IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stein & Silverman Family Partnership, Appellant	:	
v.	:	
Zoning Board of Adjustment of the City of Philadelphia, and SCRUB: The Public Voice for Public Space	:	No. 1069 C.D. 2012
	:	Argued: May 16, 2013

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE LEADBETTER FILED: June 19, 2013

Stein & Silverman Family Partnership (Stein) appeals from the Philadelphia County Common Pleas Court's order denying Stein's appeal from the City of Philadelphia Zoning Hearing Board of Adjustment's (ZBA) denial of Stein's variance request. There are three issues for this Court's review: (1) whether Scenic Philadelphia[1] is a valid intervenor; (2) whether the ZBA's denial of the variance was supported by substantial evidence;[2] and (3) whether the City's "cap" on outdoor

[1] At the time of the ZBA hearing, Scenic Philadelphia was known as "SCRUB: The Public Voice for Public Space." Before that, it was the "Society Created to Reduce Urban Blight" (commonly referred to as "SCRUB").

[2] Subsumed within this issue is Stein's issue: whether an applicant for a zoning variance is required to establish hardship by showing that no possible conforming use of a property is possible.

advertising signs in Section 14-1604 of the Philadelphia Code (Zoning Code)[3] is constitutional. We affirm.

Stein owns a 2.45-acre vacant parcel of land located at 3670 South Lawrence Street in the City's Food Distribution Center (FDC).[4] The Property is a small isthmus of land "at the foot of Lawrence Street where it meets I-95 [(a/k/a Delaware Expressway), that] is adjacent to the Eagle[']s Lincoln Financial Field sports complex." Reproduced Record (R.R.) at 87. The property has been vacant for at least 10 years.

On August 31, 2010, Stein applied to the City's Department of Licenses and Inspections (Department) for a zoning permit to erect on the Property a 20 by 60-foot double-faced, free-standing, single-pole, illuminated, V-shaped, non-accessory sign[5] with a maximum height of 76 feet. On December 2, 2010, the Department denied Stein's permit application because signs are prohibited in the City's FDC by Section 14-608(1)(a) of the Zoning Code, the proposed sign would be within 500 feet of another non-accessory sign in violation of Section 14-1604(3) of the Zoning Code, and a non-accessory sign of equal size is not being removed pursuant to Section 14-1604(10)(a) of the Zoning Code. Stein appealed to the ZBA.

The ZBA held a hearing on January 5, 2011. Although Stein's principal, Eli Stein, was present at the hearing, he did not testify. In specific response to the Department's reasons for denying Stein's variance application, Stein's counsel stated

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[3] Title 14 of the Philadelphia Code was repealed and replaced by the provisions of Bill No. 110845, approved December 22, 2011 and effective August 22, 2012. Because Stein filed its zoning permit application on August 31, 2010, the former version of Title 14 will be applied to this case.

[4] According to Stein, the formal name is the Philadelphia Regional Produce Market. On March 25, 2011, it was moved to Essington Avenue, near the old Philadelphia Auto Mall, north of the Philadelphia International Airport. Because the FDC had not been formally relocated at the time this application was filed, for purposes of this appeal, the Property is in the FDC.

[5] A non-accessory sign is an outdoor advertising sign that does not have content specific to the use of the premises on which it is located. Section 14-102(123)(b) and (k) of the Zoning Code.

that the FDC has been moved, so the Property is no longer in the FDC; there are signs on adjacent properties; and, Stein does not have any signs to remove, so it cannot comply with Section 14-1604(10) of the Zoning Code. As to hardship, Stein's counsel represented that the Property has been actively marketed for 10 years but has not attracted any tenants, so it has no practical use. Letters admitted from SPCCA/South Philadelphia Communities Civic Association, Whitman Council, Inc. and City Council president Anna Verna reflect their non-opposition to Stein's application. Stein's counsel also offered documentation that adjacent property owner Procacci Brothers Sales Corporation obtained a variance in 1997 for a 14 by 48-foot free-standing, double-faced, non-accessory outdoor advertising sign that is located within 300 feet of Stein's proposed sign.

Over Stein's objection, counsel for Scenic Philadelphia stated in opposition to the variance that the Property suffers no unique hardship. The City's Planning Commission also opposed the permit because the sign would violate the Zoning Code, it would undermine City Council's efforts to cap the City's number of existing signs, and the site is not unique or unusual and there is no hardship, since the site could "be used as a railroad maintenance yard or active rail lines that impact the regional rail line." R.R. at 61. By 2-1 vote, the ZBA denied Stein's application. On or about April 29, 2011, the ZBA issued findings of fact and conclusions of law. Stein filed a request for reconsideration that the ZBA denied. Stein appealed to the trial court. Scenic Philadelphia intervened.

The trial court heard argument and subsequently affirmed the ZBA's decision and denied Stein's appeal. Stein appealed to this Court.[6] The trial court

[6] When, as here, the trial court accepts no additional evidence in a zoning appeal, our review is limited to considering whether the ZBA erred as a matter of law or whether the findings of the [ZBA] are not supported by substantial evidence. *S. of S. St. Neighborhood Ass'n v. Phila. Zoning Bd. of Adjustment*, 54 A.3d 115, 119 n.1 (Pa. Cmwlth. 2012). "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Catholic*

issued its opinion on August 16, 2012. The ZBA was precluded from participating in this appeal due to its failure to file a brief.

Stein first argues that Scenic Philadelphia is not a valid intervenor. Stein argues specifically that Scenic Philadelphia does not represent a resident, tenant or property owner anywhere close to the Property, nor did any person with a connection to the area choose Scenic Philadelphia to represent him or her. Over Stein's objection, the ZBA permitted Scenic Philadelphia's counsel "to appear as an interested party, just for community comment." R.R. at 85. In its opinion, the trial court noted:

> Here, the Zoning Board filed a certified record of the Zoning Board proceedings with this Court on May 2, 2011 which fully expresses the Board's reasoning to justify its denial.
>
> The certified record included, *inter alia*, findings of fact, conclusions of law, and an itemized vote of the Zoning Board panel, which standing alone, was sufficient to convince this Court to deny the instant appeal.
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> . . . .
>
> It is true that SCRUB made appearances before the Board and this Court; however, the Board and this Court made their respective decisions on grounds wholly independent of any legal proffer or factual submission made by SCRUB. Therefore, since it is apparent on the face of the Board's findings of fact and conclusions of law that the Board was persuaded by significant reasons, and since this Court adhered to the appropriate standard of review, SCRUB'S presence was a nullity….

Soc. Servs. Hous. Corp. v. Zoning Hearing Bd. of Edwardsville Borough, 18 A.3d 404, 407 n.2 (Pa. Cmwlth. 2011) (citation and quotation marks omitted).

Trial Court Op. at 4-5.[7] Thus, Scenic Philadelphia's standing, or lack thereof, is of no moment. Scenic Philadelphia did not present any evidence before the ZBA, only community comment. The ZBA decided the case against Stein based on the evidence before it, and it was Stein that appealed to the trial court and, subsequently, here. Like the trial court, we must decide the case based on the evidence presented before the ZBA and the applicable law, whether Scenic Philadelphia participates or not.

Stein next argues that the ZBA's denial of its variance was not supported by substantial evidence. We disagree. Generally, "[t]he party seeking the variance bears the burden of proving 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 View Civic Ass'n v. Zoning Bd. of Adjustment*, 501 Pa. 550, 555-56, 462 A.2d 637, 640 (1983). "When an applicant seeks a variance for a property located in Philadelphia, the Board must also consider the factors set forth in the [Zoning Code]." *Singer v. Phila. Zoning Bd. of Adjustment*, 29 A.3d 144, 148 (Pa. Cmwlth. 2011) (footnote omitted).

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[7] However, had the trial court expressly granted Scenic Philadelphia intervenor status, it would have had a basis to do so. Section 14-1807(2) of the Zoning Code states, in pertinent part:

> All parties that entered an appearance in the proceedings before the Zoning Board of Adjustment may intervene in the appeal as of right by filing with the Prothonotary a Praecipe to Intervene within thirty (30) days of the date of service of the Notice of Appeal. The Court may permit any other person or persons claiming an interest to assert his, her or their right by intervention. . . .

In *Callowhill Center Associates, LLC v. Zoning Board of Adjustment, City of Philadelphia*, 2 A.3d 802 (Pa. Cmwlth. 2010), *appeal denied*, 610 Pa. 601, 20 A.3d 489 (2011), this Court held that Section 14-1807(2) of the Zoning Code authorizes Scenic Philadelphia to intervene in a ZBA matter if it files a praecipe to intervene and actively participates in the trial court's proceedings. The record reflects that Scenic Philadelphia filed a praecipe to intervene in Stein's appeal to the trial court on February 14, 2011, and it has actively participated in the proceedings since then. Thus, Scenic Philadelphia is properly before this court.

Section 14-1801(1)(c) of the Zoning Code authorizes the ZBA to grant variances from the Zoning Code "as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of [the Code] would result in unnecessary hardship . . . ." Section 14-1802(1) of the Zoning Code sets forth the criteria the ZBA must consider when deciding whether to grant a variance. This Court has more succinctly held:

> In essence, an applicant seeking a variance [in Philadelphia] pursuant to the [Zoning Code] must demonstrate that: (1) the denial of the variance will result in unnecessary hardship unique to the property; (2) the variance will not adversely impact the public interest; and (3) the variance is the minimum variance necessary to afford relief. The burden on an applicant seeking a variance is a heavy one, and the reasons for granting the variance must be substantial, serious and compelling.

Singer, 29 A.3d at 149 (citations omitted).

"While showing that a property is valueless without a variance is one way to establish unnecessary hardship, [our Supreme] Court has expressly rejected requiring such a showing." *Allegheny W. Civic Council, Inc. v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 547 Pa. 163, 168, 689 A.2d 225, 228 (1997). However, this Court does require "an applicant [to] prove that either: (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 is valueless for any purpose permitted by the zoning ordinance." *S. of S. St. Neighborhood Ass'n v. Philadelphia Zoning Bd. of Adjustment*, 54 A.3d 115, 121 (Pa. Cmwlth. 2012) [quoting *Taliaferro v. Darby Twp. Zoning Hearing Bd.*, 873 A.2d 807, 812 (Pa. Cmwlth. 2005)] (emphasis added). Moreover:

> absent a finding that property will be rendered valueless, financial hardship alone is not a sufficient basis for granting a variance and that typically the loss of rental income from disallowed outdoor advertising signs is not an unnecessary

> hardship. The applicant must also present evidence that the conditions on which the appeal for a variance is based are unique to the property and did not result from the actions of the applicant.

Soc'y Created to Reduce Urban Blight (SCRUB) v. Zoning Hearing Bd. of Adjustment, City of Phila., 858 A.2d 679, 682-83 (Pa. Cmwlth. 2004) (footnote omitted).

Here, Stein's case consisted solely of Stein's counsel's representation that the Property has been actively marketed for 10 years but has not attracted any tenants.[8] The Planning Commission opposed the application on the basis that the Property could be used as a railroad maintenance yard or active rail lines. Before the ZBA and the trial court, Stein argued that the lack of interest in the Property as a rail yard proves that the Property is valueless for any purpose permitted by the Zoning Code. Stein also argued, for the first time to the trial court,[9] that the Property cannot be used as a rail yard because the tracks are old and abandoned, and they would have to be connected either over or under I-95 in order to be used in that manner. Stein did not attempt to prove or argue that the expense of such measures would be prohibitive.

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[8] According to the ZBA transcript, Stein's counsel stated:

> Mr. Stein would testify, if need be, to the use of [the P]roperty. It's been vacant for approximately ten years. It's been actively marketed, and any attempt to obtain tenants for this site have not been successful. So we would submit that the [P]roperty has a hardship in that it cannot be used, practically for any other purpose, other than for overflow parking from an Eagle's game.

R.R. at 89. Mr. Stein's only statement on the record was: "It can't be used for that, either. It's not zoned." *Id.*

[9] When a trial court takes no additional evidence, but rather relies upon the ZBA's record, issues not raised before the ZBA are waived. *Lamar Advantage GP Co. v. Zoning Hearing Bd. of Adjustment, City of Pittsburgh*, 997 A.2d 423, 437 (Pa. Cmwlth. 2010). Although Stein did not specifically point out to the ZBA that the Property could not be used as a rail yard because the tracks are old and would have to be connected over or under I-95, when arguing to the trial court, Stein made that point using an aerial photograph admitted to the ZBA that clearly depict the condition and location of the tracks. Arguably, therefore, Stein's argument was not waived.

Stein's potential waiver of the rail condition argument notwithstanding, this contention is meritless. First, by stating what measures would have to be taken to conform the Property as a rail yard, Stein in effect acknowledged that the Property could be conformed for some permitted use. Second, the record evidence shows that Stein purchased the Property in 2010 despite its physical limitations and the Zoning Code's provisions.[10] Thus, based on Stein's own evidence, the Property is neither valueless nor without any conforming use.

Stein's counsel also offered documentation at the ZBA hearing that neighboring property owner Procacci Brothers Sales Corp. obtained a variance in 1997 for a 14 by 48-foot free-standing, double-faced, non-accessory outdoor advertising sign within 300 feet of Stein's proposed sign. Such evidence is of little value to Stein, since the proposed sign is clearly much larger and the circumstances attendant to the Procacci property are not of record here.

The ZBA concluded that, "[t]here is insufficient evidence of record to support a finding of unnecessary hardship resulting from some unique physical characteristic or circumstances of the Subject Property. . . . Accordingly, the Subject Property would not be rendered practically useless without the granting of the [v]ariance." R.R. at 21. The ZBA clearly weighed the evidence and concluded that Stein failed to meet his burden to prove the elements of unnecessary hardship. In order to obtain a variance, Stein had to demonstrate unnecessary hardship unique to the property, adverse impact on the public interest, **and** that it is the minimum variance necessary to afford relief. *Singer*. Because Stein failed to prove unnecessary hardship, let alone that it was the minimum variance necessary to afford relief, this Court need

[10] Scenic Philadelphia raised Stein's 2010 purchase of the Property before the trial court, which the trial court appeared to reject on the basis that it was not presented to the ZBA. However, Stein submitted the Property's assessment to the ZBA as its proof of ownership. The assessment record clearly shows that Stein purchased the Property in 2010. Since that fact appears in the record independently of Scenic Philadelphia's argument, this Court may consider it.

not further address whether the proposed variance would have an adverse public impact, or any of the other criteria set forth in Section 14-1802(1) of the Zoning Code.

Stein finally argues that the City's "cap" on outdoor advertising signs in Section 14-1604 of the Zoning Code is unconstitutional on the basis that it operates to ban all outdoor advertising signs within the City erected by individual property owners, but allows big sign companies to erect them. Although Stein's counsel stated at the ZBA hearing that it does not have any signs to remove, making it impossible to comply with Section 14-1604(10) of the Zoning Code, Stein did not specifically assert that the Zoning Code provision was unconstitutional. Stein raised that argument for the first time in its appeal to the trial court. Because this issue was not raised before the ZBA, it was waived. *Lamar Advantage GP Co v. Zoning Hearing Bd. of Adjustment, City of Pittsburgh*, 997 A.2d 423, 437 (Pa. Cmwlth. 2010).

Based on the foregoing, the trial court's order is affirmed.

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BONNIE BRIGANCE LEADBETTER,
Judge

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O R D E R

AND NOW, this 19th day of June, 2013, the Philadelphia County Common Pleas Court's May 4, 2012 order is affirmed.

BONNIE BRIGANCE LEADBETTER,
Judge

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BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION BY SENIOR JUDGE COLINS **FILED: June 19, 2013**

I dissent. I cannot, as does the majority, trivialize both the Zoning Board's and the Court of Common Pleas' refusal to follow the rule of law. Our Supreme Court, in Spahn v. Zoning Board of Adjustment, 602 Pa. 83, 977 A.2d 1132 (2009), emphatically declared that the very same party that intervened here, Society Created to Reduce Urban Blight (SCRUB), which subsequently changed its name to "SCRUB: The Public Voice for Public Space" and now calls itself "Scenic Philadelphia," has no immediate and direct interest in appeals such as this and, therefore, had no standing to intervene before the Zoning Board of Adjustment nor to participate in the Court of Common Pleas.

I would vacate and remand to the Court of Common Pleas with directions that it be remanded to the Zoning Board of Adjustment and that SCRUB not be allowed to intervene or participate, as they are neither a governing body nor an "aggrieved person" under Section 17.1 of the First Class City Home Rule Act, Act of April 21, 1949, P.L. 665, § 17.1, added by the Act of November 30, 2004, P.L. 1523, No. 193, § 2, as amended, 53 P.S. § 13131.1, and Spahn, 602 Pa. at 116-17, 977 A.2d at 1152-53.

JAMES GARDNER COLINS, Senior Judge