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IN RE APPEAL OF CHESTNUT HILL COMMUNITY ASSOCIATION, CHESTNUT HILL BAPTIST CHURCH, JAMES BRUNO, MAUREEN PIE-BRUNO, DAVID MERCURIS, JUDITH MERCURIS, EILEEN SISLE, KENNETH SCHOTSCH and DEVON CARGERRY, Appellants	:	PHILADELPHIA COUNTY
v.	:	DECEMBER TERM, 2021 NO. 2077
CITY OF PHILADELPHIA, ZONING BOARD OF ADJUSTMENT, Appellee	:	
and	:	
10 BETHLEHEM PIKE PROPERTY OWNER, LLC, Intervening Appellee	:	

APPELLANTS OPPOSITION TO MOTION FOR EXTRAORDINARY RELIEF

Appellants Chestnut Hill Community Association, Chestnut Hill Baptist Church, James Bruno, Maureen Pie-Bruno, David Mercuris, Judith Mercuris, Eileen Sisle, Kenneth Schotsch and Devon Cargerry ("Appellants) respond to the Motion for Extraordinary Relief submitted by Intervening Appellee 10 Bethlehem Pike Property Owner, LLC ("Appellee"), as follows.

INTRODUCTION

A. Appellee's Motion fundamentally seeks to have this Court make a preliminary ruling on the merits, without the benefit of the Record and the Zoning Board of Adjustment's ("ZBA") Findings of Fact and Conclusions of Law.

B. Additionally, Appellee mixes in *ad hominem* attacks against Appellants to support the notion that Appellee's case must be unquestionably correct, prior to any contest or proof, because Appellee says so (*ipse dixit*) and because this Court should assume and deem Appellants bad people, as predicates for determining this motion.

C. The undersigned has been a member of the Bar, and practiced in front of this Court, for over fifty (50) years, and understands his ethical obligations. The undersigned would never, under any circumstances, file what he believes to be a frivolous appeal without merit. The undersigned believes that this appeal is meritorious and that this Court, after reviewing the full Record and giving consideration to all arguments, will reverse the ZBA.

D. This Court should reject both: (1) the effort to circumvent well recognized appellate principles and this Court's long standing appellate practice of requiring a full record, including the ZBA's Findings of Fact and Conclusions of Law, and full briefing, before making a decision on the merits; and (2) rulings based on name-calling and innuendo rather than the facts and the law.

E. Further, the schedule Appellee proposes is unfair and unreasonable.

F. Appellee would have this Court require the ZBA to submit the full Record, including Findings of Fact and Conclusions of Law, by February 17, 2022.

G. The response date on Appellee's Motion for Extraordinary Relief is February 22, 2022, as stated in this Court's docket, making clear that this proposed date for the Court's requiring that the ZBA file the Record, or face sanctions, is irrational and impossible.

H. Appellee ties the proposed date for Appellants' Brief to this February 17, 2022 date, and would make that Brief due on March 3, 2022.

I. As it is clear that there could be no Order from this Court requiring the ZBA to file its Record on February 17, 2022, this leaves Appellants little time to file a brief, if any time, depending on when the ZBA actually files the Record, including its Findings of Fact and Conclusions of Law.

J. As to this last point, the undersigned has experienced circumstances where the ZBA has not been able to timely file its Findings of Fact and Conclusions of Law, and it has been necessary to file a motion for extraordinary relief to seek a reasonable extension of time to file an appellant's brief because the Findings of Fact and Conclusions of Law were not timely filed.

K. The current proposed Order that Appellee submits leaves no reasonable time for Appellant to move for extraordinary relief to extend the time when its Brief would be due in circumstances where the ZBA has not timely filed the Record and its Findings of Fact and Conclusions of Law.

L. As stated above, it is already known that the ZBA will not be filing the Record and its Findings of Fact and Conclusions of Law on February 17, 2022; and that in reality, Appellants will not have two weeks to file their Brief after receiving the ZBA's Findings of Fact and Conclusions of Law, if the Court enters an Order requiring an Appellants' Brief by March 3, 2022.

M. This Court issued a Scheduling Order dated February 14, 2022, a copy of which is attached hereto.

N. Appellants submit this Court's reasonable Scheduling Order as their proposed form of Order in response to Appellee's Motion.

O. Appellants note that two of their counsel working on Appellants' Brief will be unavailable during all or part of the period from March 2, 2022 through March 7, 2022, in considering any briefing schedule shorter than that set forth in this Court's February 14, 2022 Scheduling Order.

RESPONSE TO MOTION

Without waiving any arguments on the merits not set forth below, and specifically preserving all arguments on the merits for their Appellants' Brief, Appellants respond as follows:

1. Denied. Appellants incorporate their Introduction above, and paragraphs 2-28 below, as if fully set forth herein at length.

2. Admitted in part, denied in part. It is admitted that the Property is in the CMX-2 district. As to the remaining factual averments in this paragraph, after reasonable investigation, Appellants are without enough information to form a belief as to the truth or veracity of these allegations. They are therefore denied. Strict proof is demanded at trial, if at all times relevant. By way of further response, there are only 2 adjacent parcels to the Property and neither are completely in the CMX-2 district. 2 Bethlehem Pike, which is the adjacent parcel to the South and East, is in both the RSA-2 and CMX-2 districts, so it is mixed. 8 Summit Street is the adjacent parcel to the East and North, and it is in the RSA-2 district. Most properties to the South, East and North in the immediate vicinity are residentially zoned. The parcel closest to the Property across Summit Street to the North, 1 Summit Street, is in the RSD-3 district. While there are some CMX-2 parcels to the West and South, there are also properties in those directions in other districts such as CA-1, CMX-1 and CMX 2.5. Each and every nearby parcel may also be further restricted for development by one or more zoning overlays or other restrictions not mentioned in this paragraph.

3. Denied. Appellants are without enough information to form a belief as to the truth or falsehood of these allegations.

4. Admitted.

5. Denied as stated. The Philadelphia Zoning Code, in full, speaks for itself.

6. Denied. This paragraph avers legal conclusions as to which no response is required. By way of further answer, under the Philadelphia Zoning Code, some CMX-2 properties are required to have a setback along one or more frontages, pursuant to § 14-701(3)(1) of the Philadelphia Code.[1] The Code states, "**All** primary and accessory structures must comply with the dimensional standards in this (§ 14-701)." See § 14-701(1)(a) (emphasis added). Since this section of the Code applies to all structures *by its own terms*, it cannot be disputed that the proposed structure at the Property must comply with the provisions of § 14-701 of the Philadelphia Code, including the requirements of § 14-701(1)(c), in order to obtain a Zoning Permit by-right. This Code section states:

> **(c)** Front Yard Depths for Zone Blocks with More than One Zone. Where any block frontage[2] on one side of a street is divided into two or more districts, no structure shall be erected nearer to the street line than is permitted under the regulations for the district that covers the largest percentage of the street frontage on that block face[3].

See § 14-701(1)(c) of the Philadelphia Code (footnotes added).

With respect to the Property in this case, the Summit Street block frontage is divided into three districts. The three districts that comprise the Property's Summit Street block frontage are

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[1] See § 14-701(3)(c) of the Philadelphia Code, Bill No. 210075 (approved March 29, 2021); amended, Bill No. 210078-A (approved April 28, 2021).
[2] § 14-203(40)("Block Frontage") of the Philadelphia Code defines "block frontage", as follows: "The distance along any street line between the nearest streets intersecting it."
[3] § 14-203(39)(a)("Block Face") of the Philadelphia Code defines "block face", as follows: "In the case of a through street, the edge of a block of lots facing a publicly dedicated street and that is located between two intervening streets intersecting the street in front of the lots."

CMX-2, RSA-2 and RSD-1. Of the three districts comprising the Summit Street block face, the RSD-1 district covers the largest percentage of the street frontage. The Zoning Code states that no structure shall be erected under the requirements of the RSD-1 district *with less than a 35-foot front setback*. See Table 14-701-1 of the Philadelphia Code.

Pursuant to § 14-701(3)(1) of the Philadelphia Code, since the block face covers two or more districts, the RSD-1 district covers the largest percentage of the frontage, and the RSD-1 district requires a 35-foot setback along the Summit Street block frontage. ***The 35-foot front setback requirement of the RSD-1 district applies to all structures proposed along the Property's Summit Street block frontage***. Therefore, § 14-701(3)(1) of the Philadelphia Code requires that any structure erected along the Summit Street block frontage of the Property have at least a 35-foot setback.

7. Denied. This paragraph refers to a document which speaks for itself, and therefore no response is required. Further, this paragraph contains legal conclusions to which no response is required. By way of further response, it is specifically denied that any by-right permit should have been issued to Appellee.

8. Admitted in part, denied in part. This paragraph contains a legal conclusion to which no response is required. By way of further response, to the extent there are any factual averments contained in this paragraph, they are admitted in part and denied in part. It is admitted that the Philadelphia City Planning Commission ("PCPC"), which is an agency of the City of Philadelphia, is sometimes the recipient of a copy of the "zoning plans" that are filed with the City of Philadelphia Department of Licenses and Inspections, in connection with an application for a Zoning Permit for a property located in the City Philadelphia.

It is further admitted that PCPC is responsible for reviewing the zoning plans it receives in some cases and to make a determination on one or more of the "prerequisite preapprovals" enumerated at § 14-301(3)(c)(.1), if applicable. It is specifically denied that the PCPC had the authority to "approve" the Appellee/intervener's plans generally for the development under the City of Philadelphia Zoning Code, or to make a decision either way on whether to issue or refuse to issue a Zoning Permit in response to the application submitted. By way of further response, Appellee did not put on any witnesses from the Commission to testify about its processes.

9. Admitted in part, denied in part. This paragraph contains a legal conclusion to which no response is required. It is admitted that an appeal was filed from the permit issued by the Department of Licenses and Inspections to the Zoning Board of Adjustment, and that appeal and the evidence presented and arguments made to the ZBA speak for themselves.

10. Denied. The purpose of this appeal was to obtain a reversal of the erroneous decision of the Department of Licenses and Inspection, which issued a Zoning Permit for the proposed structure on the Property. This permit was issued in error, since the proposed structure is not permitted by-right under the plain language of the Philadelphia Code.

Appellants are comprised of the local community group and nearby neighbors to the Property, including the oldest church in Chestnut Hill, which is a neighbor located directly adjacent to the Property. If the issuance of the Zoning Permit is not reversed, Appellants will be significantly and irretrievably damaged. The proposed structure will be far more burdensome on Appellants legally-permitted uses of their adjacent and nearby properties than would a structure that actually meets all of the requirements of the Philadelphia Code, including denying their properties an adequate supply of light and air, casting a shadow and blocking light from windows of the adjacent old church (which was built in the year 1838), as well as numerous other deleterious effects to the

surrounding properties. Therefore, Appellants were compelled to file this appeal for sound and proper reasons.

11. Admitted.

12. Denied. This paragraph contains a legal conclusion to which no response is required. By way of further response, to the extent there are any factual averments contained in this paragraph, they are denied. It is specifically denied that Appellants presented no witnesses or no legal arguments in support of their appeal at the November 30, 2021 hearing. Rather, Appellants presented a number of witnesses as well as accurate, determinative legal arguments, in support of this appeal at the November 30, 2021 hearing.

On the other hand, at the hearing the Appellee/Intervener failed to address how the proposed structure complies with the requirements of § 14-701(1)(c) of the Philadelphia Code. Further, Appellants specifically deny Appellee/Intervener's characterizations and descriptions of Appellants' legal arguments, which speak for themselves, and therefore no further response is required. Nevertheless, by way of further response, see Appellant's response to paragraph 6, above.

13. Denied. It is specifically denied that Appellants failed to acknowledge that the Property is zoned CMX-2. Instead, Appellants acknowledged that, while the Property is in the CMX-2 district, the structure proposed by the application for a Zoning Permit filed by the Appellee/Intervener does not meet the requirements of the Philadelphia Code, as described in detail at the hearing and in Appellant's legal memorandum, which will be contained in the forthcoming record from the proceedings below before the Zoning Board. Further, it is specifically denied that Appellants failed to acknowledge the PCPC designated Bethlehem Pike as the primary frontage for purposes of the underlying application for a Zoning Permit. Rather, it is the

Appellee/Intervener who failed to acknowledge that the PCPC's designation of Bethlehem Pike as primary frontage had no bearing or relevance *whatsoever* on whether the proposed structure met the requirements of § 14-701(1)(c) of the Philadelphia Code.

Specifically, while § 14-301(3)(c)(.1)(.o) of the Philadelphia Code confirms that PCPC makes a determination of which frontage to designate as "primary" in the case of multiple frontages, it states that PCPC shall designate a primary frontage "where the determination of primary frontage(s) or side and rear lot lines is necessary for L&I to approve or deny an application. See § 14-701(1)(d)." In this case, PCPC's determination of "primary frontage" had no bearing *whatsoever* on the application of the Code requirements of § 14-701(1)(c), which does not mention the term "primary frontage" at all. See § 14-701(1)(c).

Furthermore, § 14-701(1)(d)(.4)(.c) of the Philadelphia Code states that the "primary frontage designation shall only apply to those provisions of this Zoning Code where specified. . ." § 14-701(1)(c) does not mention or specify the term "primary frontage". Therefore, while Appellants acknowledged that PCPC designated the Bethlehem Pike frontage as "primary," PCPC's designation of the primary frontage was not relevant or controlling as to whether the Zoning Permit should have been issued for the Property. Rather, the Zoning Permit should not have been issued since it did not meet all of the requirements of the Zoning Code.

14-15. Admitted in part, denied in part. This paragraph contains a legal conclusion to which no response is required. By way of further response, to the extent there are any factual averments contained in this paragraph, they are admitted in part and denied in part. It is admitted that Appellee/Intervener presented testimony and submitted a report from Ms. Woodcock at the November 30, 2021 hearing. Appellants specifically deny Appellee/Intervener's characterization and descriptions of the content of Ms. Woodcock's testimony, or the content of the report she

prepared, both of which speak for themselves. It is denied that Ms. Woodcock reached correct conclusions, or that her opinions can or should control the outcome of this matter. By way of further responses, Appellants specifically preserve all objections made to Ms. Woodcock's testimony for purposes of this appeal

16. Admitted in part, denied in part. This paragraph contains a legal conclusion to which no response is required. By way of further response, to the extent there are any factual averments contained in this paragraph, they are admitted in part and denied in part. It is admitted that Appellee/Intervener presented testimony from Sergio Coscia. Appellants specifically deny Appellee/Intervener's characterization and descriptions of the content of Mr. Coscia's testimony, or the content of the plans he prepared, both of which speak for themselves, and therefore no response to required. Appellants further deny that the plans presented by Mr. Coscia depict a proposed structure that would be considered a "by right project". Rather, the project as depicted in the plans does not meet the requirements of the Code.

By way of further response, see response to paragraph 6, above. In addition, to the extent it could inferred by Appellee/Intervener's allegations in this paragraph, it is specifically denied that Mr. Coscia's belief or opinion regarding whether the proposed structure would satisfy the requirements for a "by right project" under the Code would be at all controlling or determinative as to whether the structure would *actually* be permitted by-right under the Code.

17. Admitted in part, denied in part. This paragraph contains a legal conclusion to which no response is required. By way of further response, to the extent there are any factual averments contained in this paragraph, they are admitted in part and denied in part. It is admitted that Appellee/Intervener presented testimony from Mr. Frankel. Appellants specifically deny

Appellee/Intervener's characterization and descriptions of the content of Mr. Frankel's testimony, which speaks for itself, and therefore no response to required.

Appellants further specifically deny that the proposed structure would be considered a "by right project" under the Code's requirements. Rather, the project does not meet the requirements of the Code. By way of further response, see response to paragraph 6, above. In addition, to the extent inferred by Appellee/Intervener in this paragraph, it is specifically denied that Mr. Coscia's belief or opinion regarding whether the proposed structure would satisfy the requirements for a "by right project" under the Code would be at all controlling or determinative as to whether the structure would in fact be permitted by-right under the Code.

18. Admitted in part, denied in part. It is admitted that the Zoning Board "overruled" the appeal of the Appellants and affirmed the decision of the Department of Licenses and Inspections, after which Appellants promptly filed the instant appeal. Appellants deny the characterizations and descriptions of the Board's decision contained in this paragraph, which speaks for itself.

19. Admitted in part, denied in part. It is admitted that Appellants filed an appeal from the decision of the Zoning Board. Again, Appellants specifically deny that they did not present witnesses or legal arguments at the November 30, 2022; rather, both were presented. By way of further response, Appellants hereby incorporate their responses to paragraph 12 and 18 above as if set forth at length herein.

20. Denied. By way of further response, Appellants hereby incorporate their response to paragraph 10 above as if set forth at length herein.

21. Denied. This paragraph contains a legal conclusion to which no response is required. By way of further response, the factual averments and characterizations in this paragraph are

specifically denied. In addition, Appellants hereby incorporate their response to paragraph 12 above as if set forth at length herein.

22. Denied. Appellants incorporate their responses to paragraphs 1-21 above, as if fully set forth at length.

23. Denied. This paragraph contains a legal conclusion to which no response is required. By way of further response, admitted.

24. Denied. This paragraph contains a legal conclusion to which no response is required. By way of further response, to the extent this paragraph contains any factual averments, they are specifically denied. In addition, it is unclear what Appellee means when it states this case does not require an "extensive" record. There are procedures already in place for the ZBA to file its record, and it is unclear what Appellee proposes to make the record any less "extensive". Nothing to that effect is referenced in Appellee's proposed Order accompanying this Motion.

Further, this Court should reject Appellee's request that this Court presume in advance of receiving the Record that there is nothing of merit to the appeal, and therefore, that the Court move matters along to Appellee's satisfaction, without concern for the neighbors. Appellee improperly uses a Motion for Extraordinary Relief to circumvent well recognized appellate principles and this Court's long standing appellate practice of requiring a full record, including the ZBA's Findings of Fact and Conclusions of Law, and full briefing, before making a decision on the merits. Without such procedures, this Court will not be in a position to determine the ultimate issues in this appeal.

25-26. Denied. Appellants incorporate their responses to paragraphs 1 through 24 above as if fully set forth at length. By way of further response, Appellants specifically deny that this is a by-right project under the Zoning Code. Further, Appellants specifically deny that the proposed use would

be "legally conforming". In addition, Appellants specifically deny that no setback is required along the Summit Street frontage of the Property. Rather, a 35-foot setback is required.

27. Denied. Appellee is essentially asking this Court to predetermine the outcome of this matter on the merits, without a Record, on Appellee's say so. It is difficult to imagine greater prejudice than one party attempting to ask a Court to put aside its role as neutral umpire, and pre-suppose an outcome that favors one party over another.

By way of further response, Appellee asks this Court to set a briefing schedule based upon dates that make no sense, as set forth in detail in Appellants' Introduction above, which is incorporated herein as if fully set forth. Appellee would force Appellants to file a brief on March 3, 2022, based on the impossible premise that the ZBA could be ordered to file the Record on February 17, 2022. Moreover, Appellee constructs its proposed Order in such a way as to potentially force Appellants to file a brief without the ZBA's having filed the Record at all, including its Findings of Fact and Conclusions of Law at all, with no means for Appellants to seek timely extraordinary relief themselves. This is all patently prejudicial.

Further, that Appellee would even make such a proposed set of deadlines to this Court goes to the point that Appellee asks this Court to put aside normal, rational, appellate processes that accommodate full and fair decisionmaking, and instead pre-judge the case.

28. Denied. Appellants have no direct knowledge as to whether the City opposes this Motion. By way of further response, if the City does not oppose the Motion, then the City would be putting the ZBA in the position of being sanctioned because the ZBA did not file its Record on February 17, 2022, per Appellee's Order submitted to this Court.

Respectfully submitted,

FINEMAN KREKSTEIN & HARRIS, P.C.

By /s/ S. David Fineman

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Dated: February 18, 2022

EXHIBIT A

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

THE APPEAL OF	
IN RE: APPEAL OF CHESTNUT HILL COMMUNITY ASSOCIATI	***December Term 2021*** ***No. 02077***

SCHEDULING ORDER

AND NOW, Monday, February 14, 2022 it is hereby ORDERED as follows:

1. **Record**: The Agency subject to this appeal is ORDERED to electronically file its record with the Office of Judicial Records through the *Existing Case* section of the Electronic Filing System for the Trial Division – Civil available online at: http://courts.phila.gov by 04-APR-2022, or risk sanctions.
2. **Motions for Extraordinary Relief**: Shall be electronically filed with the Civil Motions Program through the *Motions* section of the Electronic Filing System not later than 02-MAY-2022. Any requests for continuance should also be filed as a Motion for Extraordinary Relief.
3. **Briefs**: Appellant's brief is due by 02-MAY-2022**.** Appellee's brief is due by 06-JUN-2022**.** Briefs shall be electronically filed in the *Existing Case* section of the Electronic Filing System, and served upon all opponents.
4. **Oral Argument**: On the legal merits of this appeal will take place anytime after 05-JUL-2022**.** Notice of the scheduled date, time and location will be sent to all interested parties at least fifteen (15) days prior to the scheduled event. Please note that once the argument date is set there will be no continuances granted.

Questions concerning this Order and its contents shall be referred to the Civil Motions Program at (215)686-8863.

ANNE MARIE COYLE, J.
TEAM LEADER

CERTIFICATE OF SERVICE

I, S. DAVID FINEMAN, co-counsel for Appellants, hereby certify that a copy of the foregoing response was filed on February 18, 2022, and will be served on the counsel named below via this Court's electronic service system:

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Date: February 18, 2022

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