

It is further **ORDERED** and **DECREED** that the contested decision of the City of Philadelphia Zoning Board of Adjustment (“ZBA”) is **REVERSED** because:

Substantial evidence did not support the ZBA’s affirmation of the issuance of the “by right” permit. The ZBA’s affirmation of L & I’s grant of the permit was erroneous because it had violated multiple Philadelphia Zoning Code provisions, particularly those relating to “set-back” restrictions as plainly recited within the Philadelphia Zoning Code Sections 14-701(1)(c) and (d) et seq., that should have been applied to the subject Property because it has more than one physical “street frontage.” Similarly, the ZBA erroneously adopted the rationale of the reviewing City of Philadelphia’s Planning Commission (“Commission”) without due diligent evaluation.

The ZBA erred by affirming the Commission’s overstepping of agency authority and disregard of Philadelphia Zoning Code prohibitions. The Commission designated one of the Property’s street-facing frontages as a “primary front” to Bethlehem Pike to purposefully exclude the Property’s existing frontage on Summit Street that had been subject to unambiguous Zoning Code restrictions. If these clear abuses of agency discretion and erroneous application of existing laws remain unabated, irreparable harm to the surrounding community shall result especially to the adjacent historically designated Chestnut Hill Baptist Church and to the adjacent and nearby single-family homes.

MEMORANDUM

The legal conclusions and supporting analysis that had been submitted on behalf of Appellants are fully incorporated into this Court’s findings and rationale which are summarized below with reservation of supplementation:

A. FACTUAL AND PROCEDURAL HISTORY

It is uncontested that the subject land parcel, hereinafter referenced as the “Property,” located at 10 Bethlehem Pike, Philadelphia PA 19118-2821 is owned by the original permit applicant, Intervening Appellee, 10 Bethlehem Pike Property Owner, LLC. As depicted, the Property is situated on a corner with two full street-facing frontages, one facing Bethlehem Pike and the other Summit Street. The attached and fully incorporated Exhibits inclusive of map drawings and diagrams accurately depict that the block upon which the Property sits, is bounded by Bethlehem Pike, Summit Lane, Prospect Avenue, Evergreen Avenue and Evergreen Place.

Historically, the Property had been operated as a commercial gas station and garage and was left vacant for some time after failure of the business. Following purchase, Intervening Appellee, by and through its principals, Zach Frankel and Max Frankel of Frankel Enterprises, reportedly demolished the existing structures before applying for a zoning permit. Appellee, by and through plans that had been prepared by Sergio Coscia, DBA Coscia Moos Architecture, LLC, applied for a zoning permit to facilitate construction of a forty-five (45) foot building with unspecified commercially use of the ground floor mixed with four upper floors for thirty-three (33) multi-roomed apartments, and eight (8) underneath grounded garage spaces.

The Application assigned to Permit Number #ZP-2021-002274 according to commonly referenced zoning parlance was couched as a request for “matter of right” or “by right” type of permit. This type of permit bypasses requirements associated with variance applications including community input. Specifically, the Permit that had been issued on April 26, 2021, had approved development “(f)or the erection of one (1) detached structure (45’ high) (using 7’ height mixed income low housing bonus as per Code Section 14-702(7) with roof deck accesses by roof access structure, green roof with balconies, size and location as shown in Application.” The “Approved

Uses” included: “Residential-Household Living-Multi-family; Retail Sales-Food, Beverages, and Groceries.” Additional “Approved Detailed Uses” included:

“Retail sale of food, beverages, and groceries from basement through first floor with multi-family household living (Thirty-three (33) dwelling units) (five (5) units using green roof bonus (as per code Section 14-602(7) and 14-602(4)(a)(8)(C); Six (6) units using moderate income density bonus and maximum twenty-two (22) units allowed as per lot size) from second (2nd) floor through fifth (5th) floors with twelve (12) 1A Class Bicycle spaces in an accessible route and with eight (8) underground parking spaces including one (1) van accessible space.”

The Permit identified the Zoning District as CMX-2 and uniquely noted the additional location of work for 10 Bethlehem Pike Philadelphia PA 19118-2821 as “See front side for primary parcel associated with this permit.” The grant enabled the owners to build a large mixed-use structure with no requirement of setback distance. As proposed, the structure would be sandwiched on the land parcel within ten feet and taller than its immediate adjacent neighbor, Appellant, Chestnut Hill Baptist Church, and within five feet of the single-family home of the Appellants, Mr. James Bruno, and Ms. Maureen Pie-Bruno.

On May 25, 2021, the ZBA accepted the third-party appeal of the local registered community organization, Chestnut Hill Community Association, and thirty-three impacted near and adjacent neighbors including all Appellants. Essentially, it was collectively argued by the “Protestants” that the Zoning Code had prohibited the issuance of this “by right” permit and that a Notice of Refusal should have been forwarded which would have triggered a variance request by the property owner and developer. After conducting a single virtual hearing with brief oral argument on November 3, 2021, the ZBA panel unanimously voted to deny the appeal. Remarkably, no one from L & I or the City of Philadelphia Planning Commission had testified before the ZBA.

The Chestnut Hill Community Association, Chestnut Hill Baptist Church, James Bruno, Maureen Pie-Bruno, Eileen Sisle, Kenneth Schotsch and Devon Cargerry filed a consolidated appeal to the Court of Common Pleas for the First Judicial District of Pennsylvania. Pursuant to Case Management Rules and Orders the appeal was transferred and assigned to the Honorable Anne Marie B. Coyle, Judge of Motions Unit, Civil Division of the Court of Common Pleas for the First Judicial District of Pennsylvania, hereinafter referenced as “this Court.” Oral arguments by Appellants and the property Owner as Intervening Appellee were presented during hearing before this Court on July 19, 2022 after the scheduled filing of respective supportive memoranda and incorporated exhibits and the Certified Record.

B. STANDING:

Standing of Appellants and Intervening Appellee as aggrieved parties has been correctly stipulated by all parties.

C. MERIT

The validity of ZBA’s affirmation of the Permit grant by the assigned City of Philadelphia L & I officials depends upon statutory interpretation of applicable sections of the City of Philadelphia Zoning Code. “Whether a proposed use falls within a given category specified in a zoning ordinance is a question of law.” *Gorsline v. Board of Supervisors of Fairfield Township*, 186 A. 3d 375, 385 (PA 2018) (Citation omitted.) Because zoning boards are not legislative bodies, they lack the authority to modify the terms of any zoning ordinance. *In re Appeal of Chestnut Hill Community Association*, 155 A.3d 658, 667-668 (Pa. Cmwlth. 2017) (Citation omitted.) Thus, the

ZBA's determination properly began and ended with their review of the legality of the permit as applied pursuant to the existing zoning regulations that had controlled its grant.

This Court's review of ZBA's decision is analogous to that of an appellate court's review of a trial court's legal ruling with due deference being accorded to fact finding determinations. Due deference however carries little or no weight "when the administrative agency's interpretation is inconsistent with the statute itself, or when the statute is unambiguous." *In re Appeal of McCrane*, 2017 WL 6061832, *6, 182 A.3d 1113 (Pa. Cmwlth. Dec. 8, 2017 (Citation omitted)). In this case, the ZBA's interpretation and justification for validating the Permit's issuance violated unambiguous terms and provisions of the Philadelphia Zoning Code particularly sourced from the original and amended versions of Section 14-701(1)(c).¹

Since no L & I examiner or representative from the Planning Commission had been presented before the ZBA, the record is unclear whether either agency's reviewing personnel had utilized Philadelphia Zoning Code Section 14-701(1)(c) before or after it had been amended on March 29, 2021, or before or after it had been amended again on April 28, 2021. The ZBA apparently utilized the post April 28, 2021 amended version as the stated basis of their decision. Since the original permit application and its grant had occurred before March 29, 2021, the pre-amendment version of Section 701(c) should have controlled.² Regardless, application of any of the statute's versions should have compelled refusal of the permit's "by right" issuance. The ZBA's decision to discount these unambiguous proscriptions was reversibly erroneous.

¹ Philadelphia Zoning Code Section 14-701(1)(c) was amended on March 29, 2021, after passage by City Council and effective Mayoral signature of Bill #210075 and amended again on April 28, 2021

² See *1050 Ashbourne Associates, LLC v Cheltenham Tsp. Bd. Of Commissioner*, 167 A.3d 828, 834 (Pa. Cmwlth. 2017); *McAneney v. Philadelphia Zoning Board of Adjustment*, Commonwealth Court No. 250 C.D. 2018, 2019 WL 6524886, *7-8 (Pa. Cmwlth. December 4, 2019).

The terms “block,” “block face,” and “block frontage,” are defined in the Philadelphia Zoning Code Sections 14-203(38)(39) and (40).³ When those terms are employed, the subject Property has two street facing block frontages, one facing Summit Street and one facing Bethlehem Pike. This fact is undeniably confirmed within the mapped drawings of the Certified Record. Philadelphia Zoning Code Section 14-701(d) provides that “when a property is fronting more than one street, each street frontage shall be considered a front yard,” and “the front yard requirements of the zoning district shall apply to those street frontages.” Thus, the Summit Street and the Bethlehem Pike frontages of the subject Property are front yards as provided within the Zoning Code. Moreover, Zoning Code Section 14-701(1)(c) specifies the restrictions should have been applied to both frontages of this proposed build.

While the Bethlehem Pike block frontage lies singularly within the CMX-2 district, the Summit Street block frontage is divided into three zoning districts, CMX-2, RSA-2 and RSD-1; Since the Summit Street block frontage is divided into the three zoning districts, of which residential districts are predominantly included, Zoning Code Section 14-701(1)(c) applies. The Zoning Code Section 14-701(1) (c) “Setbacks for Zone Blocks with More than One Zone,” that had been in place when the original application and its issuance had occurred, recited:

“Where any block frontage 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

³ The Philadelphia Zoning Code Defines these terms as follows.

14-203(38): Block: The smallest possible area of land bounded by three or more legally open streets, or two or more legally open streets in the case of a curved street, that are confirmed on the City Plan.

14-203(39): Block Face:

(a) 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.

(b) In the case of a dead end street, the edge of a block of lots facing a publicly dedicated street, and that is located between the publicly dedicated intersecting street at one end and the dead end of the street.

(c) In the case of a cul-de-sac, the edge of a block of lots facing a publicly dedicated street, and that is located between the publicly dedicated intersecting street at one end and the beginning of the turning circle, bulb, or “T” turnaround at the other end, and not including any lots whose front lot lines are on the turning circle, bulb, or “T” turnaround.

14-203(40): Block Frontage: The distance along any street line between the nearest streets intersecting it.

frontage on that block face; provided however, that when residential districts are included, the setback shall be the highest required of the applicable residential districts.”

Further, per the Zoning Code Table 14-701-1, Summit’s zoned district RSA-2 requires a minimum of 15-foot front yard depth setback; Summit’s RSD-1 zoned district, which covers the largest percentage of Summit Street frontage, requires a 35-foot front yard setback.

Thus, as plainly interpreted and practically applied, Section 14-701(c) required that no structure be erected nearer thirty-five (35) feet of the Summit Street line. This unambiguous statutory condition had been disregarded by L & I, when it had approved the “by right” Permit to enable the build of a large mixed use five story structure with zero setback to the street line. The “by right” Permit should have been refused as prohibited per plain reading of the relevant Zoning Code provisions. ZBA’s legally erroneous affirmation of the grant compelled this Court’s reversal of its determination.

The twice amended Section 14-701(c) similarly prohibited the permitted construction. Section 14-701(1)(c) as amended March 29, 2021, simply changed the Title to “Front Yard Depths for Zone Blocks with More than One Zone,” and recited:

“Where any block frontage 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; provided however, that, when residential districts are included, the front yard depth shall be the highest required of the applicable districts.”

Likewise, as amended April 28, 2021, Section 701(1) (c) recited:

“Where any block frontage 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.”

Thus, as succinctly stated, all section versions contain specified “front setback” or “front yard depth” conditions. The Property is subject to the amended requirements because it faces, or fronts, two streets and its Summit Street frontage is divided by three separately zoned districts; RSD-1 covers the largest area on Summit Street; RSD-1 explicitly directs that 35 feet of distance lie between the erected structure and its street line. Thus, pursuant to the unambiguous language of any version of this statute required thirty-five (35) feet of a setback to have been incorporated into the permit application before “by right” permission could have been granted. In this case, the opposite occurred, and zero setback distance had been granted in circumvention of explicit legislative language.

Intervening Appellee rationalized the complete bypass of applicable Code setback restrictions by circuitously claiming that reviewing personnel from the City of Philadelphia Planning Commission and L & I had the authority to designate Bethlehem Pike as the subject land parcel’s “primary frontage” to enable application of CMX-2 zoning district to the entire Property. Thus, the structure could be built without any setback restrictions. Specifically, Intervenor Appellee relies upon a sentence contained within Zoning Code Section 14-701(1)(d) which recites “the front yard requirements of the zoning district shall apply to the street frontages and the following side yard, rear yard, and primary frontages.”

This interpreted authority however is restricted by Section 14-701(1)(d)(4)(c) which provides. “The primary frontage designation shall only apply to those provisions of the Zoning Code where specified, otherwise the front yard and front setback requirements of the Zoning Code shall apply.” Even if the Zoning Code provisions allows the Planning Commission and L & I to “designate” any frontage of the subject Property as primary to assist dimensional determinations,

it does not authorize the misuse of this designation to avoid plainly identified legislative provisions.

The critical flaw of Intervenor Appellee's claim is that even if the Planning Commission's debatable designation of one of the two frontages as "primary" had been authorized, logically this label cannot exclude the reality that there are two street facing frontages to this Property. The word "primary" does not mean "only." The Summit Street frontage also exists and encompasses three separate zoning districts including the residential zones which require measured space, setbacks or distances between the building and the street line.

Moreover, the underlying motivation for the Planning Commission's overstepping of authority and bypassing of concrete Code Provisions may have been revealed during the virtual hearing before the ZBA. Although no reviewing personnel from L & I or the Planning Commission had testified at this hearing, their reasoning could be extrapolated from the testimony of Appellee's hired expert, Ms. Janice Woodstock. To support her viewpoint that the proposed plans had been consistent with the Planning Commission's future commercial growth goals for Bethlehem Pike, Ms. Woodstock impermissibly related her hearsay-based conversations with unknown persons from the Planning Commission.

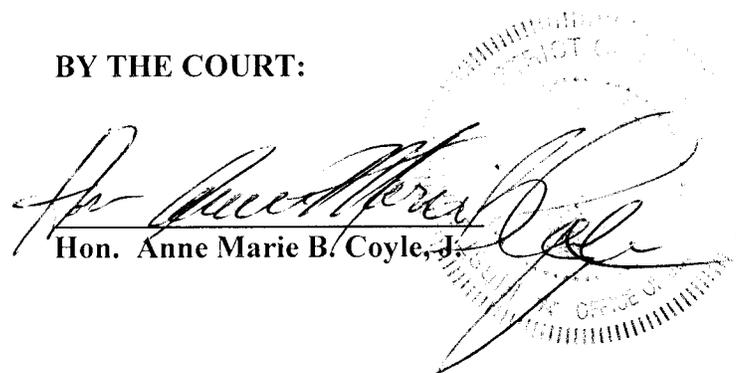
Ms. Woodstock opined that the prospective plans for the Property would be good for businesses along Bethlehem Pike and that this value had superseded the resulting impact that this large densely populated mixed-use building would naturally have upon the adjacent and nearby neighbors and surrounding community. The ZBA's unfettered adoption of the fortune telling viewpoint that had been expounded by Intervening Appellee's hired expert demonstrated that the ZBA had abused its discretion by improperly acting as a legislative body.

Finally, although raised from the outset, there is a dearth of recorded examination or factual finding by the ZBA concerning Appellants' remaining objections to the Permit's issuance related to the "roof deck" and planned "lighting by-right" requirements. If this transcribed record had not otherwise necessitated reversal of the ZBA's determination, this Court would have remanded the matter for further evaluation of these claims.

D. CONCLUSION

Based on the foregoing, this Court's reversal of the ZBA's substantively erroneous determination had constituted an appropriate exercise of reviewing discretion and authority.

BY THE COURT:



Hon. Anne Marie B. Coyle, J.