

Land Use Regulation in the City of Philadelphia

Introduction

In the late nineteenth century, cities across the United States were beset with governance challenges presented by an increasingly industrialized landscape, growing populations, and a paucity of open space. Years of disjointed municipal policies threatened attempts to imbue the nation's built environment with democratic principles, as stark disparities in quality of life persisted in the form of substandard housing and poor public health conditions from proximity to industry. The early theoretical foundations of land use as described in the 1922 Standard State Zoning Enabling Act emphasized the law's ability to regulate and reform behaviors deemed hinderances to the broader community, ostensibly eliminating all targeted ills.¹ As the practice of zoning evolved, gradually obsolescent use classifications were devised and allotted in absentia of the very populations that stood to be most impacted. Zoning has become less insensible to residents' perspectives, as reflected in Philadelphia's 2012 update to the zoning code, but the appeals process fails to adequately weight the concerns of affected residents in the Zoning Board of Adjustment (ZBA) members' deciding votes. This paper will provide an overview of two appeals presented to the ZBA and conclude with a brief evaluation of Philadelphia's land regulatory framework.

Issues Presented by the City of Philadelphia's Zoning Board of Adjustment

3539 North 16th Street

On February 17th, 2021 attorney Rachael Pritzker presented a zoning appeal to Philadelphia's ZBA on behalf of her absent client, Design Blendz Architecture. Pritzker's client was denied a permit by the Department of Licenses and Inspections (L&I) to construct a multifamily development with eight units on the vacant lot of 3539 North 16th Street. The parcel is in North Philadelphia's Tioga neighborhood, and zoned for "RSA-5" residential single-family attached use in the Philadelphia City Planning Commission's (PCPC) 2035 Comprehensive Plan. At this hearing, the ZBA refrained from requiring the applicant to substantively address concerns

¹ Ellickson, Robert et al. *Land Use Controls: Cases and Materials, Fourth Edition* (Frederick: Wolters Kluwer Law & Business, 2013), 58.

identified by the surrounding community and the PCPC, effectively neutering the influence of non-Board members.

While reviewing the exhibit package for the permit, Pritzker said the Comprehensive Plan's zoning designation presented a hardship to the owner, claiming the 2,817 square foot parcel is too large and erratically shaped to feasibly construct a single-family home. At the conclusion of Pritzker's application presentation, the ZBA requested the PCPC's recommendation for the requested zoning variance. The PCPC representative Paula Burns disputed the owner's claim and stated the parcel could accommodate a single-family home. Burns also noted the development's planned eight units exceed the standard allowance for RM-1 multifamily projects by two units, and shared the PCPC's recommendation to reject the variance.

Throughout the hearing, Rachael Pritzker displayed a cavalier demeanor, allowing her cat to walk across her desk and even going so far as to quickly answer a phone call on camera. The attorney's attitude, coupled with the absence of their client suggests the owner expected a straightforward approval from the ZBA, despite having knowledge of the affected community's apprehensions prior to the hearing. As required by the zoning code, Pritzker offered proof of communications with two designated Registered Community Organizations (RCOs) for Tioga: the Nicetown-Tioga Improvement Team and the Upper North Neighbors Association (UNNA). The Nicetown-Tioga Improvement Team attempted to offer support or disapproval of the variance to the ZBA, but a vote amongst members resulted in a tie. Pritzker presented a letter the UNNA addressed to ZBA Chair, Frank DiCicco, declaring the organization's support for the variance request, contingent upon the addition of two provisos. Before reading the provisos, Pritzker stated the Board does not possess the authority to enforce the community's requested conditions. The UNNA letter called for the owner to hire a minimum of three residents or minority subcontractors, in addition to contributing monetary or in-kind support to their "Clean Up Together" campaign.

Tioga's residents are keenly aware of the potential for rapid neighborhood change following new residential construction.² With limited access to walkable public transportation options, residents encounter obstacles to access jobs, which the UNNA's first proviso sought to confront.³ ZBA members did not acknowledge the requested provisos, or the PCPC's recommendation to deny the variance. The ZBA Chair only asked the applicant one question to further explain the hardship of a single-family designation. Pritzker replied that a home would be prohibitively expensive for Tioga residents, failing to recognize the two existing single-family homes on the same street as the parcel, or that people outside of the area could purchase a home. Despite language in the zoning code that directs the Board to grant variances offering the "least modification possible" and authorizes members to alter proposed variances, all ZBA members approved the variance with no changes.⁴

Though Pritzker correctly noted the ZBA's regulatory powers do not explicitly extend to requiring the owner to abide by the community's requested provisos, Board members could have first explored the usage of conditional use zoning with City Council collaboration before granting approval. The 1988 North Carolina (N.C.) Supreme Court case *Chrismon v. Guilford County* classifies conditional use as a legal form of zoning, wholly distinct from illegal contract zoning.⁵ As described in *Chrismon v. Guilford*, an authority can issue a rezoning by creating a conditional use district, subsequently allowing a parcel owner that meets the outlined stipulations to apply for permit approval.⁶ The suit was brought by the neighboring Chrismon family who took issue with the Guilford County Board of Commissioners' decision to allow Bruce Clapp's rezoning with conditions established by county's legislative body.⁷ The N.C. Supreme Court's decision finds conditional use zoning legal, as permitting a use change with conditions effectively managed the detriments from Clapp's agricultural business, without requiring the Board to enter into a contract with Clapp.⁸

² Laughlin, Jason. "Point Breeze and Tioga-Nicetown: Why one Philadelphia neighborhood has surged while the other languishes." *Philadelphia Inquirer*. (2020).

³ Laughlin.

⁴ Philadelphia Charter Commission. *The Philadelphia Code and Home Rule Charter* (Cincinnati: American Legal Publishing Corporation, 2021).

⁵ Ellickson et al., 355.

⁶ Ellickson et al., 354.

⁷ Ellickson et al., 357.

⁸ Ellickson et al., 357.

Philadelphia's zoning code classifies variances that threaten residents' general welfare, health, and safety as detrimental to a neighborhood and ineligible for approval.⁹ While the vacant lot at 3539 North 16th Street raises hazards to the surrounding community in its current state, the majority-Black Tioga has already grappled with greater barriers to neighborhood stabilization after decades of political, social, and economic marginalization.¹⁰ Though public subsidies were not mentioned in the hearing, the proposed development is eligible to receive the ten-year tax abatement offered in Philadelphia's 1456-A ordinance for new residential construction.¹¹ The ordinance allows eligible property owners to pay real estate taxes on the land value for ten years, excluding the value of any buildings on the parcel.¹² If the proposed development leads to an increase in the area's property values, only existing residents would be subject to higher taxes, leading to displacement risks for longtime homeowners and renters.

The hindrances introduced by the change of use in *Chrismon v. Guildford County* were more apparent than a new development in Tioga, as the *Chrismon*'s lived near the full-scale development and sale of agricultural chemicals.¹³ Nevertheless, Philadelphia's City Council could move to establish a conditional use district in Tioga that permits multifamily on single-family parcels, with the provision that developers make a demonstrated effort to maintain the area, and extend employment opportunities to residents and minorities. The widely used zoning overlay districts frequently include language encouraging developers to meet certain conditions in development proposals.¹⁴ While the current ZBA framework ensures the permit appeals process protects developers from the burden of satisfying all the desires of a community to obtain variances, the zoning code could be amended to allow RCOs to request a written response from Board members explaining the reasoning behind their vote. Doing so would allow for further explanation of members' motivations, such as why certain proviso requests could be challenged in court.

⁹ Philadelphia Charter Commission

¹⁰ Crowder, James. "The Case for Housing Justice in Philadelphia". PolicyLink (2020).

¹¹ McCrystal, Laura. "Philadelphia's controversial 10-year tax abatement soon could change for the first time. Here's what you need to know." *Philadelphia Inquirer*. (2019).

¹² McCrystal.

¹³ Ellickson et al., 350.

¹⁴ Briggs, Ryan. "The rise of the 'overlay': How an obscure zoning tool is shaping Philly's future (again)." *WHYY*. (2021).

2027 Elsworth Street

On February 24th, 2021 Derek Kane represented himself before the ZBA for a resumption hearing regarding his zoning appeal to install the structural infrastructure needed for twelve solar panels on his property's roof. Kane's permit application was denied by L&I, as the zoning code requires a seven-foot setback from the front of a home's roof, and his application requested a five-foot setback. Located at 2027 Elsworth Street, Derek Kane's home falls within Philadelphia's alleged gentrification epicenter in Point Breeze.¹⁵ While the hearing was convened to address Kane's setback variance, several neighbors were also opposed to the height of the canopy needed to support the solar panels. Though the ZBA had already convened a hearing to address the appeal, the Chair moved to discuss the variance at a closed-door executive session, excluding the public from the Board members' decision-making process.

As the ZBA had already seen Kane's application, the Vice Chair Carol Tinari had to refresh the Chair's memory of the issue, and mentioned two Point Breeze residents had suggested alternative solar panel installations to accomplish what Kane desired, with fewer disturbances. Vice Chair Tinari then reported the ZBA received a letter of opposition from one of the area's five RCO's: the Point Breeze Community Development Coalition. The Chair asked Derek Kane if he had seen the opposition letter, to which he initially claimed he was not aware of. Kane later recanted, and said he knew the letter was not in support of the variance but did not interpret it as a letter of opposition. Chair DiCicco then asked the community members who proposed alternative solutions apart from a variance to speak.

Tiffany Green, an outspoke critic of the city's zoning process, shared that residents were worried the height of the canopy would limit sunlight to other properties, and aesthetically alter the skyline.¹⁶ Additionally, Green supported enforcing the seven-foot setback as she had seen reports of faulty solar panels catching fire or falling on pedestrians, and stressed an adequate setback could prevent harm. With the acknowledgement that she is not an expert in solar energy, Green shared a letter to the ZBA presenting the various types of solar ground mounting without tall canopies. Kane maintained the canopy could be built by right, but shared the zoning code's

¹⁵ Laughlin.

¹⁶ Brey, Jared. "Council adopts amendments to Registered Community Organization process." *WHYY*. (2012).; Brey, Jared. "Planning Commission called racist after voting to support Point Breeze housing development." *WHYY*. (2016).

setback presented a hardship with evidence from PECO and Solar States to prove his household's annual energy use necessitates the installation of twelve panels to generate 5,450 kilowatt hours. According to Kane, Green's proposal would not allow the necessary number of panels and increase the project's costs in tandem. With three current residents calling in to protest the variance, one former resident's thwarted attempt to weight in, and two residents in favor, the ZBA Chair ended the matter's second hearing without a final decision moving the item to the closed-door executive session.

When presented with community input, the Board chose to conceal deliberations, despite residents' investment of time and clear desire to play a contributing role. However, neighbors in opposition to the variance outwardly only took issue with Kane's solar panel canopy, already within the zoning code's guidelines. The 1997 *Cary v. City of Rapid City* case in South Dakota declared nearby property owners do not possess the authority to approve or deny the use of a property without the use of standardized guidelines.¹⁷ The South Dakota Supreme Court ruled Rapid City's ordinance to allow 40% of nearby landowners determine zoning outcomes as illegal, contending that community protest alone cannot guide zoning regulations. While there is a need for greater transparency and insight into the final decisions made by ZBA appointees, the Board has no obligation to simply meet the whims of objecting residents, particularly in cases where community members are opposed to by-right developments as in the case of the solar panel canopy.

Conclusion

Governed exclusively by mayoral appointees, the five ZBA members wield a great deal of power in their ability to determine the cultural, physical, and economic landscape of Philadelphia. While Philadelphia's appeals process ensures developers are not obligated to meet every whim of residents to deviate from the city's zoning code, Board members themselves could improve efforts to engage with the city's RCOs and expound upon the motivations behind their votes. Though constrained by limited time and resources, members of the ZBA are seemingly partial to voting in favor of variance requests even after hearing the objections of the PCPC and the surrounding community. Given that land remains a powerful commodity in implicitly

¹⁷ Ellickson et al., 418.

determining wealth and power, the quasi-governmental bodies charged with evaluating zoning changes should take special consideration to situate deviations from the Comprehensive Plan with respect to the potential for exacerbating existing inequalities whenever possible. However, ultimately, the concerns of employment opportunities, displacement and neighborhood change raised by residents would be better served by expanded municipal social support systems, and not the land use approval process.

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