IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

LAND ENDEAVOR 0-2, INC.,	: FEBRUARY TERM, 2005
	: No. 0814
v.	: (Commerce Program)
CITY OF PHILADELPHIA, COMMISSIONER ROBERT D. SOLVIBILE Department of Licenses and Inspections,	: : Commonwealth Court Docket No. 268 CD 2006

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O P I N I O N

Albert W. Sheppard, Jr., J. ……. April 13, 2006

This Opinion is submitted relative to the defendants' appeal of this court's Order of January 26, 2006. That Order granted Partial Peremptory Judgment in Mandamus in favor of plaintiff and against the defendants, ordering the Licenses and Inspection Department ("L&I") of the City of Philadelphia to strike its denial of a zoning permit sought by plaintiff, and ordering the City through L&I to issue the zoning permit to plaintiff.

For the reasons discussed, it is respectfully submitted that this court's Order should be affirmed.

Factual Background

Plaintiff applied for a zoning permit to build thirteen (13) single-family homes on its property.[1] The application was duly processed and L&I was prepared to approve plaintiff's application for a permit as of right in accordance with applicable provisions of the Philadelphia Zoning Code. But, after L&I's announced intention to issue and before actual issuance, a City Councilperson and City Planning Commission personnel contacted certain employees at L&I in an attempt to have the permit denied. As a result, what should have been a routine ministerial decision by L&I was stopped cold. This interference caused plaintiff's application to be improperly denied by L&I.

Plaintiff brought this action in mandamus to compel the City of Philadelphia and the Commissioner of L&I (defendants) to issue the zoning permit. Following a number of hearings and the submission of a number of legal briefs, this court granted the Petition in Mandamus. The defendants now appeal.

I. An Action In Mandamus Is Proper Under The Circumstances.

Plaintiff brought this action in mandamus to compel L&I to perform a ministerial duty, that is, to approve plaintiff's proper zoning permit application.

> A proceeding in mandamus is an extraordinary action at common law and is available only to compel the performance of a ministerial act, or mandatory duty where there exists no other adequate and appropriate remedy; there is a clear legal right in the plaintiff, and a corresponding duty in the defendant.

McCray v. Pa. Dep't of Corr., 582 Pa. 440, 447, 872 A.2d 1127, 1131 (2005). "Where the right to the permit is clear, the issuance thereof by the proper official is no more than the performance of a ministerial act which admits of no discretion in the municipal officer, and mandamus is both appropriate and proper to compel performance." Lindy Homes, Inc. v. Sabatini, 499 Pa. 478,

[1] The property owned by plaintiff that is the subject of the zoning application and this action has an address of 9838-44 Legion Street (Northeast Philadelphia).

481-2, 453 A.2d 972, 973 (1982); Lhormer v. Bowen, 410 Pa. 508, 514, 188 A.2d 747, 749-50 (1963). For the reasons discussed, the plaintiff's right to the requested zoning permit was clear, and this court properly ordered L&I to issue the permit to plaintiff.

II. Plaintiff Had A Clear Legal Right To Receive The Permit For Which It Applied.

In determining whether plaintiff's application for the zoning permit should have been approved as of right, L&I (and this court) was required to review the applicable provisions of the Philadelphia Zoning Code to see if plaintiff's proposed use was permitted.

A. Plaintiff's Proposed Dwellings Are Permitted In An R12 Zone.

Plaintiff's property is split-zoned: 86.79% of it is subject to the R12 zoning requirements and the remaining 13.21% is subject to the R6 zoning requirements. The Zoning Code contains a provision that governs the use of property in such situations:

> When the boundaries of various districts as shown on the zoning map are established so that a single property has more than one zoning district designation, or is subject to various controls or requirements as established in this Title, the most restrictive district, requirement, or control shall apply; provided, when a zoning designation on a split-zoned property covers twenty percent or less of the area of the parcel, this designation shall not apply in terms of use control or zoning control on the entire lot, but shall control only that portion of the lot so zoned.

Phila. Code § 14-102(3). Under this provision, plaintiff must comply with the R6 requirements of the Zoning Code only with respect to the 13.21 % of its property that is subject to the R6 designation, and plaintiff may rely upon the R12 zoning requirements with respect to the rest of the property.

In an R6 zone, single-family dwellings are permitted, but duplexes and multi-family dwellings are not. *Id.* at § 14-205. Such single-family dwellings may be detached, semi-detached, or attached, but there may not be multiple buildings on one lot. *Id*.

> In 'R-6': With respect to new construction for which a building permit application is filed after March 1, 2003, attached dwellings are permitted in groups of not more than 4 and the minimum lot width for all dwellings shall be 20 feet; for all other properties, attached dwellings are permitted in groups of not more than 10.

Id. at § 14-204(6). In other words, R6 zoning permits up to 4 new, attached, single-family dwellings in a group, but each dwelling must occupy its own lot.

In an R12 zone, single-family dwellings are permitted, and so are duplexes and multi-family dwellings. *Id.* at § 14-205. They may be detached, semi-detached, or attached, and more than one of them may be on the same lot. *Id*. In other words, more single-family dwellings may be built on R12 zoned property than may be built on R6 zoned property.

In this case, plaintiff proposed to build 5 attached single-family dwellings in one group and 8 in another group, for a total of 13. The type of dwelling plaintiff proposed (i.e. attached single-family) would be allowed in both an R6 zone and an R12 zone, but the number of dwellings per group and the number of dwellings per lot as proposed by plaintiff are permitted only under the R12 zoning classification. All of the proposed dwellings will be built on the portion of plaintiff's property that is zoned R12, so they are proper under the Code. Plaintiff does not propose to build any dwellings on the R6 portion of its property. Instead, it proposes to use that portion as a driveway and as street frontage only. These uses are proper in an R6 zone.

B. Plaintiff's Proposed Driveway Is Permitted In An R6 Zone.

The Code requires that plaintiff set aside a portion of its property for parking[2] for the residents of the proposed dwellings and that it provide them with a driveway or other street access for their vehicles:

> With every one-family and duplex dwelling erected in any Residential District after the effective date of this ordinance, there shall be provided on the same lot an area or garage containing one parking space for each family, with adequate

[2] The parking for the dwellings will be on the R12 zoned portion of the property.

> access to a street or driveway connecting with a street, for the use of the occupants of the dwelling . . .

Phila. Code § 14-1402(1)(a). The section applies to dwellings constructed on both R6 and R12 zoned lots. The Code defines a "Driveway" as

> A common right-of-way shared by three (3) or more abutting landowners, building owners or condominium owners which provides vehicular access to one (1) or more lots or buildings and which shall not be included as part of the required rear yard or open space of any of the abutting lots and which shall not be obstructed by any of the abutting lots and which shall not be obstructed by any of the abutting landowners without the concurrence of all those with legal rights to the driveway.

Phila. Code § 14-102(40).[3] This definition applies to both R6 and R12 zoned lots.

As defined, a driveway may abut any single-family dwelling, whether detached, attached, or in a group. The drafters of the Code did not choose to impose different requirements for an R6 driveway and an R12 driveway, or for a driveway abutting single-family dwellings erected one per lot and a driveway abutting single-family dwellings erected more than one per lot. Instead, a driveway, such as the one proposed here, which is shared by three or more building owners, and which provides vehicular access to one or more lots or buildings, is permitted in an R6 zone as well as in an R12 zone. Therefore, under a plain reading of the Code, plaintiff's proposed driveway on the R6 section of its property is proper.[4]

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[3] The Code also provides as follows: "*Parking Lots - Driveway* - Any area of a parking lot connecting an aisle to a public street which does not provide direct ingress and egress to any parking space." Phila. Code §14-102(81)(b). Any "driveway" included in the proposed parking lot on the R12 portion of plaintiff's land is not at issue here.

[4] It does not matter that the proposed driveway serves an R12 use that would not itself be permitted in the R6 zone because the same driveway could serve a proper R6 use. In other words, under the R6 use requirements, it would be permissible for a single driveway to serve 13 single-family dwellings, each of which occupies its own lot. Such a driveway is no different from the proposed driveway, which will serve 13 single-family homes on the same property.

C. Plaintiff's Proposed Street Frontage Is Permitted In An R6 Zone.

The Zoning Code requires that every property on which dwellings are built front on a street as follows:

> (a) Single Family and Duplex Dwellings. Any lot upon which a single family or duplex dwelling is erected after the effective date of this ordinance shall have a street frontage not less than two-thirds of the minimum lot width required for the district.
>
> (b) Multiple Dwellings and Buildings Other than Dwellings.[5] Any lot upon which a multiple dwelling or building other than a dwelling is erected after the effective date of this ordinance shall have a street frontage not less than two-thirds of the width of the lot at its widest point.

Phila. Code § 14-231(5). In an R6 zone, the minimum lot width is 20 feet for new construction, and in an R12 zone, the minimum is 50 feet. *Id*. at § 14-204(1)(6); § 14-205.

The R6 portion of plaintiff's property is 50 feet wide where it abuts Legion Street. Since that portion of the property is more than 2/3 of 50 feet, it satisfies the R12 street frontage requirements, as well as the lesser street frontage requirements for R6, *i.e.*, at least 2/3 of 20 feet. The street frontage requirements for R6 are minimum requirements. There are no maximum street frontage requirements for R6 lots. Therefore, the fact that the proposed frontage is greater than the R6 requirements, such that it also meets the R12 requirements, does not cause it to violate the R6 requirements. The Code clearly permits the proposed street frontage of 50 feet in an R6 zone.

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[5] Plaintiff does not propose to build a multiple dwelling as that term is defined by the Code. *See id* at § 14-102(43)(c) ("A multiple dwelling shall be a dwelling occupied by three (3) or more families, including rooming and boarding houses and similar dwellings, except hotels, apartment hotels and motels;") § 14-102(42) (A "Dwelling" is "a building, any portion of which is used or intended to be used for living or sleeping by human occupants."). In addition, plaintiff is not proposing a building other than a dwelling.

Plaintiff proposes to build 13 attached single-family dwellings. *See id.* at § 14-102(43)(a) ("A single-family dwelling shall be a dwelling occupied as the home or residence of one (1) family;") § 14-102(21)(c) ("An attached building is one with two (2) or more party walls, or one (1) party wall in the case of a building at the end of a group of attached buildings;") § 14-102(59). Therefore, plaintiff need only meet the street frontage requirements for a single-family dwelling.

D. The December 2004 Code Bulletin Does Not Apply to Plaintiff's Application.

In order to justify its decision to deny plaintiff's application, L&I[6] first issued on December 7, 2004 an Administrative Code Bulletin which stated:

> When a property is split zoned, the portion of the property that is 20% or less shall not be used for street frontage, driveway access to a less restrictively zoned property, or any other purpose that is not specially allowed in the more restrictive district.

Complaint, Ex. G. L&I then cited this Code Bulletin as the basis for its denial of plaintiff's application. *Id.*, Ex. H. As set forth above, this Bulletin does not accurately interpret the applicable provisions of the Zoning Code. It constitutes, at best, an attempt to change the zoning law. Furthermore, this Bulletin was plainly aimed at plaintiff's application and constitutes an improper, *ad hoc* interpretation of the Zoning Code by L&I, being utilized in an inappropriate manner.

Plaintiff filed its application for zoning permit on September 18, 2003. *See* Complaint, Ex. E. On or before October 14, 2004, L&I determined that plaintiff's permit should issue as of right. *See* 10/14/04 Memo. The Code Bulletin was issued on December 7, 2004. *See* Complaint, Ex. G. On December 16, 2004,[7] plaintiff's application was denied. *See* id., Ex. H. Since the Code Bulletin was not in place at the time plaintiff's application was filed, and it constituted an attempted change of applicable law, the Code Bulletin was improperly applied to plaintiff's pending application. "It is impossible to escape the conclusion that the [Code Bulletin] here involved was special legislation, unjustly discriminatory, arbitrary, unreasonable, and confiscatory in its application, in that it was aimed at this particular piece of property." Lindy

[6] David J. Perri, who is identified as a "Chief Code Official" at L&I, was the author of the Bulletin. The record shows that Mr. Perri met with a Councilperson to discuss the issuance of plaintiff's permit. *See* L&I Internal Memorandum, dated October 14, 2004, attached as Exhibit N to Plaintiff's Second Supplemental Motion for Partial Peremptory Judgment (the "10/14/04 Memo").

[7] The Law Department recommended granting the permit on November 18, 2003. So, L&I could have, and should have, issued the permit at that point. *See* Section III *infra*, page 9.

Homes, Inc. v. Sabatini, 499 Pa. 478, 483, 453 A.2d 972, 974 (1982). Therefore, the Code Bulletin may not serve as a proper basis for denying plaintiff's permit.[8]

III. L&I Had A Duty To Issue Plaintiff's Permit.

L&I, acting alone, was required to approve plaintiff's permit application as of right. "The duty and power to administer and to enforce the provisions of Chapters 14-100 through 14-2000 of this Title [the Zoning Code] is hereby vested in the Department of Licenses and Inspections, which in this Chapter and in Chapter 14-1800 shall be called "The Department." Phila. Code § 14-1702(1). "All applications for any zoning or use registration permit under this Title shall be made to the Department." *Id*. at § 14-1703.

> No zoning or use registration permits shall be issued unless:
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> (a) The owner or his agent authorized in writing files a plan in duplicate drawn to scale showing the actual lot dimensions, use or intended use, height or size, and location of the building or buildings on the lot, together with such other information and data as the Department may require;
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> (b) Such plan is approved by the Department as showing compliance with the applicable provisions of this Title.

Id. Under these provisions, it is L&I's ministerial duty to issue a zoning permit where the proffered plan complies with the Zoning Code. In this case, plaintiff's application proposed a use of plaintiff's property that was permitted under the Zoning Code. Indeed, L&I should have approved the application. L&I personnel should not have allowed themselves to be influenced

[8] Likewise, the amendment to the Zoning Code that made all of plaintiff's property subject to R6 zoning was not applicable to plaintiff's application because the bill was introduced to City Council on September 11, 2003, approved by the Rules Committee on October 30, 2003, and approved by City Council on December 4, 2003, after plaintiff's permit application had been submitted to L&I. Only an amendment to the Zoning Code that was pending before City Council at the time of plaintiff's application could serve as a proper basis for denying plaintiff's application. *See* Lhormer v. Bowen, 410 Pa. 508, 511-12, 188 A.2d 747, 748-49 (1963) (where no public hearings were held on, or public notice given of, the proposed zoning ordinance prior to the filing of plaintiff's permit application, the ordinance was not "pending" and "could not be applied retroactively" to plaintiff's application.)

by a Councilperson's contrary opinion[9] and thereby repudiate their mandatory, ministerial, duties. Instead, they should have approved plaintiff's permit, as they had originally intended and as the Code required.

In performing its ministerial duty, L&I was entitled to, and in this case did, request advice from the City Law Department as to whether plaintiff's application should be approved.

> Whenever any officer, department, board or commission shall require legal advice concerning his or its official business or whenever any legal question or dispute arises . . . in which any officer, department, board or commission is officially concerned . . . it shall be the duty of such officer, department, board or commission, to refer the same to the Law Department.
>
> It shall be the duty of any officer, department, board or commission having requested and received legal advice from the Law Department regarding his or its official duty, to follow the same.

Phila. H.R.C. § 8-410. L&I submitted a memorandum to the Law Department in which it outlined the facts in plaintiff's application and "request[ed] that you review this matter and advise this office on how the Zoning Unit should interpret the Zoning Code in this matter so that review of the application may proceed." *See* Memorandum from L&I to Law Department, dated October 24, 2003, attached as Exhibit E to plaintiff's Motion for Partial Peremptory Judgment. The Law Department responded by memorandum in which it found that both the driveway and the street frontage were permitted uses of the R6 portion of plaintiff's property. *See* Memorandum from Law Department to L&I, dated November 18, 2003, attached as Exhibit F to plaintiff's Motion for Partial Peremptory Judgment ("After reviewing the plan, the Zoning Code and the positions of the applicant and City Planning, I agree with the applicant's position and

[9] The Councilperson's opinion was adopted by the City Planning Commission, which also attempted to influence L&I's decision with respect to plaintiff's application. In doing so, the Commission argued that plaintiff's proposed use constituted "multiple dwellings" with larger street frontage requirements. *See* Email from City Planning Commission to L&I, dated Aug. 11, 2003, attached as Exhibit D to plaintiff's Motion for Partial Peremptory Judgment. As set forth previously, plaintiff's proposed use constituted single-family dwellings and not multiple dwellings.

recommend that the permit issue as of right.") L&I was not required to obtain this advice from the Law Department before proceeding. **However, once L&I obtained the opinion, it was duty bound to follow it**, particularly since the opinion conformed to a plain reading of the applicable Zoning Code provisions.[10]

IV. Plaintiff Has No Other Adequate And Appropriate Remedy.

In summary, then, plaintiff was entitled to receive the permit for which it applied, without any hearing or debate. Instead, the permit was denied, and plaintiff's only remedy, aside from bringing this action, was to appeal the denial to the Zoning Board of Adjustment ("ZBA").[11] Phila. Code § 14-1705(1) ("Appeals to the Zoning Board of Adjustment may be taken by any person aggrieved by, or by any officer, department, board, or commission of the City affected by any decision of the Department rendered under this Title.") However, an appeal before the ZBA would not automatically result in plaintiff receiving its permit as of right.

The ZBA would not have simply compared plaintiff's application to the provisions of the Code to see if there is a clear right to the permit, **as L&I should have done and as this court has done**. Instead, the ZBA would have to hold a hearing at which "any party may appear in person or by his attorney" and testify and "any agency of the City" may appear and "present facts and information to assist the Board in reaching a decision." Phila. Code § 14-801; § 14-

[10] The City claims that this opinion, issued by Cheryl Gaston, a Senior Attorney at the Law Department, does not constitute advice from the Law Department because the City Solicitor subsequently issued a contrary opinion after this action was filed. *See* Letter from City Solicitor to plaintiff's counsel, dated August 16, 2005, attached as Exhibit A to defendants' Response to the Motion for Partial Peremptory Judgment. However, there is no evidence that Ms. Gaston was acting in anything other than her official capacity as an agent of the Law Department when she issued her opinion to L&I on November 18, 2003. Therefore, her advice constitutes advice from the Law Department, which L&I is duty bound to follow.

[11] Plaintiff could also have conceded the propriety of the denial and requested a variance from the ZBA. However, the ZBA is required to consider a litany of criteria in granting a variance, none of which need be considered by L&I when it approves a permit as of right. Phila. Code § 14-1802. Such factors need not be considered here because such criteria have already been considered by the drafters of the Zoning Code and found not to weigh against the uses they chose to permit under the Code.

1805(8)-(9). In other words, what should have been a simple ministerial task - issuing a permit as of right – would become a prolonged inquiry subject to ZBA's discretion.[12]

The court will not "discard mandamus in favor of protracted administrative appeals, where entitlement to issuance of land use permits is clear, [and the appeals] would unduly burden landowners with an inadequate, and inefficient, remedy, while facilitating municipal abuse of the licensing power." Lindy Homes, Inc. v. Sabatini, 499 Pa. 478, 483, 453 A.2d 972, 974 (1982).

CONCLUSION

For these reasons, this court respectfully submits that its decision to grant the Motion for Partial Peremptory Judgment and to direct L&I to issue plaintiff's permit should be affirmed.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

[12] This court submits that plaintiff had **no realistic chance** of receiving a permit from the ZBA. The potent distillation of the political pressures would have made it next to impossible for plaintiff to have prevailed before that Board.

Parenthetically, it is noted that in Philadelphia County, there is a recognized protocol pursuant to which the Councilperson for a given district has the prerogative to pass on certain zoning and other activities in his/her district. **There is no legal basis for this practice.** This court believes that it constitutes fertile ground for the seeds of mischief and should be officially abandoned.