**[J-1-2014] [MO: McCaffery, J.]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

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| GLORIA MARSHALL | : No. 37 EAP 2013 |
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| | : Appeal from the Order of the |
| v. | : Commonwealth Court, entered on October |
| | : 11, 2012, at No. 244 CD 2012, |
| | : (reconsideration denied, November 27, |
| CITY OF PHILADELPHIA AND ZONING | : 2012) reversing the Order entered on |
| BOARD OF ADJUSTMENT | : October 3, 2011, in the Court of Common |
| | : Pleas, Civil Division, Philadelphia County, |
| | : at No. 4476 January Term, 2011. |
| APPEAL OF: ARCHDIOCESE OF | : |
| PHILADELPHIA | : ARGUED: March 11, 2014 |

## DISSENTING OPINION

**MR. JUSTICE EAKIN** **DECIDED: July 21, 2014**

I respectfully dissent, as I find the Commonwealth Court followed the proper standard of review in reversing the Philadelphia Zoning Board of Adjustment's grant of the variance. An applicant for a variance bears the burden of proving: "(1) unique hardship to the property; (2) no adverse effect on the public health, safety or general welfare; and (3) the variance will represent the minimum variance that will afford relief at the least modification possible." East Torresdale Civic Association v. Zoning Board of Adjustment of Philadelphia County, 639 A.2d 446, 447 (Pa. 1994). An applicant may prove unnecessary hardship by establishing: "(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 City of Pittsburgh, 721 A.2d 43, 47 (Pa. 1998) (citation omitted).

At the evidentiary hearing before the Board, appellant only offered evidence demonstrating its proposed use would receive substantial federal funding and overwhelming support from the community; however, it did not submit any evidence related to the three methods of proving hardship enumerated in Hertzberg. While such funding for church-owned property is indisputably remarkable and appellant's proposed use is certainly laudable, these particular points are inapposite to the case. The potential loss of federal monies if a variance is not granted does not constitute hardship, and the proposed socially salutary use does not carry the day. The question is not whether this would be a great use of the property — it is whether appellant proved other uses were uniquely impossible.

Because appellant presented no evidence relevant to "unique hardship," it failed to prove the need for a variance — a burden it was required to meet, not one the Board may assume has been shown. But see Majority Slip Op., at 14 (emphasis added) ("Based on the record before it, as well as its expertise in and knowledge of local conditions, the [Board] was certainly entitled to infer that the building could not be used for any permitted purpose without major, prohibitively expensive renovation."). The Commonwealth Court applied the proper standard and determined the Board's findings were unsupported by substantial evidence. See Marshall v. City of Philadelphia and Zoning Board of Adjustment, No. 244 CD 2012, unpublished memorandum at 7-11 (Pa. Cmwlth. filed October 11, 2012) (citations omitted). Specifically, the court noted:

> [Appellant] offered no evidence whatsoever demonstrating that the property could not in any case be used for any other permitted purpose, that it could only be used for such purposes at a prohibitive expense, or that it has no value for any purpose permitted by the Zoning Code.
>
> …[T]he testimony never actually addressed the issue of why there was a unique hardship to the property warranting the granting of variances.

Id., at 9-10. With this I must agree, and hence I respectfully dissent.