

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

SILOAM

v.

**BOARD OF LICENSE & INSPECTION
REVIEW, et al**

JUNE TERM, 2011

NO. 0934

DOCKETED

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T. DUGAN

OPINION and ORDER

This is an appeal from a May 18, 2011 decision of the Philadelphia Board of License & Inspection Review (Board) which sustained an appeal from and reversed a decision of the Philadelphia Historical Commission (Commission).

FACTUAL and PROCEDURAL HISTORY

The appeal concerns the proposed demolition of a decommissioned Catholic Church building located at 1123-33 Spring Garden Street (Church). The current owner of the property is Siloam, Inc. (Siloam), a 501(c)(3) nonprofit corporation which provides direct services to individuals affected by HIV/AIDS. Siloam began leasing a rectory building from the Archdiocese of Philadelphia in 1996. This rectory, located at 1135 Spring Garden Street, is part of a complex of associated adjacent buildings including the Church, a convent building, a storefront, and a parking area. The Church has been vacant, unused and unmaintained at least since it was closed as a place of worship in 1995. In 2009, the Philadelphia Department of License & Inspection declared the building "unsafe" in violation of Code.

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In 2006, Siloam purchased the five associated properties as a package from the Archdiocese for a total price of \$800,000. Initially, Siloam planned to use the Church as a community center for its clients, but quickly realized that the Church structure required costly renovations before it could be used for any purpose at all. After leaving the Church building unused for several years, Siloam decided to demolish the structure, and executed a contract with a construction company to do so in February of 2009.

To forestall the scheduled demolition, a neighborhood resident and member of the Callowhill Neighborhood Association (CNA) nominated the Church to be added to the Philadelphia Register of Historic Places. After consideration of the Church's nomination, and after a public hearing, the Commission formally added the Church to the Register. This required Siloam to obtain a special permit from the Commission before proceeding with the demolition.¹ In August of 2010, after having made attempts to market the Church for sale, Siloam submitted an application for such a demolition permit based on financial hardship.

The evidence the Commission considered is summarized in twenty eight single-spaced pages of minutes from the meetings at which the Commission and its committees considered Siloam's application. This evidence included, among other items, a 2007 report from the Community Design Collaborative (CDC), a collective of professionals who provide *pro bono* design and development services to nonprofit organizations. The CDC report concluded that the cost of rehabilitating the Church structure to a level which would support *any* use of the building would be approximately \$5,453,139. A 2010 report from Becker & Frondorf, a construction cost consulting firm, gave an updated estimate of \$6,319,000. An appraisal carried out by Edward Snyder in 2009 found that, given

¹ § 14-2007(7)(a) of the Philadelphia Code requires that historic buildings may not be demolished without a permit from the Commission.

the condition of the Church structure, the property "has no market value." The Commission also considered a report from Colliers International, a commercial real estate broker which specializes in selling unused churches. The Colliers report states that Colliers marketed the property for six months in 2010 in a number of ways, including directly contacting 240 brokers to whom Colliers believed the property might be appealing. Despite these efforts, Colliers received only one offer. The received offer was contingent on the structure requiring less than \$400,000 in rehabilitative work, and was withdrawn once the offeror learned of the estimated cost of rehabilitation. Relying on these items as well as other reports, affidavits and live testimony from witnesses both in support of and in opposition to the issuance of a demolition permit, the Commission found in Siloam's favor and granted its demolition permit application.

The CNA then appealed the Commission's decision to the Board of License & Inspection Review. The Board had before it all of the evidence presented to the Commission, and additionally held three public hearings on the appeal during which the Board heard voluminous testimony and argument. Ultimately, the Board sustained CNA's appeal and reversed the Commission's grant of a demolition permit. In reversing the Commission's decision, the Board used a test for "hardship" that required Siloam to show (1) that sale (or rental) of the property is impracticable, and (2) that other potential uses of the property were foreclosed. The Board held that Siloam failed this test because it believed that Siloam did not "in good faith [] attempt the sale of the property, [] seek tenants for it, and [] explore potential reuses for it." The Board made what it termed "factual findings" that "Siloam's efforts to explore adaptive reuse of the Church was [sic] inadequate," and, through adoption and endorsement of a witness' testimony, that "Siloam's efforts to sell the church were inadequate."²

² *Findings of Fact and Conclusions of Law of the Board of License & Inspection Review*, pp. 52, 76.

In the Board's conclusions of law, the Board stated that Siloam had not made a "good faith" effort to sell the Church because Siloam had not marketed the Church broadly, had not exposed the Church on the market for a sufficient length of time, had listed the Church at too high a price (\$575,000), had not attempted to subdivide the lot upon which the Church stood, and was selling the Church lot in such a way that access to parking and rear access would be cut off by Siloam's surrounding property. The Board's conclusions of law also stated that Siloam had not established that other uses of the property were foreclosed in that Siloam had not specifically identified potential alternate uses of the Church and had not performed a cost/revenue analysis for each alternative.

In reviewing the evidence, the Board relied almost entirely on the testimony of two witnesses: Philadelphia real estate agent Alexander Generalis, and Preservation Alliance Executive Director John Gallery. Generalis testified generally that in his opinion the Church was salable and that Siloam had not made a strong attempt to effect a sale. Generalis believed that Siloam should have lowered its initial asking price, spent more time listing the property, and listed the property for sale in alternative ways – specifically, by placing an advertisement on the internet website Craig's List and on another website referred to in testimony as "loop net." 3/28/2011 N.T. at 140. Generalis further testified that he himself knew of no potential buyers for the property (N.T. 3/28/2011 at 153) and that he had never examined the interior of, or in fact been inside, the Church structure (*Id.*).

Gallery testified that he believed Siloam's attempts to sell the property had not been in "good faith" because Siloam had not provided documentary proof of all of the individuals and organizations which had been contacted in connection with selling the property, because Siloam's real estate agency had only listed the property for six months, and because Siloam had imposed an unreasonable condition on the sale of the property. Gallery did not testify that Siloam had actually failed to broadly

market the property. Neither did Gallery state the period of time he believed would have been appropriate for the property to be listed before a "good faith" effort to sell had been made. In fact, when asked how long he believed the property should have been listed, Gallery responded "I don't think there's any rule of thumb." 2/38/2011 N.T. at 49. The unreasonable condition Gallery testified about was Siloam's requirement that a prospective buyer have financing for their purchase. Gallery also testified that he believed Siloam's efforts to investigate alternate uses for the property had been insufficient because Siloam had not individually evaluated each possible use before concluding that no alternate use was possible.

After the Board's decision, Siloam filed the instant appeal, and CNA intervened on the side of the Board. Siloam's appeal argues that the Board failed to review the Commission's decision with an appropriate level of deference to the Commission's factual findings and interpretations of law, and that a denial of a permit to demolish the Church constitutes an unconstitutional taking of Siloam's property insofar as it reduces the value of the Church property to zero.

DISCUSSION

The Board's finding that the sale or rental of the Church was impracticable and its finding that other potential uses were foreclosed, are not supported by substantial evidence. Further the Board erred in holding that the facts before it were insufficient to meet the governing legal standard. Accordingly, this court now reverses the Board's decision which reversed the Commission's decision to permit Siloam to demolish the Church. Since the Board's findings of fact were not supported by substantial evidence, and since the Board's determination that the facts as it found them did not meet

the applicable legal standard was in error, the court has adequate grounds to reverse the Board and need not reach the question of Constitutional law Siloam raises. The Court finds the issues of deference Siloam raises to be inapplicable to the case at bar.³

Before a permit to demolish a historic building may issue, the Commission must find that “the building, structure, sire or object cannot be used for any purpose for which it is or may be reasonably adapted.” Philadelphia Code § 14-2007(7)(j). A property cannot be used for any purpose for which it may be adapted where “the sale of the property is impracticable [], commercial rental cannot provide a reasonable rate of return, and [] other potential uses of the property are foreclosed.”⁴ *Id.* The Code provides that it is the applicant who bears the burden of showing that the property at issue cannot be used for any purpose for which it is or may be adapted. *Id.* As part of meeting this burden, “[t]he applicant has an affirmative obligation in good faith to attempt the sale of the property, to seek tenants for it, and to explore potential reuses for it.” Philadelphia Historical Commission Rules & Regulations § 9.4.

A party may appeal a decision of the Commission to the Board of License & Inspection Review. The Board’s appellate function is created by § 5-1005 of the Philadelphia Home Rule Charter, and it serves to “afford[] citizens, adversely affected by the exercise of licensing and inspection powers vested in City agencies, an orderly procedure . . . for review of action taken against them.” That provision provides specifically that:

³ Although the parties devote considerable space in their briefs to discussions of the deference the Board owes to the Commission’s interpretation of the Historical Preservation Ordinance under *Turchi v. Phila. Bd. Of License*, 20 A.3d 586 (Pa. Commw. Ct. 2011), this focus is misplaced as the record does not reveal, nor did the parties specifically identify, any disagreement between the Board and the Commission as to the meaning of any ambiguous language in the Ordinance. Because there does not appear to be any actual dispute about the meaning of the Ordinance, this court need not reach the question of *Turchi* deference.

⁴ Although the Board collapsed the first and second prongs of this test into one, the test the Board applied was essentially this one.

“The Board of License and Inspection Review shall provide an appeal procedure whereby any person aggrieved by . . . any City license or by any notice, order, or other action as a result of any City inspection, affecting him directly, shall upon request be furnished with a written statement of the reasons for the action taken and afforded a hearing thereon by the Board of License and Inspection Review.”

351 Pa. Code § 5.5-1005.

When considering an appeal from the Board, this court must hold against the Board when “the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter A of Chapter 5 (relating to practice and procedure of Commonwealth agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence.” 2 Pa.C.S. § 704. “Substantial evidence” means more than a “mere scintilla”; rather, substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *McDonald's Corp. v. Bd. of License & Inspection Review*, 849 A.2d 1277, 1281 (Pa. Commw. Ct. 2004). Once a set of facts is established by substantial evidence, the question of whether that given set of facts meets a legal standard is a question of law over which this court exercises *de novo* review. *Civil Service Com. v. Putz*, 520 A.2d 940, 941 (Pa. Commw. Ct. 1987).

Findings of Fact

The Board’s “findings of fact” that “Siloam’s efforts to sell the church were inadequate” and that “Siloam’s efforts to explore adaptive reuse of the Church was [sic] inadequate,” insofar as they are properly characterized as factual findings at all,⁵ were not supported by substantial evidence. With

⁵ The Board’s statements here seem to be whether or not the facts meet a given legal standard, which is a question of law. However, since the Board characterized them as findings of fact, the court will analyze them under

respect to Siloam's attempted sale of the Church, the evidence on record indicates without contradiction that Siloam engaged a commercial real estate broker specializing in former churches to sell the Church at issue. The broker used several methods – including directly targeting potential buyers – to expose the property on the market. Siloam in fact negotiated with more than one party to sell that Church for substantially less than its \$575,000 listing price. However, those parties lost interest upon learning of the condition of the Church structure. The property as appraised "has no market value."

Against this uncontradicted evidence, the Board relied solely on the testimony of two witnesses. One of these witnesses, John Gallery, stated that in his opinion Siloam's efforts were inadequate insofar as Siloam had not adequately *documented* its communications with prospective buyers. This point however, goes to the sufficiency of the evidence provided, not the adequacy of Siloam's actual efforts, whatever those efforts may have been. Given that the sufficiency of the evidence provided is a matter for a fact-finder and not a witness, this assertion has no evidentiary value. Gallery also testified that, in his opinion, Siloam did not list the property for a period of time sufficiently long enough to constitute a "good faith effort" and that Siloam's requirement that potential buyers demonstrate financing was unreasonable. Gallery however, was not able to state a time which he believed would have been sufficient for a "good faith effort," and did not explain why exactly he believed that a financing requirement was unreasonable. Importantly, Gallery did not actually testify that he believed the Church was salable, only that he believed Siloam's efforts were insufficient. Given the established facts about the Church – that it had a market value of zero, and that rehabilitation of the Church structure for any purpose would cost over 5 million dollars – Gallery's unsupported and

the "substantial evidence" standard applicable to those questions, and address the Board's similar conclusions of law separately.

unexplained opinion that Siloam's efforts to sell were not in "good faith" was, at most, a "mere scintilla" of evidence of the sort that is not substantial enough to support a finding.

The other witness, Alex Generalis, believed that Siloam's efforts to sell the property were not in "good faith" because the asking price of the Church should have been around \$300,000 rather than \$575,000, and because the Church should have been listed using alternative methods such as the website Craig's List, and because Siloam should have used different marketing techniques. Again, the only evidence as to the Church's market value was the appraisal report, which concluded that the Church's value was zero. There is no indication however, that these changes would have been likely to result in a sale. In fact this seems highly unlikely given that the prospect of millions of dollars of structural rehabilitation apparently deterred buyers. The idea that a listing on Craig's List would have allowed Siloam to sell a property with zero market value for \$300,000 simply strains credulity. Again, given the appraised value of the Church and the condition of the Church structure, a witness' bare opinion that "good faith" required the Church to do so is nothing but a "mere scintilla" of evidence, insufficient to sustain the Board's findings of fact.

With respect to Siloam's efforts to explore adaptive reuse of the Church, the Board's conclusions were similarly unsupported. Here, the Board relied entirely on Galley's testimony that, in his opinion, Siloam should have run more detailed cost/revenue analyses of specific reuse options. However, given that Siloam's total annual budget has ranged between five and seven thousand dollars, and estimates of the cost to rehabilitate the Church structure for any use ran between five and seven *million*, the idea that Siloam had to perform a separate analysis for different uses it might imagine for the structure is unconvincing. The evidence clearly shows that Siloam could not afford to do anything with the Church, and Gallery's opinion that Siloam should have gone through a more

formal exercise in order to support its application is therefore not evidence substantial enough to support the Board's conclusion that Siloam's efforts were insufficient.

Conclusions of Law

The Board's relevant conclusions of law were similar to its findings of fact. Essentially, the Board believed that Siloam's efforts to explore sale or adaptive reuse of the property were insufficient to meet the "good faith" standard, and that Siloam did not establish that the Church could not be adapted to be used for some other purpose. Reviewing this question of law *de novo*, this court finds that the Board erred and that Siloam did in fact make a "good faith" effort to sell the property and that Siloam's exploration of adaptive reuses of the Church structure was sufficient.

As part of showing that sale or alternate use of a property are impracticable, "[t]he applicant has an affirmative obligation in good faith to attempt the sale of the property, to seek tenants for it, and to explore potential reuses for it." Philadelphia Historical Commission Rules & Regulations § 9.4. As discussed earlier, the only assessment of the Church's market value on record values the Church at zero dollars. Despite this serious obstacle to sale, Siloam engaged a real estate broker with specific expertise in the sale of former Catholic Church properties. That broker listed and marketed the Church for six months in a variety of ways, including directly marketing the property to a large number potential buyers the broker had reason to believe might be interested. Siloam then responded to every party who expressed interest, even offering to sell the property for hundreds of thousands of dollars less than its listed price, although all parties lost interest when they learned the details of the condition of the Church and the costs of rehabilitation. Given the underlying economics of the

situation, it cannot be seriously maintained that Siloam's attempts to sell the Church were not broad or legitimate enough to be in "good faith."

Similarly, Siloam's exploration of potential re-uses for the property were sufficient to meet the "good faith" standard. The property was evaluated by two separate groups of experts, who gave minimum estimates of the cost to renovate the Church for *any* use – wholly apart from any specialized adaptive renovations which might be required for specific uses – in the \$5m-7m range. Although Siloam did not include separate cost/benefit analyses for each adaptive use it considered, any such analysis would have to include *at least* that minimal renovation cost. Once Siloam determined that this was an insurmountably high cost for any use to which Siloam might wish to put the structure after it was renovated, any individual examination of different uses would have been a mere formal exercise. The bottom line is that the structure is at this point simply too dilapidated to be reasonably adapted for any purpose, and no individual analysis of options would have changed this. Thus, both Siloam's efforts to sell the Church and Siloam's exploration of adaptive reuses were in "good faith" and were sufficient to meet the standard for financial hardship.

CONCLUSION

The Board's findings that Siloam's efforts to sell or adapt the property were inadequate were not supported by substantial evidence, and because the Board's conclusions of law that Siloam's efforts to sell or find an alternative use for the Church did not meet the "good faith" standard were in

error, for the reasons discussed above, the court hereby reverses the Board's decision and reinstates the Commission's approval of Siloam's demolition permit application.

ORDER

AND NOW, this 1st day of *October* 2012, upon consideration of the appeal from the decision of the Board of License & Inspection Review, the response thereto, a review of the certified record, the briefs submitted by the parties and after oral argument, and for the reasons set forth above, it is hereby **ORDERED** and **DECREED** that the appeal is **GRANTED** and the decision of the Board is **REVERSED**. It is further **ORDERED** that the decision of the Philadelphia Board of License & Inspection reversing the Philadelphia Historical Commission's decision to grant Siloam's permit to demolish the 1123-33 Spring Garden Street church is hereby **REINSTATED**.

BY THE COURT:



IDEE C. FOX, J.