

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Keystone Sports and Entertainment, :  
LLC; FC Pennsylvania Stadium, :  
LLC; and Pennsylvania Professional :  
Soccer, LLC, :  
Appellants :

v.

: No. 1017 C.D. 2013  
: Argued: May 13, 2014

City of Chester Zoning Hearing :  
Board of Commissioners and T.I.B.C. :  
Depot Partners, L.P. and T.I.B.C. :  
Partners, L.P. :

BEFORE: HONORABLE DAN PELLEGRINI, President Judge  
HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
PRESIDENT JUDGE PELLEGRINI

FILED: June 3, 2014

Keystone Sports and Entertainment, LLC (Keystone); FC Pennsylvania Stadium, LLC; and Pennsylvania Professional Soccer, LLC (collectively, Objectors) appeal from an order of the Court of Common Pleas of Delaware County (trial court) affirming the decision of the Zoning Hearing Board of the City of Chester (Board) which granted use variances to T.I.B.C. Depot Partners, L.P. and T.I.B.C. Partners, L.P. (collectively, Applicants) to operate parking facilities at three parcels of land located in the City of Chester (City). For the reasons that follow, we affirm.

This appeal concerns three parcels of land (collectively, Lots) in the City: (1) the “12 Reaney Lot,” located at 12 Reaney Street; (2) the “105 Reaney Lot,” located at 105-117 Reaney Street; and (3) the “Flower Street Lot,” located on several properties situated south of West Front Street between Reaney Street and Central Avenue. The 12 Reaney Lot and 105 Reaney Lot are located in the City’s W-1 Waterfront Development District,<sup>1</sup> while the Flower Street Lot is located in an

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<sup>1</sup> The following uses are permitted in the W-1 Waterfront Development District:

- (1) Office building or group of buildings;
- (2) Commercial retail, including restaurant facilities;
- (3) Hotel, Motels, and Inns, including restaurants and other related and accessory uses;
- (4) Conference Center;
- (5) Theme amusement park, theaters;
- (6) Public and/or private commercial recreation facilities;
- (7) Marina;
- (8) Race Track;
- (9) Gaming Facilities;
- (10) Sports Stadium;
- (11) Entertainment Center;
- (12) Service, sales, repair and storage of boats, yachts, and marine equipment;
- (13) Residential multi-family dwellings, or group or cluster of dwellings designed as a project under private ownership or owned and operated as a condominium under the Pennsylvania Condominium Act. The group or cluster may include the following: semi-detached or attached dwellings; or multifamily dwellings;
- (14) A combination of the uses permitted above, provided that such multiple use shall be only pursuant to a single unified development plan for the entire lot; and,
- (15) Accessory use customarily incidental to any use permitted in the District and including the following:

A. Living accommodations for executives, watchman or similar employee employed upon the premises provided that any

**(Footnote continued on next page...)**

M-3 Industrial District.<sup>2</sup> Each of the Lots is located in the immediate vicinity of PPL Park, an 18,000 seat stadium complex leased and operated by Objectors.

Applicants acquired the Lots in December 2011, and in January 2012, applied to the Board for variances<sup>3</sup> pursuant to Sections 1365.02 and 1366.02 of

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**(continued...)**

such accessory living accommodation shall be located within the principal building.

B. Nursery school or day care center subject to Section 1377.05.

Article 1366.02(a) of the Ordinance.

<sup>2</sup> The following uses are permitted in an M-3 Industrial District:

- (1) Uses permitted in the M-1 and M-2 Industrial District.
- (2) Higher intensity manufacturing, processing, cleaning, servicing, testing, or repairs of materials, goods, or products which meet the performance standards specified in this article.
- (3) Communication Antenna located on an existing building.

Article 1365.02(a) of the Ordinance.

<sup>3</sup> Article 1327.035(a)(1) of the Ordinance, relating to criteria for variances, provides:

A. The Board shall hear requests for variances where it is alleged that the provisions of the Zoning Ordinance inflict unnecessary hardship on the applicant.

B. A variance from the terms of the Zoning Ordinance shall not be granted by the Board unless and until a written application for a variance is submitted by the applicant who shall have the burden of establishing:

1. That there are unique physical circumstances or conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical

**(Footnote continued on next page...)**

the City's Zoning Ordinance (Ordinance) to operate the temporary off-street parking facilities on the Lots because parking lots are not permitted uses in the aforementioned zoning districts.

Before the Board, Curt Heffler (Heffler), one of Applicants' principals, testified that when Applicants purchased the Lots in December 2011, the 12 Reaney Lot contained several dilapidated buildings and was essentially being used as a trash dump. He explained that Applicants purchased the Lots for the purpose of operating temporary off-street parking facilities in conjunction with events held at PPL Park, which is used by a professional soccer team and for other

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**(continued...)**

conditions peculiar to the particular property, and that the unnecessary hardship is due to such conditions, and not the circumstances or conditions generally created by the provisions of the Zoning Ordinance in the neighborhood or district in which the property is located.

2. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the Zoning Ordinance and that the authorization of the variance is therefore necessary to enable the reasonable use of the property.

3. That such unnecessary hardship has not been created by the applicant.

4. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

5. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

events, and intended to use one of the remaining buildings on the 12 Reaney Lot as an office building for the parking operations. Heffler further testified that a parking facility is the only feasible use for any of the Lots because the Commodore Barry Bridge's entrance and exit ramps wind around and cut through the Lots. John Mullin, a civil engineer, also testified that development in conformity with the Ordinance is not feasible with respect to the 12 Reaney Lot due to the Commodore Barry Bridge ramps and abutments, and opined that the proposed parking use would not create traffic problems. Alan Klenodiz (Klenodiz), another of Applicants' partners, testified that the prior owners of the Lots utilized them as a trash hauling and storage and recycling facility. Klenodiz further testified that the height of the Commodore Barry Bridge ramps as they cross the Lots is approximately 50 feet, which prevents Applicants from constructing buildings on the Lots. He also stated that PennDOT maintains a permanent easement of a maximum of 50 feet on each side of the ramps. Finally, he testified that in addition to the ramps, there is a 3,000 pound high pressure natural gas line running through the top of the Flower Street Lot, which further limits Applicants' ability to develop that Lot in conformity with the Ordinance.<sup>4</sup>

On behalf of Objectors, Michael Hare, Senior Vice President of the Buccini Pollin Group, a real estate development company, testified that his company developed a design proposal for the City's waterfront area that included

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<sup>4</sup> William Payne, Planning Director/Zoning Officer for the City, also testified that the proposed use of the 12 Reaney Lot would not be contrary to the public interest or inconsistent with the City's land use objectives, and submitted a written report containing his findings with respect to that lot. Applicants also submitted a traffic assessment and environmental reports in support of their variance requests.

commercial office, residential and recreational development. According to that proposal, the City's waterfront area is suitable for retail buildings. Seth Shapiro (Shapiro), Director of Planning and Urban Design for Park Partners, an architecture and planning firm, testified that the Lots are relatively unencumbered by the Commodore Barry Bridge ramps. Shapiro opined that there are a variety of viable uses for the Lots, including restaurants, gas stations, a bank, a shopping center, two to three story commercial buildings or warehouses. David Debusschere, PPL Park's Executive Vice President and Chief Operating Officer, testified that since Applicants opened the Lots in 2012, PPL Park has received complaints from patrons about significant delays in leaving the stadium due to increased traffic from the Lots. Moreover, he testified that cars exiting the Lots create a significant traffic jam at the intersection of Route 291 and Reaney Street, and that there are safety issues with patrons parking in the Lots and crossing Seaport Drive. Finally, Joseph Fiocco, a civil engineer specializing in traffic engineering and highway safety, testified that the Lots undermine PPL Park's parking plan by creating unnecessary conflict points between cars and pedestrians crossing Seaport Drive, Reaney Street and Flower Street. He similarly concluded that the Lots compromise the safety of patrons and hinder traffic flow and submitted a report in support of his testimony.

The Board found that the 12 Reaney Lot, 105 Reaney Lot and Flower Street Lot are encumbered by the Commodore Barry Bridge ramps, which constitutes a hardship preventing the Lots from being used in conformity with the Ordinance, and that Applicants did not create this hardship. Moreover, the Board found that granting the requested variances will not create significant safety

hazards, alter the essential character of the neighborhood or impair the use or development of any adjacent property. Finally, the Board noted that there is a need for off-street parking in the waterfront area due to the stadium and the uses proposed in the development of the area. Accordingly, the Board granted variances for the 12 Reaney Lot, 105 Reaney Lot and Flower Street Lot.<sup>5</sup>

Objectors then appealed to the trial court, which affirmed the Board. In its subsequent opinion, the trial court explained that substantial evidence supported the Board's finding that the Commodore Barry Bridge ramps created an unnecessary hardship, and that Applicants did not create the hardship because there is no dispute that the ramps existed prior to their purchase of the Lots. The trial court recognized that Applicants knew about the zoning restrictions prohibiting temporary off-street parking in the W-1 Waterfront District and M-3 Industrial

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<sup>5</sup> Applicants also sought a variance for a lot located at 1917-1923 West Second Street and 126-134 Reaney Street in the City's W-1 Waterfront District (the "North Reaney Lot"), which the Board denied because it found that the Commodore Barry Bridge ramps do not pass over that lot. Following the Board's denial of that variance, the City issued an enforcement notice ordering Applicants to cease and desist operating parking facilities on the North Reaney Lot. Applicants appealed the notice to the Board and Keystone intervened. The Board granted Applicants' appeal and dismissed the enforcement notice, finding that it was improperly issued. The Board explained that the North Reaney Lot's previous use as a trash transfer and recycling operation was a prior nonconforming use and that, pursuant to Section 1377.01(c) of the Ordinance, a nonconforming use may be changed to a nonconforming use of the same or more restricted classification. The Board determined that the use of the North Reaney Lot as an off-street commercial parking lot is "of the same or more restricted classification" than a trash transfer/recycling use in the W-1 Waterfront District and, therefore, that Applicants are legally entitled to use the property for off-street parking. (Board's September 26, 2013 Order at 12). Keystone filed an appeal of that decision which is currently pending. Applicants then requested that this Court take judicial notice of the Board's September 26, 2013 order, arguing that it renders the Board's grant of variances for the 12 Reaney Lot and 105 Reaney Lot moot.

District when it purchased the Lots, but held that this “does not constitute a self-created hardship because the zoning conditions relate to the property, not the owner.” (Trial Court’s August 26, 2013 Opinion at 20). Finally, the trial court held that the variances will not alter the essential character of the neighborhood, impair adjacent properties or be a detriment to the public welfare, explaining that the Board acted within its discretion in disregarding the testimony of Objectors’ witnesses regarding the traffic and safety issues allegedly created by Applicants’ operation of off-street parking facilities. This appeal by Objectors followed.<sup>6</sup>

Before reaching the merits of Objectors’ appeal, we must first address Applicants’ Application for Judicial Notice. *See supra* n.5. Applicants contend that the Board’s September 26, 2013 determination permitting an off-street parking facility on the North Reaney Lot as a prior nonconforming use is applicable to the other lots in the W-1 Waterfront District (the 12 Reaney Lot and 105 Reaney Lot) and, therefore, renders the grant of variances for those lots moot. We disagree.

As Objectors argue, determining whether the use of a property is a prior nonconforming use requires a factual inquiry specific to that particular property. In its September 26, 2013 order, the Board made specific factual findings with respect to the North Reaney Lot, including that “[p]rior to

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<sup>6</sup> Our review in a zoning case where the trial court has not taken additional evidence is limited to determining whether the local zoning board committed an error of law or an abuse of discretion. *Lench v. Zoning Board of Adjustment of City of Pittsburgh*, 13 A.3d 576, 579 n.3 (Pa. Cmwlth. 2011). A board is considered to have abused its discretion when its findings are not supported by substantial evidence. *Id.* Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.*



[Applicants'] acquisition of the Property, the principal use of the Property was as a trash recycling facility" which was a "pre-existing non-conforming use because the use was legally in existence prior to the enactment of the W-1 Zoning District." (Board's September 26, 2013 Order at 3, Findings of Fact 24-25). Moreover, the Board specifically noted that Applicants did not make any structural alterations to the North Reaney Lot in changing the previous nonconforming use (trash/recycling facility) to another nonconforming use (parking facility),<sup>7</sup> and that the nonconforming trash/recycling facility use was not abandoned prior to Applicants' acquisition of the North Reaney Lot. Although Applicants presented testimony that the 12 Reaney Lot and 105 Reaney Lot were also part of this trash and recycling facility prior to Applicants' acquisition of those lots, the Board made no factual findings whatsoever regarding the prior use of those lots in its order granting the variances. We cannot merely assume that the use of the 12 Reaney Lot and 105 Reaney Lot also qualifies as a prior nonconforming use under the Ordinance. Accordingly, Applicants' Application for Judicial Notice is denied.

Turning to the merits, Objectors contend that the Board abused its discretion in concluding that the Lots cannot be used in conformity with the Ordinance. They argue that the 12 Reaney Lot is already being used in accordance with the Ordinance because Applicants intend to utilize a building on that lot as an office building for its parking operations, which is a permitted use in the W-1

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<sup>7</sup> Section 1377.01(c) of the Ordinance provides, in relevant part, that "[a] nonconforming use of a building or land may be changed to a nonconforming use of the same or more restricted classification, **if no structural alterations are made therein**, provided, that such change may include structural alterations when authorized as a special exception." (Emphasis added).

Waterfront Development District. Moreover, Objectors contend that they presented substantial evidence demonstrating that the Lots are suitable for several permitted uses and that the granting of the requested variances will have a serious adverse effect on the public health, safety and welfare.

Here Applicants and Objectors both presented ample testimony regarding the feasibility of development on the Lots in accordance with the Ordinance and the effect that granting the variances would have on the public health, safety and welfare.<sup>8</sup> The evidence demonstrates that the Commodore Barry Bridge ramps cutting through the Lots, the 50 foot setback requirement on each side of the ramps, and the 3,000 pound high pressure natural gas line running through the top of the Flower Street Lot constituted substantial hardship emanating from the land that would prevent the Lots from being developed in accordance with the requirements of the pertinent zoning district regulations and, thus, was sufficient to establish that Applicants were entitled to variances. Moreover, regarding Objectors' argument that the 12 Reaney Lot is already being used in conformity with the Ordinance, that does not mean that new office development could take place on the lot and may just be a vestige of what was and not what is. The presence, then, of this lone building does not establish, as Objectors contend, that the entire 12 Reaney Lot is suitable for retail and office space. Accepting

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<sup>8</sup> In zoning cases, the Board is the sole judge of the credibility of witnesses and the weight afforded their testimony. *Tri-County Landfill, Inc. v. Pine Township Zoning Hearing Board*, 83 A.3d 488, 518 (Pa. Cmwlth. 2014). The Board is free to reject even uncontradicted testimony it finds lacking in credibility, including testimony offered by an expert witness, and does not abuse its discretion by choosing to believe the opinion of one expert over that offered by another. *Id.* Assuming the record contains substantial evidence, we are bound by the Board's findings that result from resolutions of credibility and conflicting testimony. *Id.*

Objectors' argument would require us to overturn the Board's specific factual finding that the Commodore Barry Bridge ramps create an encumbrance preventing development in conformity with the Ordinance on the 12 Reaney Lot.

Accordingly, the trial court's order is affirmed.

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DAN PELLEGRINI, President Judge

Judge Leadbetter did not participate in the decision of this case.

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**ORDER**

AND NOW, this 3<sup>rd</sup> day of June, 2014, the order of the Court of Common Pleas of Delaware County, dated May 20, 2013, at No. 12-8075, is affirmed. The Application for Judicial Notice filed by T.I.B.C. Depot Partners, L.P. and T.I.B.C. Partners, L.P. is denied.

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DAN PELLEGRINI, President Judge