

FILED

09 FEB 2022 03:50 pm

Civil Administration

D. KIM

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
COUNTY – CIVIL TRIAL DIVISION

IN RE: APPEAL OF CHESTNUT HILL	:	
COMMUNITY ASSOCIATION, ET AL.	:	
	:	
FROM A DECISION OF THE	:	DECEMBER TERM, 2021
PHILADELPHIA ZONING BOARD	:	
OF ADJUSTMENT	:	NO. 02077
	:	
Property Address: 10 BETHLEHEM PIKE	:	
PHILADELPHIA, PA 19118	:	
	:	
Property Owner: 10 Bethlehem	:	
Pike Property Owner LLC	:	

ORDER

AND NOW, this _____ day of _____, 2022, upon consideration of the Property Owner/Appellee 10 Bethlehem Pike Property Owner LLC’s Motion for Extraordinary Relief to Expedite Scheduling Deadlines, it is hereby ORDERED that the Motion is GRANTED.

IT IS HEREBY FURTHER ORDERED that the case management and scheduling deadlines in the above-captioned case are hereby expedited 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 **February 17, 2022** or risk sanctions;
2. **Motions for Extraordinary Relief.** Shall be electronically filed with the Civil Motion Program through the Motions section of the Electronic Filing System not later than **March 3, 2022**. Any request for continuance should also be filed as a Motion for Extraordinary Relief.
3. **Briefs.** Appellant’s briefs are due by **March 3, 2022**. Appellee’s brief is due by **March 17, 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 any time between **March 31, 2022** and **April 14, 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.

BY THE COURT:

J.

In the Court of Common Pleas of Philadelphia County
MOTION FOR EXTRAORDINARY RELIEF

(Check One Program)
 Commerce Mass Tort
 Day Forward/Major Jury Non-Jury
 Arbitration Appeal

CONTROL NUMBER

IN RE APPEAL OF CHESTNUT HILL
 COMMUNITY ASSOCIATION, ET AL

 Appellants(s)

DECEMBER TERM, 2021

 Month Year

vs.

CITY OF PHILADELPHIA, ZONING
 BOARD OF ADJUSTMENT

 Appellee(s)

No.: 2077

Filing of: 10 BETHLEHEM PIKE PROPERTY OWNER LLC

 Name of Filing Party

Plaintiff Movant
 Defendant Respondent

NAME OF PLAINTIFF AND COUNSEL

S. David Fineman, Esquire
 Fineman Krekstein & Harris, P.C.
 1801 Market Street, Suite 1140
 Philadelphia, PA 19103

NAME OF DEFENDANT AND COUNSEL

Michael V. Phillips
 KLEHR HARRISON HARVEY BRANZBURG LLP
 1835 Market Street, 14th Floor
 Philadelphia, PA 19103

ASSIGNED TRACK (Check one)

Expedited Complex
 Standard Extraordinary

CURRENT APPLICABLE CASE MANAGEMENT DEADLINES (Complete all dates subsequent to the date you are asking to be extended)

Discovery Deadline Not yet set
 Expert Discovery _____
 Motion Deadline _____
 Settlement Conference _____
 Pretrial Memo _____
 Trial Date _____

NAME OF JUDICIAL TEAM LEADER

Judge Coyle

SET FORTH DATES OF ISSUANCE OF ORDERS ON PREVIOUSLY FILED MOTIONS FOR EXTRAORDINARY RELIEF - ATTACH COPIES OF THOSE ORDERS

None

DESCRIBE RELIEF REQUESTED (Attach proposed Order, setting forth the current deadlines and proposed deadlines)

Set forth the efforts made to comply with the applicable deadlines; specify what needs to be done; set forth all relevant activity which has already been scheduled; and length and reason for the time requested.

SEE ATTACHED ADDENDUM.

THE CITY OF PHILADELPHIA DOES NOT OPPOSE THIS MOTION.

A COPY OF THIS MOTION WAS SENT OR WILL BE SENT TO THE FOLLOWING PARTIES OR COUNSEL ON THE FOLLOWING DATES:

S. David Fineman, Esquire - February 10, 2022 Leonard F. Reuter, Esquire - February 10, 2022
Sharon Suleta, Esquire - February 10, 2022

Response due: February 20, 2021 (within 10 days of filing of Motion)

I certify the above to be true and correct.

Respectfully submitted,

Date: 2/9/2021



Leslie M. Gerstein, Esquire
Attorney for Plaintiff/Defendant

**ADDENDUM TO APPELLEE/PROPERTY OWNER
10 BETHLEHEM PIKE PROPERTY OWNER LLC's MOTION FOR
EXTRAORDINARY RELIEF TO EXPEDITE SCHEDULING DEADLINE**

Appellee/Property Owner, 10 Bethlehem Pike Property Owner LLC (“Owner”), respectfully requests that this Honorable Court expedite all scheduling deadlines and avers the following in support thereof.

1. This case involves a baseless appeal of a by right zoning permit issued by the City of Philadelphia, Department of Licenses and Inspections (“L&I”) for the redevelopment of a lot located at 10 Bethlehem Pike, in Chestnut Hill, Philadelphia, PA (the “Property”).

2. The Property is zoned CMX-2, Neighborhood Commercial Mixed-Use-2, as are the properties to the west, north and south of the Property.

3. Upon acquiring the Property, Owner immediately proceeded with plans to redevelop the site for mixed use commercial and residential.

4. The Property has frontage on both Bethlehem Pike and Summit Street.

5. Section 14-701(1)(d) of the Philadelphia Zoning Code provides that for lots fronting on more than one street, each street frontage shall be considered a front and “[t]he front yard requirements of the zoning district shall apply to those street frontages . . .” Phila. Code § 14-701(1)(d).

6. Under the Philadelphia Zoning Code, CMX-2 properties are not required to have a front setback. *See id.* at Table 14-701-3 (Dimensional Standards for Commercial Districts).

7. On April 26, 2021 Owner obtained by right zoning permit no. ZP-2021-002274 for the construction of a mixed-use building with ground floor commercial and multi-family residential with thirty-three (33) dwelling units on floors two (2) through five (5).

8. As part of the permitting process, and as required by the Philadelphia Code, the plans for the development were reviewed and approved by the Philadelphia City Planning Commission (the “Planning Commission”).

9. Despite the clear language of the Code providing that a front setback is not required in the CMX-2 zoning district, and the by right nature of the zoning permit, 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 (collectively, “Appellants”), appealed L&I’s issuance of the permit to the Philadelphia Zoning Board of Adjustment (“Board”) claiming that a 35-foot setback was required.

10. The sole purpose of the appeal was to delay and thwart the approved redevelopment of the Property.

11. A hearing on Appellants’ appeal was held before the Board on November 30, 2021.

12. At the November 30, 2021 hearing , Appellants presented no witnesses or legal support for allegation that a 35-foot front setback was required. Instead, counsel for Appellants tried to explain to the Board that, because adjacent properties along Summit Street were zoned RSA-2, that the RSA-2 zoning district should apply to the front setback requirement, despite the fact that the Property is zoned CMX-2 and properties zoned CMX-2 clearly do not have a front setback requirement.

13. Appellants altogether failed to even acknowledge that the Property is zoned CMX-2, or that the Planning Commission properly designated Bethlehem Pike, which is a commercial transit hub, as the primary frontage and thus the set back requirement for the CMX-2 use was controlling.

14. Owner, on the other hand, presented the testimony of Janice Woodcock, AIA, an expert land planner and former director of the Planning Commission, who submitted an expert report as to the issue of the setback requirement.

15. At the hearing, Ms. Woodcock testified to the role of the Planning Commission, how the Planning Commission came to its decision concerning the primary frontage, and how it was the correct decision under the Philadelphia Zoning Code.

16. Owner also presented the testimony of Sergio Coscia, the architect for the project who testified that he designed a by right project.

17. Owner also presented the testimony of Zach Frankel, one of the principals of Owner who testified that he directed the design of a by right project.

18. After the parties rested, the Board unanimously denied the appeal.

19. Despite their failure to present any witnesses of evidence in support of their position, Appellants nonetheless filed an appeal of the ZBA's decision to this court on December 29, 2021.

20. The purpose of the appeal is to further delay the approved redevelopment of the Property.

21. Appellants took and continue to take this abusive course of action, that is, the meritless filing of the instant appeal, without any risk to themselves. Whereas Owner sustains direct harm in the form of lost revenue with every day that passes while the project remains under appeal, Appellants are not required post a bond and are not limited by anything other than their willingness to spend time and money to frustrate and wear down the Owner with expensive construction delays and related increased costs.

22. Due to the frivolous and bad faith nature of the zonings appeal and the by right nature of the project, this appeal merits expedited consideration and scheduling by this Honorable Court.

23. The sole issue previously before the Board and now before this Court is whether the zoning permit in question was properly issued by L&I.

24. The issue is a matter of law and does not require an extensive record for a fair and just resolution.

25. Neither the Property's CMX-2 zoning classification, nor displeasure with the language of the Zoning Code and uses permitted thereby, give the Appellants grounds to attack a zoning permit lawfully issued by L&I. *See e.g. Nettleton v. Zoning Board of Adjustment*, 574 Pa. 45 (2003) (where a property is being used for a proper and lawful purpose, city is without authority to compel a change in use or prohibit the building of structures so long as the structures are not detrimental to public safety and health).

26. The by right development of the Property should not be held up or delayed any longer because of neighboring property owners' complaints about the setback of a legally conforming use for which no setback is required.

27. No prejudice will result from expediting the instant proceedings to ensure a swift resolution of the legal issue and to avert Appellants' continued, abusive efforts to hinder the redevelopment of the Property.

28. The City of Philadelphia does not oppose the filing of this Motion.

Respectfully submitted,

KLEHR HARRISON HARVEY
BRANZBURG LLP

/s/ Michael V. Phillips
Michael V. Phillips
*Counsel for Property Owner/Appellee
10 Bethlehem Property Owner LLC*

Dated: February 9, 2022