IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

COUNTY - CIVIL TRIAL DIVISION

SOCIETY CREATED TO REDUCE URBAN BLIGHT (SCRUB) and MARY CAWLEY TRACY	:	SEPTEMBER TERM, 1997
v.	:	
ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA and THE CITY OF PHILADELPHIA and MATTHEW F. HEHL, PRESIDENT, FREEDOM INTERNATIONAL TRUCKS, INC. and NEVISTAR INTERNATIONAL TRANSPORTATION	:	NO. 3834

OPINION

WOLF, J. Date: March 28th, 2001

This case comes currently before the court on appeal from a decision of the Zoning Board of Adjustment of the City of Philadelphia ("Board") granting the request of Matthew F. Hehl ("Mr. Hehl"), Freedom International Trucks, Inc.("Freedom") and Nevistar Transportation's ("Nevistar") (collectively referred to as "Applicants") for a variance to convert an accessory, free-standing, double-faced, illuminated sign to a non-accessory, general outdoor advertising sign.

FACTS AND PROCEDURAL HISTORY

This matter has a lengthy history of consideration before both the Board and the Courts of this Commonwealth. On May 7, 1997, Mr. Hehl applied to the Philadelphia Department of Licenses and Inspections ("L&I") for permission to convert an accessory, free-standing, double-faced, illuminated sign to a non-accessory, general outdoor advertising sign ("Proposed Sign").

L&I determined that the proposed sign would exceed the maximum height and size limits allowed under the Philadelphia Zoning Code ("Code") and would be located within 660 feet of a recreational facility, also in violation of the Code. In addition, the proposed conversion would not involve the removal of an existing non-accessory sign. Accordingly, on May 14, 1997 L&I issued one zoning refusal and three use refusals.

On May 20, 1997, Applicants filed an appeal of L&I's refusals with the Zoning Board of Adjustment ("Board"), which held a public hearing on June 18, 1997. Although not all members of the Board were present, there was the requisite quorum of four and the hearing proceeded.[1] At the conclusion of the hearing, the Board took the matter under advisement. Subsequently, on July 1, 1997, the Board members who were present voted against the issuance of a variance. Before the decision letter was sent out however, the Board received a letter from Applicants requesting a new hearing.[2] As the basis for this request, Applicants pointed to the fact that two Board members were not at the hearing. Applicants also asked for the opportunity to supplement the record. By letter dated July 9, 1997, Applicants' request was granted.

The next hearing was held on July 23, 1997. At that hearing, Judith Eden, counsel for the Tacony Civic Association ("Tacony Civic") and Ann Butchart, attorney for the Society Created to Reduce Urban Blight ("SCRUB") objected to the additional hearing as the Board had already heard and voted to deny the requested variance. The case was then continued without consideration of the merits as a quorum of the Board was not present.

---

[1] The Board is made up of six members and, thus, only four members need be present to constitute a quorum.

[2] Unless there has been some procedural defect, once a decision has been reached, it is highly unusual for the Board to order a new hearing. Instead, it is expected that the applicant will either file for reconsideration or file an appeal to this court.

The final hearing on the requested variance was held on August 27, 1997. At that hearing, the Tacony Civic, by letter, withdrew its opposition to the variance based on a settlement with Applicants.[3] SCRUB continued to object to the variance as did the City Planning Commission and Councilman David Cohen. No additional testimony or evidence was presented by Applicants and the only supplements to the record were the transcripts of the June 18, 1997 and July 23, 1997 hearing, the Tacony Civic's withdrawal of objection letter, and a letter from Councilwoman Joan Krajewski, in whose district the Property is located, voicing her support for the application.

The facts that were adduced at these hearings are as follows. Freedom acquired the property located at 6601 New State Road, Philadelphia, PA (the "Property") in 1993. Freedom uses the Property for the operation of a dealership providing sales, service and repairs for large trucks and trailers.. The Property, which is zoned G-2 Industrial, is a fenced, ten acre commercial lot improved with a one story detached commercial structure/building. The building holds office, a parts department, and 48 services bays. The surrounding lot is used, in large part, for the open air sale of trucks.

In 1995, Freedom was granted a permit to erect a double faced, internally illuminated, free-standing accessory sign at the Property. The sign, which is supported by a single steel pole, measures 61 feet from grade to the bottom of the sign fact, and 80 feet from grade to the top of the sign fact. The sign face is 19 feet high and 60 feet wide, with a total area of 2,280 square feet. The sign is one of two free-standing accessory signs on the Property. It is only this sign which Applicants propose to change to a non-accessory use.

---

[3] Under the terms of this agreement, Applicants have agreed not to erect any additional signs on the Property even if permitted to do so as of right. Applicants have also agreed to use the sign for the advertising of tobacco products, alcoholic beverages, or adult entertainment activities as defined in Section 14-1605 of the Philadelphia Zoning Code ("Code").

Applicants do not intend to alter the dimensions of the sign. Applicants contend, however, that now that the business is established, it no longer has any need for an accessory sign. Applicants claim to have tested the market and found a demand for general outdoor advertising signs and thus seek to convert the sign to such use, thereby deriving some financial benefit from its existence.

The area surrounding the Property is, for the most part, zoned G-2 General Industrial or L-R Limited Industrial. Other area businesses include three junk yards, an auto repair shop, a ladder company, and, on an adjacent lot, an adult cabaret. There is also a recreational facility within 400 feet of the Property, but it is separated by the elevated Delaware Expressway and the elevated Philadelphia-Trenton railroad line. As a result, the sign is not easily visible from the recreational facility.

At the close of the August hearing, which was also attended by only four members, the Board voted three to one in favor of granting the variance. SCRUB filed a timely appeal of the Board's decision. Thereafter, Applicants filed a motion to quash the appeal, arguing that SCRUB lacked standing to contest the grant of the variance. By Order dated February 11, 1998, the Honorable Judge Steven E. Levin granted Applicants' Motion and quashed the appeal.[4] SCRUB filed a timely appeal of this Order. Ultimately, the Commonwealth Court reversed Judge Levin with regard to the issue of SCRUB's standing to contest the grant of variances for outdoor advertising signs throughout the City of Philadelphia. See Society Created to Reduce Urban Blight v. Zoning Board of Adjustment, 729 A.2d 117 (Pa. Cmwlth. 1999). The case was then remanded to this Court for a decision on the merits.

---

[4] In the Opinion in support of his decision, Judge Levin relied on an opinion rendered in an earlier unrelated SCRUB case which also dealt with the issues of standing and which was on appeal to the Commonwealth Court.

Standard of Review

Under Pennsylvania law, when the trial court takes no additional evidence on appeal from a Board decision, the scope of review for the court is limited to determining whether the Zoning Board committed an abuse of discretion or an error of law. Board of Supervisors of Upper Southampton Twp. v. Zoning Hearing Board of Upper Southampton Twp., 124 Pa. Cmwlth. 103, 107, 555 A.2d 256, 258 (1989). Where the Zoning Board's findings of fact are not supported by "substantial evidence," the granting of a variance is an abuse of discretion. Somerton Civic Assn. v. Zoning Bd. of Adjustment, 471 A.2d 578, 580 n.1 (Pa. Cmwlth. 1984); Valley View Civic Assoc. v. Zoning Bd. of Adjustment, 462 A.2d 637 (Pa. 1983).

Applicants Failed To Prove That The Requested Variance Was Not Contrary To Public Interest

The party seeking a variance bears the burden of proving that unnecessary hardship will result if the variance is denied and that the proposed use will not be contrary to the public interest. City of Pittsburgh v. Zoning Board of Adjustment of City of Pittsburgh, 522 Pa. 44, 60, 559 A.2d 896, 903 (1989). (Emphasis added). Applicants have met neither of these requirements. To the contrary, Applicants have failed in their obligation to prove that changing the use of the sign to non-accessory would not be detrimental to the public interest. In fact, Applicants relied solely on statements of counsel to prove that the sign would have no adverse impact on the community. Not only were no facts or data offered to support these statements, but the enactment by City Council of the relevant outdoor advertising provisions of the Code directly rebuts these assertions.

In enacting the outdoor advertising provisions of the Code, City Council announced its

interest in keeping streets free from urban blight. Specifically, the Code provides:

> (g) Said signs jeopardize public safety by distracting pedestrians and to a greater extent, passing motorists...
>
> (h) Regulation and removal of these signs will promote traffic safety by eliminating the hazards to pedestrians and motorists ...
>
> (i) Regulation and removal of these signs will enhance the aesthetic beauty of the City of Philadelphia ...

Philadelphia Code §14-1604(1)(g)-(i), (k).

This statement of public policy merits deference from the Courts. As stated by the Pennsylvania Supreme Court in Bilbar Construction Co. v. Bd. of Adjustment, 141 A.2d 851 (Pa. 1958).

> [W]hat serves the public interest is primarily a question for the appropriate legislative body in a given situation to ponder and decide. And, so long as it acts within its constitutional power to legislate in the premises, courts do well not to intrude their independent ideas as to the wisdom of particular legislation. Specifically, with respect to zoning enactments, judges should not substitute their individual views for those of the legislators as to whether the means employed are likely to serve the public health, safety, morals and general welfare.

Bilbar Construction Co., 141 A.2d at 856.

As it is clearly public policy in Philadelphia to limit strictly the proliferation of signs, both the Board and the courts should be hesitant to exercise judgment independent from that enunciated in the Code. The proposed sign is the exact type of sign the Code seeks to regulate and permission to vary from these regulations should be sparingly given. In granting Applicants' requests, the Board acted without substantial evidence, mandating this Court's reversal.[5]

---

[5] Clearly at some point the Board recognized that there was insufficient evidence to support the grant of a variance as the original vote on the request went against Applicants. What facts or information served to change the Board's decision is beyond the Court's knowledge.

Applicants Failed to Demonstrate Hardship

Even had Applicants been able to prove that the proposed sign would not negatively impact on the public interest, it has failed to demonstrate some hardship not of its own making. To establish entitlement to a zoning variance, an applicant must show that because of the particular physical surrounding, shape, or topographical conditions of the specific structure or land involved, a literal enforcement of the provisions of the Code would result in unnecessary hardship. See Philadelphia Zoning Code § 14-1802(1)(a). Unnecessary hardship may also be established through evidence that the property has no value for any purpose permitted by the Zoning Code. Anderson v. Witt, 692 A.2d 292, 294 (Pa. Cmwlth. 1997).

In reviewing the Zoning Board's Findings of Fact, this Court finds no substantial evidence of unnecessary hardship to Applicants. What the Court does find is that the proposed sign violates at least three provisions of the Code [6] and is contrary to the public interest as evidenced by the opposition of SCRUB, the City Planning Commission, and other members of city government. The only mention of "hardship" made by Applicant was testimony that Freedom employed approximately 75 people, had a heavy overhead, and thus would benefit from the income that could be generated by changing the use of the sign to non-accessory. This is simply insufficient. See SCRUB v. Zoning Board of Adjustment (Conrail), 713 A.2d 135 (Pa. Cmwlth. 1998). In SCRUB(Conrail), the Commonwealth Court found that the mere fact that the Applicant would be denied some financial benefit by denying the request for a variance was not sufficient proof of hardship. In reaching this conclusion, the Court found that:

(1) the property is presently being productively used for a permitted

---

[6] Applicants' sign exceeds the height regulations, the area regulations, and is within 660 feet of a recreational facility, all in violation of the Code. The Code also requires that in order to put up a new sign, and old sign must be taken down. Applicants made no offer to do so.

> use, and (2) there is no right of a property owner to utilize its land for its highest and best *financial* gain. (Emphasis in original). The law is clear that, absent evidence that the property will be rendered valueless, financial hardship alone is not a sufficient basis for granting a variance.

SCRUB, 713 A.2d at 138, citing Atlantic Refining & Marketing Co. v. Zoning Hearing Board of Upper Merion Township, 133 Pa. Cmwlth. 261, 575 A.2d 961 (1990).

Similarly, in the case before the Court, the facts provided do not establish that the subject property cannot or is not being used for a permitted purpose. See Philadelphia Zoning Code § 14-1802(1)(a). Certainly, there was no evidence presented that the subject property has no value for any purpose permitted by the Zoning Code. See Anderson, *supra*. To the contrary, the subject property is being used successfully. As Applicants have not provided any evidence of unnecessary hardship, the Zoning Board abused its discretion by granting such a variance in the face of the specific provisions set forth in the Code.

CONCLUSION

Based on the numerous violations of the Code, the lack of evidence of hardship, and the evidence of negative impact upon the public, it is clear that the Board was without substantial evidence upon which it could justify its grant of a variance. Accordingly, this Court was obliged to reverse the decision of the Board, which reversal should not be disturbed.

BY THE COURT:

WOLF, J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Society Created to Reduce Urban Blight (SCRUB) and Mary Cawley Tracy	:	
v.	:	No. 2375 C.D. 2000
Zoning Board of Adjustment of the City of Philadelphia and City of Philadelphia, Matthew F. Hehl, President of Freedom International Trucks, Inc. and Navistar International Transportation	:	
Appeal of: Matthew F. Hehl, Freedom International Trucks, Inc. and Navistar International Transportation	:	

ORDER

AND NOW this 11th day of October, 2001, the order of the Court of Common Pleas of Philadelphia County, dated September 21, 2000, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Judge

Certified from the Record

OCT 11 2001

and Order Exit

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Society Created to Reduce Urban Blight (SCRUB) and Mary Cawley Tracy	:	
v.	:	No. 2375 C.D. 2000
	:	Submitted: August 10, 2001
Zoning Board of Adjustment of the City of Philadelphia and City of Philadelphia, Matthew F. Hehl, President of Freedom International Trucks, Inc. and Navistar International Transportation	:	
Appeal of: Matthew F. Hehl, Freedom International Trucks, Inc. and Navistar International Transportation	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN FILED: October 11, 2001

Matthew F. Hehl, Freedom International Trucks, Inc. (Freedom International) and Navistar International Transportation (collectively, Appellants) appeal from a decision and order of the Court of Common Pleas of Philadelphia County (trial court) reversing a decision of the Zoning Board of Adjustment of the City of Philadelphia (Zoning Board) to grant Appellants a variance for the

conversion of a freestanding sign from an accessory use to a nonaccessory use. We affirm.

The facts in this case are not in dispute. The subject property is a ten-acre lot located at 6601 New State Road, Philadelphia, and used by Freedom International for the sales and service of tractor trailers. The subject property is located in a "G-2" industrial zoning district, which permits outdoor advertising signs as a matter of right, subject to the requirements set forth in section 14-1604 of the Zoning Code for the City of Philadelphia (Zoning Code).

The sign at issue in this case is one of two free-standing accessory signs on the subject property. This sign is double faced and internally illuminated. Supported by a single steel pole, the sign measures sixty-one feet from grade to the bottom of the sign face and eighty feet from grade to the top of the sign face. The sign face is nineteen feet high and sixty feet wide, with a total sign area of 2,280 square feet.

On May 7, 1997, Appellants applied to the Philadelphia Department of Licenses & Inspections (L & I) for a permit to convert the sign in question from an accessory use to a nonaccessory use without making any change to the sign's size, area or height. L & I denied the application because the sign significantly exceeded the allowable height and size for nonaccessory advertising signs under

section 14-1604 of the Zoning Code and because the sign is located within 660 feet of a recreational area, another prohibition of section 14-1604.[1]

Appellants appealed the L & I decision to the Zoning Board, and a series of public hearings was held on the matter. In support of their request for a variance, Appellants presented the testimony of Hehl, President of Freedom International. Hehl testified that the sign in question is no longer a useful asset to Appellants. According to Hehl, when Freedom International moved to its present location, the sign was useful to advertise the move to Freedom International's customers. However, now that Freedom International's customer base is familiar with the new location, Hehl believes that the other accessory sign on the property is sufficient to identify Freedom International's location and that the sign in question would be better utilized as a "revenue draw [rather] than as an identification factor, which we believe, over the last year and-a-half, it has done." (R.R. at 27a-29a.) In order to establish that Appellants would suffer "hardship" without a variance, Hehl testified that Freedom International carries high overhead expenses due to the large size of its building and a $75,000 per week payroll and that converting the sign to a nonaccessory use would help offset some of this expense. (R.R. at 28a.)

---

[1] Section 14-1604(5)(b) of the Zoning Code limits the size of any nonaccessory advertising sign to 1,500 square feet along any street or right-of-way which is sixty feet or more in width. Section 14-1604(6)(a) requires that the "bottom edge of any outdoor advertising sign shall not be located more than twenty-five feet above the road surface from which the advertising message is visible and further provided, that in no case shall the sign extend more than twenty feet in height above its bottom edge . . . ." Section 14-1604(9)(n) prohibits placement of nonaccessory signs "within six hundred sixty feet of any park, playground, recreation center, play lot or other recreational facility under the jurisdiction of the Department of Recreation . . . ."

The Zoning Board granted Appellants' request for a variance.[2] In its Conclusions of Law, No. 4, the Zoning Board stated:

> Applicant in the present case has met the requirements for grant of a variance. The sign at issue is an asset which has no practical value in its present use. The Applicant proposes only to change the sign's message, and not to increase its height or dimensions. In addition, the sign, although located within 660 feet of a recreational area, is not obviously visible from that area.

(R.R. at 100a.)

On September 29, 1997, another community group, the Society Created to Reduce Urban Blight (SCRUB), and its president, Mary Tracy (collectively, Objectors), appealed the Zoning Board's decision to the trial court. The trial court quashed Objectors' appeal due to lack of standing. (Order of the trial court dated February 11, 1998.) Objectors then filed an appeal to this court, arguing that their appeal should not have been quashed because they had standing as taxpayers in the City of Philadelphia. By order dated April 5, 1999, this court reversed the trial court's order quashing the appeal and remanded the case for a determination on the merits. Society Created to Reduce Urban Blight v. Zoning

[2] The variance was granted subject to certain conditions set forth in an August 18, 1997 letter of agreement between Appellants and the Tacony Civic Association, one of the community groups that initially had opposed Appellants' variance request. Under this agreement, Appellants would not use the converted sign to advertise tobacco products, alcohol or adult entertainment activities and would not build any additional accessory signage even if Appellants otherwise had the right to do so. (R.R. at 63a.)

Board of Adjustment of the City of Philadelphia, 734 A.2d 949 (Pa. Cmwlth. 1999), appeal denied, 561 Pa. 682, 749 A.2d 474 (1999).

On remand, after briefing and oral argument, the trial court reversed the Zoning Board and revoked the variance. SCRUB v. Zoning Board of Adjustment of the City of Philadelphia, (C.P. Pa., Philadelphia, No. 3834-97, filed September 21, 2000). According to the trial court, Appellants failed to meet their burden of proving either that unnecessary hardship would result if the variance were denied or that the proposed use would not be contrary to the public interest.

On appeal to this court,[3] Appellants contend that the trial court should not have disturbed the Zoning Board's decision because Appellants were seeking a dimensional variance as opposed to a use variance and, therefore, under Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998), Appellants' burden to show undue hardship is subject to a lesser standard.

The party seeking a variance bears a two-pronged burden of proof. He or she must establish that (1) unnecessary hardship will result if the variance is denied, and (2) the proposed use will not be contrary to the public interest. Valley

[3] Our review of the trial court's order is limited to determining whether the Zoning Board committed an error of law or an abuse of discretion. Society Created to Reduce Urban Blight v. Zoning Board of Adjustment of the City of Philadelphia, 771 A.2d 874 (Pa. Cmwlth. 2001). An abuse of discretion is established where the 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. Id.

View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983).

Unnecessary hardship may be established by showing that the physical features of the property are such that it cannot be used for a permitted purpose or that the property can be conformed for a permitted use only at prohibitive expense. Allegheny West Civic Council, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 547 Pa. 163, 689 A.2d 225 (1997). Unnecessary hardship may also be established by showing that the property has no value for any purpose permitted by the zoning ordinance; however, such a showing is not required. Id.

In Hertzberg, our supreme court relaxed the standard for showing hardship where the applicant seeks a dimensional variance as opposed to a use variance, holding that

> [t]o justify the grant of a dimensional variance, courts may consider multiple factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.

Hertzberg at 544 Pa. 264, 721 A.2d at 50.

Appellants suggest that, under Hertzberg, the "unique nature of Appellants' business weigh[s] heavily in favor of granting a variance." (Appellants' brief at 15.) We disagree.

Initially, we note that, contrary to Appellants' claim, the variance requested in this case is not merely dimensional. "Dimensional variances involve only a reasonable adjustment from open area and space requirements in order to develop a *permitted* use." Society Created to Reduce Urban Blight (SCRUB) v. Zoning Board of Adjustment for the City of Philadelphia (Conrail), 772 A.2d 1040, 1045 (Pa. Cmwlth. 2001) (emphasis in original). (SCRUB (Conrail)) Here, the sign in question is within 660 feet of a recreational area. The display of a nonaccessory sign at this location is a use which is strictly prohibited by Section 14-1604(9)(n) of the Zoning Code. See id.

Moreover, even under the more relaxed Hertzberg standard, which would allow us to consider multiple factors in determining whether undue hardship exists, our review of the record reveals no conceivable hardship.

A mere showing that a property could be utilized more profitably is insufficient to support the grant of a variance. SCRUB (Conrail). Here, by Hehl's own admission, Appellants wished to convert the sign to nonaccessory use only to use the income it generated to offset their payroll and overhead expenses. Therefore, we agree with the trial court that Appellants failed to demonstrate hardship of any kind.

Appellants also argue that the trial court erred in holding that Appellants failed to meet their burden of proving that a variance would not be detrimental to the public interest. However, because we already have determined

that Appellants did not meet the first prong of their burden of proof, we need not address Appellants' contention that they met the second prong of their burden.

For all of the above reasons, we affirm.

ROCHELLE S. FRIEDMAN, Judge