (See e§14-1402(1)(b) of the Philadelphia Code)

8. The Supreme Court of Pennsylvania has defined a variance as,

“... a departure from the exact provisions of a zoning ordinance... granted where a strict enforcement of the literal terms of the ordinance will result in unnecessary hardship upon a particular property over and above the hardship that may be imposed... on all properties in that community.” Brennen v. Board of Adjustment, 409 Pa. 376, 187 A.2d 180 (1963).
9. Zoning ordinances are presumed valid. The burden is upon the party challenging such an ordinance to show otherwise. Lantos v. Zoning Hearing Board of Haverford Township, 621 A.2d 1208, 153 Pa. Cmwlth. 591 (1993).
10. The burden of proof in obtaining a variance is upon the landowner. Evidence in support of the variance must be presented showing a hardship unique or peculiar to the property. Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983); Yeager v. Zoning Hearing Board of the City of Allentown, 779 A.2d 595 (Pa. Cmwlth. 2001).
11. The hardship, underlying the request for a variance, must not be self-created. Manayunk Neighborhood Council v. Zoning Board of Adjustment, 815 A.2d 652 (Pa. Cmwlth. Ct. 2002); N. Pugliese, Inc. v. Palmer Township Zoning Hearing Board, 140 Pa. Cmwlth. 160, 592 A.2d 118 (1991).
12. An adverse economic impact alone is not sufficient to grant a variance. SCRUB v. Zoning Board of Adjustment, 814 A.2d 847 (Pa. Cmwlth Ct. 2003).
13. After a review of the record and the consideration of the evidence presented, the Zoning Board finds that the Applicant has met its burden in support of a zoning/use Variance(s). Granting Variances in the instant matter *would not* create an overuse for the Subject Property. Applicant has provided evidence of hardship. Therefore, a Zoning Permit and/or Use Registration Permit is granted *with provisos*.

Respectfully Submitted,



Thomas C. McDade, III
Administrator, Zoning Board of Adjustment

Vote of the Board

David L. Auspitz	Yes.	With Proviso: Central Air, garbage disposal in kitchen, emergency pedestrian bridge. Parking plan to be 1 to / without sta?ig. As per proviso letter from Josh Grimes, Esq. 11-2-07 as per plan stamped by Board 11-14-07.
Eleanor M. Dezzi	Yes.	Same Proviso
Samuel Staten, Jr.	Yes.	Same Proviso
Judith Eden	Yes.	Same Proviso