

(Submitted to the Zoning Code Commission on December 15, 2009)

PARTICIPATION OF COMMUNITY GROUPS AT THE ZONING BOARD

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The purpose of this memorandum is to explain that, under the law, the City of Philadelphia has the free and unfettered responsibility to allow citizens and community groups the ability to participate fully in hearings at the Zoning Board of Adjustment (the “ZBA”) and to assert that the new Zoning Code should expressly codify such participation. This would include the full range of participation long allowed by the ZBA, including presenting evidence and cross-examining applicants’ witnesses.¹

INTRODUCTION

If ZBA decisions are to be meaningful and reliable, the City must allow citizens and community groups the ability to exercise completely their rights to participate. Unfortunately, some people outside and inside of city government appear to have misread state law and a recent Pennsylvania Supreme Court case as somehow affecting citizen involvement in ZBA hearings. Any such implication is incorrect.

Preliminarily, we emphasize that no community group looks forward to spending time and resources contesting a project at the ZBA or appealing a decision to court. Groups would rather reach agreement with applicants and appear at the ZBA to voice support. In practice, community groups rarely appear at the ZBA to contest projects and rarer still are appeals to the courts. However, it is the *ability* to contest or appeal that often gives the parties sufficient motivation to reach an appropriate compromise.

I. The Law: There are no restrictions on the public’s ability to participate at the ZBA

The ZBA is created and governed by the Home Rule Charter (Sections 3-911 and 5-1006) and city ordinances. These laws do not restrict in any way the ability of citizens and community groups to participate in ZBA hearings. Indeed, the ZBA has allowed and even encouraged citizens and groups to participate fully, without requiring a showing of standing.² This participation improves ZBA decision making.

¹ This memorandum supports Comments #1 and #3 contained in the Crosstown Coalition’s Joint Response to the Detailed Recommendations of the Zoning Code Commission’s consultant.

² By allowing citizens and community groups to participate at the ZBA, the City does nothing more than that which is allowed in every other zoning board in the Commonwealth of Pennsylvania. The Pennsylvania Municipalities Planning Code, which applies to all zoning boards in the Commonwealth except Philadelphia, provides at Section 908(3) that “[t]he parties to the hearing shall be the municipality, any person affected by the application who has made timely appearance of record before the board, and any other person including civic or community organizations permitted to appear by the board. 53 P.S. Section 10908(3) (emphasis added).

Coalition members as of November 12, 2009:

Center City Residents Association • East Passyunk Crossing Civic Association • Logan Square Neighborhood Association
Northern Liberties Neighbors Association • Old City Civic Association • Society Hill Civic Association • South Broad Street
Neighborhood Association • South of South Neighborhood Association • Washington Square West Civic Association

II. Standing to appeal a ZBA decision to the Court of Common Pleas

While there are no restrictions on who can participate at the ZBA, there are restrictions on who can appeal a decision of the ZBA to the Court of Common Pleas. The Philadelphia Zoning Code has long provided that ZBA decisions can be appealed to the Court of Common Pleas by the following two categories of citizens: “[a]ny person or persons jointly or severally aggrieved” or by “any taxpayer.” Section 14-1807(1).

However, in 2004, the State enacted Section 17.1 of the Home Rule Act, which eliminated taxpayer standing for purposes of appeals from decisions of the “zoning hearing board or other board or commission created to regulate development within the city.” Accordingly, after 2004, citizens can maintain an appeal from the ZBA only if they are “aggrieved persons,” defined as those with “a substantial, direct and immediate interest in the claim sought to be litigated.” *Spahn v. Philadelphia Zoning Board of Adjustment*, 977 A.2d 1132, 1149-50 (Pa. 2009). The *Spahn* Court explained that this is the traditional definition of standing used in Pennsylvania courts for more than thirty years, since *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). In sum, for purposes of establishing standing to appeal a decision of the ZBA, the category of taxpayer status is no longer available, but the traditional standard of “aggrieved persons” is alive and well.

III. Community Groups can satisfy the “aggrieved persons” standard

Not only did the *Spahn* court maintain the “aggrieved person” standard, but it reiterated that community groups can indeed meet this standard and establish standing. The *Spahn* Court referred extensively to the precedent of *Society Hill Civic Ass’n v. Philadelphia Bd. of Licenses and Inspection Review*, 905 A.2d 579 (Pa. Commw. 2006), in which a Philadelphia community group successfully challenged a Philadelphia Historical Commission decision concerning the preservation of buildings in Society Hill. The community group had submitted to the Board various documents, including bylaws identifying the relevant purposes of the group, an affidavit that the group’s dues-paying members owned property in the vicinity of the project, and further documentation establishing the group’s advocacy with the developer and the City regarding the preservation topic at issue. On the basis of this type of evidence, the court concluded that the group was “aggrieved” under the traditional *William Penn* standard and “[c]learly, the Association had standing.” *Society Hill*, 905 A.2d at 586.³

In the words of the *Spahn* Court, the traditional “substantial, direct and immediate” standard of aggrievement, as retained by Section 17.1 of the Home Rule Act, is “the door through which any party seeking to appeal a decision of a zoning board or ‘other board or commission regulating development in the city’ must enter in order to have standing to appeal.” *Spahn*, 977 A.2d at 1149 (emphasis in original).

³ The Supreme Court also recognized the continuing validity of *Pittsburgh Trust for Cultural Resources v. Zoning Board of Adjustment of Pittsburgh*, 604 A.2d 298 (Pa Commw. 1992), in which the court affirmed the standing of a trust and a community association with sixty dues-paying members because the groups had a substantial, direct and immediate interest in maintaining the integrity of an historic district in Pittsburgh and in encouraging upscale commercial establishments, which would be adversely affected by the proposed amusement arcade.

In sum, based on the above authorities, the following points are clear:

1. Contrary to some remarks made in Zoning Code reform discussions, no statute or court case limits the responsibility of the City to grant full participatory rights to community groups appearing at the ZBA, as has long been allowed.
2. Persons who can demonstrate they are aggrieved do have standing to appeal ZBA decisions to the Court of Common Pleas.
3. The state Supreme Court, in its August 2009 *Spahn* decision, confirmed that Philadelphia community groups can be aggrieved and therefore can establish standing to appeal ZBA decisions to the Court of Common Pleas.

It is clear that the City must continue to afford citizens and community groups the ability to participate fully at the ZBA. To deny these rights would risk a due process violation and would likely force, on appeal, the Court of Common Pleas to reopen the record for a mini-trial on standing followed by a full rehearing on the merits, which would result in meaningless ZBA decisions and a waste of time and resources at the ZBA for all stakeholders, including the developer and the City. Accordingly, an appropriate reform of the Zoning Code would expressly provide that community groups have the opportunity to provide testimony, documents and conduct cross examination at the ZBA and to utilize all other procedures currently allowed by the Zoning Code.

As the Zoning Code Commission proceeds to the codification phase, we look forward to discussing and debating the various procedures that could be enacted to protect community rights as well as streamline the process so it is more efficient for all concerned.