

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

**WOODLAND TERRACE HOMEOWNERS'
ASSOCIATION, MARYANN KURMLAVAGE
AND CONSTELLAR CORP.,**
Appellants

**COMMONWEALTH COURT
801 CD 2014**

**COURT OF COMMON PLEAS
130303186**

v.

**PHILADELPHIA BOARD OF LICENSE
AND INSPECTION REVIEW**
Appellee

and

**TRUSTEES OF THE UNIVERSITY OF
PENNSYLVANIA, O.A.P., INC., AND
AZALEA GARDENS PARTNERS, LP**
Intervening Appellees

Woodland Terrace Homeowners' Assoc Vs L & I-OPFLD



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OPINION

ELLEN CEISLER, J.

DATE: September 15, 2014

I. FACTS AND PROCEDURAL HISTORY¹

¹ This Court has thoroughly read the Certified Record and the briefs of all parties, heard oral argument, and reviewed the transcripts. This Court decided in favor of the Appellees and has found the arguments in Intervening Appellees brief to accurately reflect the certified record and to correctly, concisely, and effectively set forth the pertinent facts, procedural history, and legal analyses. As such, for the sake of judicial economy, this Court's Opinion relies heavily upon substantial portions of the "Brief of Intervening Appellees in Opposition to Appeal and in Support of the Decisions of the Philadelphia Board of License and Inspection Review and the Philadelphia Historical Commission." This brief will be referred to simply as "Intervening Appellees Brief".

The instant appeal arises out of this Court’s April 9, 2014 Order, which affirmed a decision by the Philadelphia Board of License and Inspection Review (hereinafter “BLIR”), through which the BLIR upheld the Philadelphia Historical Commission’s decision to grant the Intervening Appellees (Azalea Gardens Partners, LP, O.A.P. Inc., and Trustees of the University of Pennsylvania), financial hardship application to demolish an historic building located at 400 S. 40th St., Philadelphia (hereinafter, the “Property”).

Two of the appellants in this matter are owners of investment rental properties which abut the Subject Property: (i) Constellar Corp. (a Spruce Hill real estate investor and developer), and (ii) Ms. Maryanne Kurmlavage (a resident of Fairmount and an investment property owner) (N.T. 07124/2012 at 81)². The third appellant is Woodland Terrace Homeowners' Association (the "HOA"), a small homeowners association representing the interests of property owners located several blocks from the Subject Property. The Intervening Appellees are the property owners/developers of the Property.

A. The Subject Property

400 S. 40th Street is a large four story Italianate mansion located in West Philadelphia, at the southwest corner of 40th and Pine Streets. Appellants’ Brief at 4. It was constructed in 1853, based on a design by notable architect Samuel Sloan. In 1902, the Property was substantially altered and expanded in the Colonial Revival style. Then, in 1942, the Property was transformed into a convalescent home, though it still retained its 1902 appearance. Id. The Property was significantly altered in 1964 and then again in 1975, with it being almost entirely encased in a series of concrete blocks additions that covered the outside walls of the Property.³ Id.; *see also* Certified Record Part 62 at 2-3 (Showing pictures of the Property’s North, South, East, and West façades). Intervening Appellees Brief, page 9-10.

² The certified record in this case was filed in two parts on two separate dates. The first record filing contained 70 different pieces and will be referred to in this opinion in the number order in which it is listed on the docket; i.e. “Certified Record Part 1,” “...Part 2,” “...Part 3,” etc. The second record filing was only one piece that detailed the findings of fact and conclusions of the law of the Board. This piece will be referred to simply as “Findings of Fact and Conclusions of Law.”

³ Though the Commission designated the Property as being historic in 1973, it did not review the 1975 alterations. Certified Record Part 66 at 14.

The Historical Commission designated the Property historic in 1973 before the adoption of the City's current historic preservation ordinance which now places restrictions on the demolition of designated structures.⁴ Neither the Commission's files nor the certified record contains information documenting the rationale of the Commission's 1973 designation. (City Exhibit 1, tab 16 at 4-6 - providing that the Commission's files admittedly contain "scant information on the designation."). Intervening Appellees Brief, pages 9,10.

The Property operated as a convalescent nursing home from 1986-2002. During this time the Property was poorly maintained and investigations of the convalescent home by various governmental regulatory agencies revealed that its elderly residents were living in appalling conditions. Certified Record Part 1 at 119. The convalescent home was ultimately shut down, but prior to its closing, the prior owners turned off all of the heat in January 2003. As a result, the pipes burst which resulted in substantial damage and the destruction of what was left of the outdated heating and plumbing systems. Intervening Appellee, OAP, which is a wholly-owned affiliate the University of Pennsylvania, and the Trustees of the University of Pennsylvania,⁵ recognized that the Property was a vacant and deteriorating eyesore that was impacting the safety and stability of the neighborhood and it became their goal to acquire and redevelop the Property. (City Exhibit 1, tab 31; N.T. 08/07/2012 at 111; N.T. 12/17/2012 at 197-199). At the time of acquisition, the Property was completely uninhabitable. (N.T. 12/17/2009 at 199-201) Since its acquisition in 2003, Penn has taken significant steps to secure and stabilize the Property, spending roughly \$25,000 to \$35,000 on operating expenses and general upkeep. (N.T. 12/17/2012 at 201-02). For example, Penn installed smoke alarm and security systems, cleaned graffiti, contracted with a property management company, instructed University police to patrol the Property, fixed the roof and have basically "done all the requisite things that a responsible property owner would do to maintain this vacant, blighted property and to be safe." (N.T. 12/17/2012 at 201-02). See also, Intervening Appellees Brief, pages 10-14.

⁴ During the relevant time period of this matter, the Preservation Ordinance was found at Chapter 14-2007 of the Philadelphia Code. Under the Philadelphia zoning code effective August 22, 2012, the Preservation Ordinance was re-codified at Chapter 14-1000. Because the Application predates that re-codification, the Preservation Ordinances references in this brief are to the pre-re-codification version.

⁵ OAP and University of Pennsylvania will be collectively referred to as "Penn" for the remainder of the Opinion.

B. Penn's Efforts to Rehabilitate and/or Sell the Property

Penn's redevelopment efforts of the Property were managed by Penn's office of Facilities and Real Estate Services ("FRES") which runs all capital development projects and construction for Penn. Extensive testimony regarding Penn's efforts to redevelop the Property was presented by Mr. Paul Sehnert, Director of Real Estate Development for Penn/FRES. Over the prior ten years, FRES was involved in over \$750 million of development in the University City including approximately \$250-300 million of capital projects per year. (N.T. 12/17/2012 at 194-95). In light of FRES's deep real estate market knowledge, experience, and capability in University City, Penn utilizes FRES, which employs an experienced real estate broker, when it markets a property or seeks a redeveloper. Penn does not engage an outside real estate broker for these purposes. (N.T. 12/17/2012 at 196-97).

In December 2002, three months prior to Penn's acquisition of the Property, Penn engaged Becker Winston Architects ("BWA") to explore adaptive reuses for the Property (City Exhibit 1, tab 33). The BWA engagement letter provided: "[s]ince the property is so close to the Penn campus, the University sees purchase of the deteriorated property and its conversion to uses compatible with the neighborhood as an opportunity to transform it into a community asset." (*Id.* at 1). BWA determined that the most likely adaptive reuses for the Property were either market rate apartments or a "greek house", *i.e.* a University fraternity or sorority. (*Id.* at 1-2; see also, N.T. 12/17/2012 at 202-203). Both uses would require zoning relief from the ZBA. (N.T. 12/17/2012 at 203). FRES ultimately determined that conversion of the Property Building to such residential uses was not economically feasible.⁶ Intervening Appellees Brief, page 14.

Upon its acquisition, Penn hired an expert/consultant to conduct a comprehensive examination of the costs associated with renovating the Property. According to professional civil and structural engineer and cost estimator James W. Hoolehan of Blue Rock Construction,

⁶ As will be discussed later, in deciding to demolish the Property, Penn was required to submit an Application to the Historic Commission for permission to do so. As part of the Application, Penn put together a pro forma based upon the scenarios discussed in the BWA study. (N.T. 12/17/2012 at 203-04). The pro forma explored two possibilities: (i) the residential conversion of the entire Existing Complex (with the 1960s and 1970s additions); and (ii) the residential conversion of the "mansion" portion of the Existing Complex and the demolition of the 1960s and 1970s additions) (N.T. 12/17/2012 at 203-205; see also City Exhibit 1, tab 34). The pro forma reasonably assumed construction costs of \$200 per foot and each case demonstrated the failure to produce a return that would attract a market participant to invest. For example, the two scenarios produced an overall cap rate of 2.9 percent and return on equity of 2.5 percent and an overall cap rate of 2.7 percent and a return on equity of 1.9 percent respectively -- both well below any reasonable return for a real estate development. (City Exhibit 1, tab 26 at 2; N.T. 12/17/2012 at 204-05, 207-09). Intervening Appellees Brief, Page 14, footnote 12.

Inc., the Property was in extremely poor condition and was facing structural issues. (N.T. 01/15/2013 at 4-10, 18-19). The upper floors exhibited a “definite lean” and there were visible signs of significant floor settlement. (N.T. 01/15/2013 at 19-20). According to this expert, rehabilitation of the property would require the structure be jacked and shored up, which could likely cause or reveal further structural issues. “[I]t’s a total gut job. . . . It’s not just coming in and putting paint on the walls.” (N.T. 01/15/2013 at 20 (testimony of J. Hoolehan)); see also N.T. 02/12/2013 at 9 (testimony of developer Jonathan Weiss: “There’s significant structural work that need[s] to be done, all interior plaster is compromised, so the entire interior of the building would basically need to be rebuilt, so it’s basically a shell”).⁷ The Property also has no sprinkler, plumbing, heating or useable electrical systems. In the event of rehabilitation, all new building systems would need to be installed which would require that the walls and ceilings be ripped out. (N.T. 01/15/2013 at 20-25). Rehabilitation would also require removal of the large, bunker like concrete block structures that surround the original building, the other additions, fire tower, and fire escapes, and the exterior of would have to be sealed, repaired, and replaced. (N.T. 01/15/2013 at 21-22 (testimony of J. Hoolehan)). Mr. Hoolehan estimated that the cost to restore the Property and put in all new building systems would exceed \$200 per square foot and would likely be \$230 or more.⁸ (N.T. 01/15/2013 at 27; see also City Exhibit 53, containing 2011 Blue Rock estimate). Intervening Appellees Brief, Pages 11-13.

Since 2003, FRES repeatedly exposed the Property to the market and initiated several efforts to find a meaningful adaptive reuse scheme for the Property. First, Penn “made extensive internal inquiries in an effort to identify potential University users” for the Property. (City Exhibit 1, tab 26 at 2). Mr. Sehnert explained the process: “You know, Penn is a very decentralized place. Basically, this is like making a deal with a Dean, or a business agent, or a leader of some school or center.” (N.T. 12/17/2012 at 209-10). In light of the Property’s high

⁷ Mr. Weiss has significant experience in rehabilitating historic properties in Philadelphia. (N.T. 02/12/2013 at 6 (Jonathan Weiss: “We have rehabilitated over 60 Victorian brownstones throughout North Philadelphia over the last 15 years”)).

⁸ Mr. Hoolehan’s firm previously prepared a construction cost estimate in September 2011 for the rehabilitation of the Property, demolition of the existing additions, and the construction of a seven-story addition. (N.T. 01/15/2013 at 13-15). The estimated price for that project (which included the new construction) was \$207 and would have spread the cost of the new building system between the new construction and the rehabilitation. According to Mr. Hoolehan, based upon his knowledge of the Property, however, \$200 per square foot is “absolutely” the lowest one could responsibly rehabilitated the Property. (N.T. 01/15/2013 at 16-17).

rehabilitation costs, no internal user expressed interest despite considerable internal marketing efforts. (N.T. 12/17/2012 at 210; City Exhibit 1, tab 26 at 2).

Between 2003 and 2006, FRES continuously marketed the adaptive reuse of the Property and took all actions that are associated with marketing properties including: targeting current market participants; sharing due diligence materials with potential developers; and hosting site visits. Despite all of this effort, there was no interest in the Property (N.T. 12/17/2012 at 211-13).

In late 2006, Penn/FRES issued a Solicitation of Interest (“2006 SOI”). According to Mr. Sehnert, Penn tried to keep this process as open as possible with potential developers. “[W]e asked them to provide a pro forma over a 25-year period, and we left totally silent any questions on reusing or demolishing the building. It’s sort of here’s the site. Here’s what we know about it. Developers, you tell us what you think you can do with it.” (N.T. 12/17/2012 at 214). Although FRES did not put any restrictions on potential uses, FRES made it clear to developers that Penn wanted to enter into a long-term ground lease deal (e.g., at least 45 years) as opposed to a simple conveyance. (N.T. 12/17/2012 at 214-15). According to FRES, when it comes to market exposure and market feasibility, the University ground lease structure actually increases the likelihood of an adaptive reuse deal going forward. Mr. Sehnert explained:

Well, the ground lease is basically conveying all the rights and benefits of ownership to a developer, except for the ground, itself. So we may have some concerns on it, we may have some control factors, but for the purposes of a real estate transaction, you’re conveying all of the rights and benefits to a developer, all the risks, all the costs. It’s their deal. It’s as if they bought it, **but it’s a better deal for a developer because they don’t have to come out of pocket for the land value up front.**

(N.T. 12/17/2012 at 215 (emphasis added)). Intervening Appellees Brief, pages 14-16.

Penn presented two additional distinct advantages for a developer in a ground lease transaction with the Penn. First, the developer gets to defer the price of the land. Second, the financing becomes easier because Penn’s credit is in the chain of title. (N.T. 12/17/2012 at 216-17). Essentially, the marketplace sees this ground lease scenario as almost a University subsidy making third party financing easier to obtain. (N.T. 12/17/2012 at 217-18 (P. Sehnert: “It’s going to be easier for the developer to make a deal, to get financing”). Additionally,

Pennsylvania views a long-term ground lease as a conveyance for purposes of the realty transfer tax. (N.T. 12/17/2012 at 215). Intervening Appellees Brief, page 16 and footnote 13.

Penn obtained five preliminary proposals in response to this 2006 SOI. (N.T. 12/17/2012 at 213-14). Two proposals were deemed patently unresponsive. (N.T. 12/17/2012 at 218-19; see also City Exhibit 1, tab 35 (providing summary of responses)). (N.T. 12/17/2012 at 220-21). The remaining three proposals submitted by Campus Apartments, Altman, and Tom Lussenhop, all proposed the demolition of the Property. (City Exhibit 1, tab 35; N.T. 12/17/2012 at 221). Intervening Appellees Brief, pages 16-17.

Faced with no development proposals for the adaptive reuse of the Property, Penn requested that two of the respondents, Tom Lussenhop and Campus Apartments, prepare a joint proposal that would rehabilitate the Property by constructing an eleven story hotel to essentially subsidize such rehabilitation. (N.T. 12/17/2012 at 222).⁹ That redevelopment proposal failed

⁹ As Intervening Appellees aptly noted in their brief:

“Absent from appellants brief is the critical admission that the same three appellants four years earlier claimed that a financial hardship application for the Property would be meritorious. On February 19, 2009, the Philadelphia Zoning Board of Adjustment (the “ZBA”) held the second of two hearings on the University’s proposal to construct a hotel on the Property. The proposal involved the historic rehabilitation of what remains of the 19th century residence and the construction of an 11-story hotel addition. The University and its then-developer argued that the historically protected Existing Complex imposed a zoning hardship justifying use and dimensional variance relief. Conversely, the appellants contended at the 2009 ZBA hearing that there was no zoning hardship because the University could avail itself of the Preservation Ordinance’s financial hardship provisions and obtain approval to demolish the Existing Complex. At the February 19, 2009 ZBA hearing, the appellants were represented by attorney S. David Fineman of Fineman Krekstein & Harris, P.C.⁹ At the February 19, 2009 ZBA hearing, the appellants proffered the sworn testimony of Richard Tyler, Ph.D. -- the former executive director of the Commission. Dr. Tyler’s testimony in the 2009 ZBA appeal is directly relevant to the case sub judice.

Regarding the historical, architectural or aesthetic significance (or lack thereof) of the Existing Complex, Dr. Tyler on direct examination described the Property’s “mansion” as a “somewhat **mutilated** 1853 house.” (University Exhibit I-5 (containing transcript from ZBA Cal. No. 4923) at 2 (testimony of Dr. Tyler at transcript page 5, line 19) (emphasis added)).

Regarding the merits of a prospective financial hardship application to demolish the Existing Complex, Dr. Tyler’s offered the following on behalf of the appellants:

MR. FINEMAN: [I]f I was to apply for a demolition permit, what would happen when I went before the Historic[al] Commission?

MR. TYLER: Okay, there is a provision in the Ordinance for demolition. There are two grounds for it, one, financial hardship, two, the public interest. **This, I should think, would -- that a case could be made for financial hardship; that there is no reasonable reuse for the building consistent with preservation that would be viable** Buildings are torn down all the time. Does that answer your question? But that option -- for some reason, the developer did not apply for demolition. So the remedies have not been exhausted at that level.

(University Exhibit I-5 (containing transcript from ZBA Cal. No. 4923) at 3 (testimony of Dr. Tyler at transcript pages 8-9) (emphasis added)). And regarding whether Dr. Tyler thought the Commission would indeed grant a

due to community opposition. Penn again went out to the marketplace to seek another proposal to adaptively reuse the Property. This time, FRES sent out a Solicitation of Interest and qualifications in June 2010 (the “2010 SOP”) specifying an interest in a housing and/or mixed use product geared to graduate students. (City Exhibit 1, tabs 26 at 4, 39 at 2). The 2010 SOI was sent to nineteen developers who, based upon FRES’s experience, would yield the greatest amount of responsive proposals. (N.T. 12/17/2012 at 223, 226). FRES received five proposals from four development teams: Blue Rock Construction, Orens Development Inc., Radnor Property Group and Beech/Lussenhop. (City Exhibit No. 40; N.T. 12/17/2012 at 226-28). Only two proposed the adaptive reuse of the Property. (N.T. 12/17/2012 at 228). The other three proposed demolition of the Property.

The proposal by Beech/Lussenhop contemplating adaptive re-use, expressly provided that the rehabilitation of the Property was not feasible without significant public subsidies. The Blue Rock proposal which called for the construction of a multi-family addition to the Property was selected by Penn. (N.T. 12/17/2012 at 229). Eventually Intervening Appellee Azalea Gardens partnered with Blue Rock on the development proposal. After refinement and construction pricing, the Azalea Gardens proposal called for a 7-story addition. The 7-story addition, however, was opposed by the Spruce Hill Community Association (as well as the three appellants) and required substantial zoning variance relief. (N.T. 12/17/2012 at 230). There was

financial hardship application to demolish the Existing Complex, Dr. Tyler offered the following on behalf of the appellants:

MR. TYLER: I think that you should have -- that the applicant should have gone for a demolition permit.

MR. FINEMAN: Do you think one would have been granted, in your experience?

MR. TYLER: Yes

(University Exhibit I-5 (containing transcript from ZBA Cal. No. 4923) at 4 (testimony of Dr. Tyler at transcript page 13) (emphasis added)). The foregoing 2009 testimony was introduced during the BLIR proceedings. Paul Sehnert of FRES (who attended the 2009 ZBA hearing) confirmed for the BLIR that Dr. Tyler (as a representative of the three appellants): (i) described the Existing Complex as being “somewhat mutilated”; (ii) advocated for its demolition to allow for a smaller project; and (iii) opined that a financial hardship application would be meritorious and granted. (N.T. 08/07/2012 at 127). Later in the BLIR proceedings, the appellants again offered Dr. Tyler who confirmed his 2009 ZBA testimony. (N.T. 11/01/2012 at 125). Moreover, the existence of these two diametrically opposed positions regarding the merits of a hardship application was even admitted by opposing counsel before the BLIR. (N.T. 09/18/2012 at 55).⁹ In any event, Dr. Tyler’s prior testimony regarding the meritorious nature of the now-appealed financial hardship application -- expressly acknowledged before the BLIR by Messrs. Tyler, Sehnert and Boni -- is uncontested.” See Brief of Intervening Appellees in Opposition to Appeal and in Support of the Decisions of the Philadelphia Board of License and Inspection Review and the Philadelphia Historical Commission, Pages 20-22

no community or political support for this proposal. As a result, FRES and Azalea Gardens abandoned the 7-story adaptive reuse scheme. (N.T. 12/17/2012 at 232). Intervening Appellees Brief pages 16-18.

C. The Decisions by the Historical Commission and the BLIR

After almost 10 years of continual attempts to adaptively reuse the Property, Penn recognized that this course of action was economically unfeasible. Penn determined that the only economically feasible way to develop the Property was to demolish it and start from scratch. In order to do so, Appellees were required to file an application with the Historical Commission seeking approval to demolish the Property on grounds of financial hardship pursuant to Philadelphia Code Section 14-2007(7)(j).¹⁰ (City Exhibit 1, tab 26). The two principal ways in which a property owner may obtain permission under the Historic Preservation Ordinance to demolish a historically designated structure, would be a determination by the Historical Commission that the demolition is “necessary in the public interest,” or that the structure “cannot be used for any purpose for which it is or may be reasonably adapted.” Phila. Code § 14-2007(7)(j). To show that a structure “cannot be used for any purpose for which it is or may be reasonably be adapted,” a property owner must demonstrate that: (i) the sale of the property is impracticable; (ii) commercial rental cannot provide a reasonable rate of return; and (iii) that other potential uses of the property are foreclosed.” Id. Additionally, the Commission’s rules and regulations provide that a property owner “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.” Historical Commission Regulation 9.4. Finally, in reviewing a financial hardship application, the Historic Preservation Ordinance provides that the Commission must consider the “historical, architectural, or aesthetic significance” of the affected structure. Phila. Code § 14-2007(k)(.2).

The Historical Commission’s procedure for handling such applications is to first determine whether the application submission to the Historical Commission is complete. The application is then sent to the Historical Commission’s Committees on Financial Hardship as

¹⁰ At the time of the filing of the Application, the Preservation Ordinance was found at Chapter 14-2007 of the Philadelphia Code. Under the Philadelphia zoning code effective August 22, 2012, the Preservation Ordinance was re-codified at Chapter 14-1000. Because the Application predates that re-codification, the Preservation Ordinances references in this brief are to the pre-re-codification version.

well as its Architectural Committee for their non-binding recommendations to the Commission. Id. Finally, the Historical Commission holds a full hearing on the application, taking into consideration the recommendations of its two sub-Committees. Id.

In this matter, the Commission took the additional step of hiring its own *independent* consultant, Margaret “Meg” Sowell of RES, because “the Commission wanted the best advice possible in order to review this application.” (N.T. 12/17/2012 at 8, testimony of Dr. Jonathan Farnham, Executive Director of the Historical Commission). Ms. Sowell “was asked to look at the financial feasibility [of the Existing Complex] and whether or not there were any options that could reasonably be used to preserve” it. (N.T. 12/17/2012 at 106 - testimony of Ms. Sowell). Upon being engaged, RES inspected and toured the Property and its environs. (N.T. 12/17/2012 at 107-testimony of Ms. Sowell). RES reviewed the Application thoroughly and tested every assumption. (N.T. 12/17/2012 at 112, 186, testimony of Ms. Sowell). Moreover, RES “also spent a great deal of time on [construction] cost estimates of different kinds.” (N.T. 12/17/2012 at 113 (testimony of M. Sowell)). RES “double checked with a couple of different construction people whether or not construction costs, as they appeared, were generally reasonable in the community.” (N.T. 12/17/2012 at 113-141-testimony of Ms. Sowell). At the end of the review, RES agreed with the University Parties that construction costs for the rehabilitation of the Property were “probably never going to be below [\$]200 a square foot.” (N.T. 12/17/2012 at 116-117 - testimony of Ms. Sowell). After conducting extensive research into the economic viability of several options for the Property, including affordable housing, a condominium conversion, and commercial use, Ms. Sowell testified that “none of the options that we looked at that involves saving the historic structure, made any economic sense.” Certified Record Part 66 at 29 and 30-31. N.T. 12/17/2012 at 119 - (testimony of M. Sowell; City Exhibit 1, tab 24). Intervening Appellees Brief, pages 19-20.

In accordance with established procedures, the Historical Commission sent Penn’s demolition Application to its sub-Committees Financial Hardship and Architecture for their review and recommendations. Id. at 5. The Committee on Financial Hardship convened a meeting on April 24, 2012, to consider the financial hardship claim. At this meeting, the Committee heard extensive testimony from representatives on behalf of Intervening Appellees and Appellants, as well as from independent consultant Meg Sowell.

Following consideration of the Application, the evidence, and public comment, the Committee on Financial Hardship voted 3-1 to recommend that the full Commission approve the Application.¹¹ In doing so, the Committee specifically adopted a motion recommending that the full Commission: (i)“find that the applicant has demonstrated that the sale of the property is impracticable, that commercial rental cannot provide a reasonable rate of return, and that other potential uses of the property are foreclosed”; (ii) “find that the building’s required retention would result in a financial hardship for the property owner”; and (iii) “approve the demolition, pursuant to Section 14-2007(7)(j) of the historic preservation ordinance.”

Following the review and approval of the Application by the Financial Hardship and Architectural Committees, the full Historic Commission reviewed Penn’s Application at its May 11, 2012 meeting. (City Exhibit 1, tab 5). The Commission again took significant amounts of testimony and evidence from the University Parties, RES, and the appellants during the public comment period. (Id.). Following consideration of the Application, the evidence and public comment, the Commission voted 7-2 to approve the Application. In doing so, the Commission determined that: (i)“the applicant has demonstrated that the sale of the property is impracticable, that commercial rental cannot provide a reasonable rate of return, and that other potential uses of the property are foreclosed”; (ii)“the building’s required retention would result in a financial hardship for the property owner”; and (iii)the demolition was approved “pursuant to Section 14-2007(7)(j) of the historic preservation ordinance, provided no demolition is undertaken until all prerequisite approvals for the building permit are obtained and the building permit has been issued for the new construction.” (Id. at 29). Intervening Appellees Brief, Page 8.

Appellants timely appealed the Historical Commission’s decision to the BLIR on May 29, 2012. Findings of Fact and Conclusions of Law at 4. The BLIR subsequently conducted *ten* hearings over a period of eight months. Id. On February 22, 2013, the Board announced its decision; the vote was split, with two Board members for the appeal, and the other two against it. Id.; however, the legal effect of this split vote was to affirm the Commission’s decision.¹² Id.

¹¹ The application was approved by the Architectural Committee as well.

¹² “A tie vote of an administrative body, constitutes a refusal of action requested from it...” “This Court expressly disavows any conclusion that a tie vote of an [administrative body] constitutes the absence of a decision” Giant Food Stores, Inc. v. Zoning Hearing Bd. of Whitehall Twp. 501 A.2d 353 (Pa. Cmwlth. Ct. 1985). Thus here, because Appellants sought to overturn the Commission’s ruling, the Board’s tie vote constituted a refusal to take such action, and operated as a decision to affirm the Commission. Intervening Appellees Brief, page9, footnote 4.

In support of its decision to affirm the Commission, the BLIR issued twenty-two pages of Findings of Fact and Conclusions of Law including seventy-seven detailed Findings of Fact and nine Conclusions of Law. The BLIR specifically found that:

- The Existing Complex is vacant and is in fairly poor condition. (Findings of Fact 21, 34, 60, 68 (citing testimony of Dr. Farnham, J. Hoolehan and J. Weiss)).
- The Commission retained an independent consultant specializing in real estate market analysis, financial analysis and economic development, RES, chosen by the preservation community to thoroughly review the Application and assess potential adaptive reuse scenarios for the Existing Complex. (Findings of Fact 22-23, 35-37 (citing testimony of M. Sowell)).
- After a thorough review, the Commission determined that the Application satisfied the submission requirements and was complete. (Findings of Fact 20, 24, citing testimony of Dr. Farnham).
- The financial resources of the applicant are irrelevant in a hardship application. (Finding of Fact 27, citing testimony of Dr. Farnham).
- On several occasions, the Commission previously approved hardship applications where the property owner did not list the property for sale, but instead based its application on financial and real estate analysis. (Findings of Fact 30-31, 34, 75 (citing testimony of Dr. Farnham and Dr. Tyler)).
- Nothing in the Preservation Ordinance prevents finding financial hardship solely because a property owner bought a property with knowledge of its historic designation. (Findings of Fact 32, 34, 75, citing testimony of Dr. Farnham).
- The University's past attempts to market and ground lease the Property, as well as real estate evaluations establish that the sale of the Property is impracticable. (Findings of Fact 33-34, 45, 48-54, 58, 75, citing testimony of Dr. Farnham and Mr. Sehnert).
- Past University attempts to market the Property for ground lease were substantial, advantageous to adaptive reuse, and were without restrictions negatively affecting adaptive re-use options. (Findings of Fact 48-49, 50-55, 58, 75, citing testimony of Paul Sehnert).
- RES's positive review of the Application involved a thorough independent investigation. (Findings of Fact 37, 41, 75, citing testimony of Ms. Sowell).
- The Application's assumptions regarding minimum rate of return analysis were reasonable. (Findings of Fact 37, 41, 47, 54, 58, 69, 75, citing testimony of Ms. Sowell, Mr. Sehnert, Mr. J. Weiss)).

- The Application’s construction cost estimates were appropriate. (Findings of Fact 37, 41, 44, 46, 58-61, 75, citing testimony of M. Sowell, Mr. Sehnert, and Mr. J. Hoolehan)).
- The adaptive re-use of the Existing Complex is not financially feasible and meets the test therefor enumerated in Section 14-2007(7)(j) of the Preservation Ordinance, i.e. (i) that the sale of the property is impracticable, (ii) that commercial rental cannot provide a reasonable rate of return, and (iii) that other potential uses of the Property are foreclosed. (Findings of Fact 39-41, 53-55, 64, 66-68, 72-75, citing testimony of M. Sowell, P. Sehnert and D. Hollenberg).
- Conversely, the appellants failed to provide sufficient evidence to establish (i) that the Commission Decision was plainly erroneous or inconsistent with the Preservation Ordinance, (ii) that the Commission acted arbitrarily or capriciously, (iii) that the Commission abused its discretion, or (iv) that the Commission acted unreasonably, fraudulently or in bad faith. (Finding of Fact 76).

Intervening Appellees Brief, pages 29-31, summarizing BLIR Findings of Fact and Conclusions of Law.

Based upon its extensive Findings of Fact, the BLIR concluded that: (i) the “Commission properly determined that the Application was complete”; (ii) the Commission “made a reasonable and informed judgment in approving the Application”; and (iii) the “Commission properly considered, interpreted and applied the provisions” of the Preservation Ordinance and the Regulations”; (iv) “the record before it contains substantial evidence to affirm the decision of the Historical Commission”; and (v) the “Commission’s decision to approve the Application to demolish the historic building on the Property was not plainly erroneous and was consistent with” the Preservation Ordinance and the Regulations. (Conclusions of Law 3, 5-8).

Intervening Appellees Brief, page 29.

Appellants appealed the BLIR’s decision to the Court of Common Pleas on March 21, 2013. On March 29, 2013, Intervening Appellees filed a praecipe to intervene in this matter. Oral argument before this Court occurred on April 8, 2014. After thorough deliberation, this Court affirmed the Board’s decision in an order docketed on April 9, 2014. On May 6, 2014, Appellants appealed this Court’s decision to the Commonwealth Court. On May 7, 2014, this Court issued an order, directing Appellants to provide a Statement of Errors pursuant to Pa. R.A.P. 1925(b); Appellant’s response was received by this Court on May 28, 2014 and is attached to this opinion as Appendix A.

I. THE SCOPE OF REVIEW AND THE *TURCHI* STANDARD

Since the instant appeal involves an appeal from a local agency, the BLIR, this appeal is governed by Section 754 of the Local Agency Law, 2 Pa. Con. Stat. § 754. Under the Local Agency Law, where no additional evidence is presented, the scope of review is limited to determining whether the BLIR committed a manifest abuse of discretion or an error of law in affirming the Commission. In re Petition of Dolington Land Grp., 576 Pa. 519, 526, 839 A.2d 1021, 1026 (2003); Valley View Civic Ass'n v. Philadelphia Zoning Bd. of Adjustment, 501 Pa. 550, 555, 462 A.2d 637, 639 (1983). The BLIR abuses its discretion only if its findings are not supported by substantial evidence. Valley View, 501 Pa. at 550, 462 A.2d at 639. "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. at 555, 462 A.2d at 640; Eichlin v. New Home Boro. Zoning Bd., 679 A.2d 1173, 1175 (Pa. Commw. Ct. 1996).

A court reviewing a decision of an administrative agency should be reluctant to measure and assess the multitude of factors and considerations that support an administrative agency's decision. See Cohen v. Zoning Bd. of Adjustment, 276 A.2d 352, 355 (Pa. Commw. Ct. 1971). Stated differently, where the reviewing court takes no additional testimony, the court should exercise self-restraint and avoid substituting its own opinions for the decision of local officials. Id. "It is, after all, the sole function of the Board, in the performance of its role as fact finder, to evaluate witness credibility and assign evidentiary weight." Lower Allen Citizens Action Grp., Inc. v. Lower Allen Twp. Zoning Hearing Bd., 93 Pa. Commw. 96, 105, 500 A.2d 1253, 1258 (1985). The BLIR "has the power to reject even un-contradicted testimony if it finds it lacking in credibility." Id. Consequently, the BLIR does not abuse its discretion by deeming the testimony of one expert or witness more credible than that of another. The BLIR "as fact finder is the ultimate judge of credibility and resolves all conflicts in the evidence." Eichlin, 679 A.2d at 1175.

The decision of the BLIR, in addition, should be affirmed where the BLIR reached an appropriate decision even under a different or even wrong theory of relief. See Bailey v. Zoning Bd. of Adjustment, 801 A.2d 492, 505 n.24 (Pa. 2002); Reformed Seventh Day Adventist Church, Inc. v. Philadelphia Zoning Bd. of Adjustment, 561 A.2d 1324 (Pa. Commw. Ct. 1989); see also Robert S. Ryan, Pennsylvania Zoning Law and Practice § 9.5.11 (providing that decisions of municipal boards may be affirmed on alternative grounds). The Court may,

therefore, affirm the decision of the BLIR on any ground upon which the BLIR could have relied. See Bailey, 801 A.2d at 505 n.24.

Moreover, because this appeal concerns the decision of the BLIR, a purely adjudicatory agency, affirming the Commission, an administrative agency, the scope of review is governed by Commonwealth Court's decision in Turchi v. Philadelphia Bd. of License and Inspection Review, 20 A.3d 586 (Pa. Commw. Ct. 2011). In Turchi, Commonwealth Court comprehensively opined on the powers, duties and role of the Philadelphia Historical Commission, as well as the BLIR's and a reviewing court's limited scope of review of Commission decisions. 20 A.3d 586 (Pa. Commw. Ct. 2011). The Turchi court held that the Commission possesses "authoritative interpretive powers" regarding the application of Philadelphia's historic Preservation Ordinance and its rules and regulations. Id. at 592, 594. Commonwealth Court reasoned that the Historical Commission has "numerous encounters with matters of historic preservation and those areas where the concern for historic preservation may conflict with the growth and development necessary to a large city" and, therefore, its interpretation (and subsequent application) of the Preservation Ordinance and the Regulations are entitled to substantial deference. Id. at 594. Afforded such deference, the Commission's interpretations must not be disturbed unless they are plainly erroneous or inconsistent with the Preservation Ordinance or the Regulations. Id. Therefore, the limited scope of the BLIR's review of a Commission decision on a demolition decision is to "determine if [the Commission's] actions can be sustained or supported by evidence taken by [the Board]." Id. at 595 (quoting Pa. Dept. of Env'tl. Protection v. N. American Refractories, 791 A.2d 461, 466) (Pa. Commw. Ct. 2002)) (emphasis added). Intervening Appellees Brief, pages 3-5.

II. DISCUSSION

This Court respectfully requests that the instant appeal be denied for the following reason:

1. In approving the Application to demolish the Property, the Historical Commission followed the appropriate legal and procedural guidelines set forth in the Historic Preservation Ordinance, as well as its own Rules and Regulations. Accordingly, the BLIR properly exercised its limited deferential authority when it upheld the Commission's decision, and therefore, this Court did not err in affirming the BLIR.

Despite Appellant's extensive 1925(b) Statement, the analysis of this appeal is rather straightforward. As previously stated, the Commonwealth Court has firmly held that the BLIR is required to treat Historical Commission decisions with significant deference, and may only reverse the Historical Commission in situations where the Commission's interpretation and application of the Historic Preservation Ordinance was "plainly erroneous[,] or inconsistent" with the terms of the Ordinance. Turchi v. Philadelphia Bd. of License & Inspection Review, 20 A.3d at 586, 594 (Pa. Cmwlth. Ct. 2011). Thus, unless the Historical Commission's approval of the Application was based on its misinterpretation or misapplication of the Historic Preservation Ordinance, or reflected egregiously unsupportable factual conclusions, the BLIR was *required* to abide by the Commission's decision.

In the instant appeal, Penn's application was based on a claim of financial hardship; thus, in order to approve Penn's development plan, the Historical Commission needed to determine that the Property could not "be used for any purpose which it is or may be reasonably adapted," and that Penn made a good-faith attempt to sell the property, seek tenants, and explore potential reuses for it. The purpose of this provision is to ensure that an applicant has exposed the property to the market so that the Commission can better assess the viability of potential adaptive reuse scenarios.¹³

As concisely stated in Intervening Appellees Brief:

"On appeal, the fundamental question is whether the Commission's decision approving the Application "**can be sustained or supported**" by evidence taken by the BLIR. *Id.* at 595 (quoting Pennsylvania Dept. of Env'tl. Protection v. N. American Refractories, 791 A.2d 461, 466) (Pa. Commw. Ct. 2002)) (emphasis added). It is not whether the BLIR or

¹³ Ultimately, assessing market exposure is one way the Commission can assess whether or not the "sale of the property is impracticable." (See N.T. 12/17/2012 at 34 (Dr. Farnham discussing Section 9.4: "I think that's the final test in the ordinance, is a sale practicable or impracticable.")).

a reviewing court agrees with the Commission, *i.e.* the BLIR is not to decide the Application anew. Rather, it is whether the Commission abused its discretion. As is evident by both the Commission's and the BLIR's voluminous records, the Commission did not abuse its discretion. Approval of the Application was clearly based upon substantial evidence.

The question before the Commission was whether the Existing Complex can be used for any purpose for which it is or may be reasonably adapted. As demonstrated during the BLIR hearings, the evidence in support of the Application was voluminous. First, there was the testimony from the University regarding the nearly ten-year history of attempts to find an adaptive reuse for the Existing Complex. Second, there were the financial analysis prepared by the University Parties evidencing rates of return, well below any acceptable rate. Last, there was the testimony and expert reports of the RES -- the Commission's independent consultant. What did RES conclude? RES concluded that regardless of the owner, the adaptive reuse of the Existing Complex was not financially feasible. Contrary to the allegations of appellants, RES did not restrict its analysis to the University's preferred uses of the Property or the University's style of development. Rather, they looked at using the Existing Complex for student housing, residential condominium development, affordable housing subsidized by discretionary low income housing tax credits, commercial office space and restaurant space. (See City Exhibit 1, tab 23 (containing May 3, 2012 RES report) and City Exhibit 1, tab 24 (containing May 10, 2012 (RES report)). Most relevant to the Commission's review was the RES's May 10, 2012 report which examined the financial feasibility of the adaptive reuse of the Existing Complex on its own, *i.e.* without new multi-story additions subsidizing the rehabilitation. The projected returns in the May 10, 2012 report tell the story of hardship: (i) a **less than 1 percent return** for apartments if purchased at the 2003 purchase price without escalation for inflation; (ii) a **less than 2 percent return** for apartments if ground leased at the below market rent of \$20,000 per year (in essence a University subsidy); and (iii) a **less than 2.83 percent return** for commercial office. (City Exhibit 1, tab 25 at 2). Each of these returns are **well below** any reasonable rate of return for real estate development. RES explained that:

[A]nalyzes indicated no [adaptive reuse] alternative was likely to be financially feasible. The issue is that the cost of rehabilitation of the existing structure is very high, and the income generated by different uses examined is not sufficient to pay debt service and to provide a reasonable return on the required equity from an equity investor."....

Moreover, appellants have provided no compelling evidence as to why the Commission and the BLIR erred in accepting the financial conclusions of the University Parties and RES." Intervening Appellees Brief, pages 40-42

Furthermore, while Appellants argue that the Application should fail because Penn did not literally list the Property for sale, the Historical Commission interpreted and applied Section 9.4 to mean that neither Regulation 9.4, nor any other Preservation Ordinance/Regulation, specifically requires a property owner to list its property for sale with a third party broker to establish hardship. On this point the Historical Commission relied on the expert testimony of

Dr. Jonathan Farnham, Executive Director of the Historic Commission, who explained that a good-faith effort to sell does not necessarily require a for-sale sign to be hung on the property. Dr. Farnham offered an example of a prior Historical Commission decision where the Commission interpreted Section 9.4 as not requiring an applicant to actually list a property for sale to third parties for adaptive reuse if the facts establish that such offering would be fruitless in light of the infeasibility of adaptive reuse.¹⁴ Before the BLIR, Dr. Farnham confirmed that Section 9.4 of the Regulations “was discussed at the Commission meeting” on the Application. (N.T. 12/17/2012 at 93-94). He further explained:

“There are many ways . . . to attempt the sale of a property There are various ways in which this is applied, depending on the context, depending on the circumstances of the property under consideration, and . . . in this case the applicant met the burden to attempt the sale of the property by its ground lease [structure] and by other evaluations that it did, real estate evaluations that it did as a prelude to this application.

(N.T. 12/17/2012 at 97 (testimony of Dr. Farnham)).

The Commission’s reading of Regulation 9.4 is that its requirements are satisfied, in part, as long as an applicant can conclusively demonstrate that there is no demand for a given property, whether this is accomplished by *actually* listing that property for sale, or through other means (such as, for example, the evidence and testimony provided in this matter by Dr. Farnham, Penn, and Ms. Sowell). While this interpretation does not precisely square with the Regulation’s wording, and though the type of proof offered might differ, the result of the process is ultimately the same, in that an applicant must exhaust all reasonable options to obtain financial value from a historic property before being given permission to demolish it due to financial hardship. Indeed, the Commission’s more liberal construction of this regulatory language implicitly reflects the recognition, based in common sense, that it would be an exercise in futility to force an applicant to put a property on the market, even though it is clear that the market will not be receptive to

¹⁴ Dr. Farnham testified about another major Philadelphia development project in historic Rittenhouse Square - “The Ten Rittenhouse” - where the developer submitted a financial hardship application to demolish a historic property even though the developer never offered the property for sale to third parties. On appeal to the BLIR, the Executive Director of Philadelphia’s Preservation Alliance’s testified in support of the demolition stating: “Well, basically, you’re trying to show that you have either made an effort [to sell the property] or that you have conducted analyses which is based on reasonable real estate finance procedures that demonstrate whether it is possible or not to sell or lease a historic property.” (City Exhibit 2 (containing BLIR N.T. 09/28/2004 at 103 (emphasis added))); see also University Exhibit 7 (BLIR Decision affirming hardship determination in 10 Rittenhouse matter); N.T. 12/17/2012 at 31-32 (testimony of Dr. Farnham)).

such a listing. Accordingly, the Commission's reading of Regulation 9.4 was neither plainly erroneous nor inconsistent.

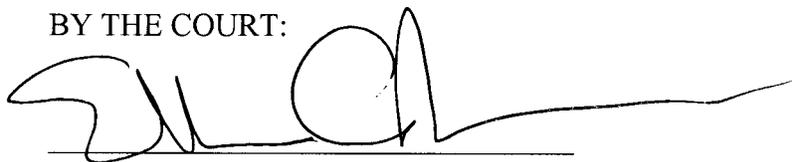
Additionally, the Commission's interpretation of Regulation 9.4, which was promulgated under the Historic Preservation Ordinance was consistent with the reason for the enactment of Preservation Ordinance, namely, to strengthen the social, cultural and economic interests of Philadelphia, by preserving and protecting "buildings, structures, sites...of historic, architectural, cultural, archaeological, educational, and aesthetic merit." See Phila. Code § 14-2007 (1) and (4)(h). The Commission's interpretation of Regulation 9.4 forced Penn to do everything reasonably possible to reuse and rehabilitate the Property, before approving their Application. Only when Penn demonstrated that there was no financially feasible way to preserve the Property, did the Commission approve Penn's Application. This was in keeping with the purposes of the Historic Preservation Ordinance, just as forcing a property owner to maintain a dilapidated building, bereft of any economic value, does not contribute to the social, cultural or economic interests of Philadelphia.

In reviewing this evidence, the BLIR was not charged with retrying this matter; instead, the BLIR was required to defer to the Commission's factual findings, in line with the aforementioned Turchi standard of review. With this evidence on the record, and in the absence of any legal error or abuse of discretion, the BLIR did not err in affirming the Commission's decision. Accordingly, this Court properly affirmed the BLIR and denied Appellants' appeal.

III. CONCLUSION

For the aforementioned reason, this Court respectfully requests that the instant appeal be denied.

BY THE COURT:

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.

J.

APPENDIX A

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Filed and Attested by
PROTHONOTARY
28 MAY 2014 03:51 pm
T. TAYLOR

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY, PENNSYLVANIA

Woodland Terrace Homeowners' Association,
Maryann Kurmlavage and Constellar Corp.,

Appellants,

v.

Philadelphia Board of License and Inspection
Review; Trustees of the University of
Pennsylvania, O.A.P., Inc.; and, Azalea
Gardens Partners, LP,

Appellees.

Court Term: March Term 2013

Case No. 03186

APPELLANTS' STATEMENT OF ERRORS COMPLAINED OF

Appellants, by and through their counsel, hereby respond to the Order dated May 7, 2014 and issued pursuant to Pa. R.A.P. 1925(b).

The Appellants, with all due respect, are appealing the Court's Order dated April 9, 2014 on the bases stated below. In accordance with Pa. R.A.P. 1925(b)(4)(vi), Appellants preface their statement by noting that one cannot readily discern the basis for the April 9, 2014 Order and so the following statement identifies the errors in only general terms.

1. Appellants believe that the Court erred in affirming the decision of the Board of License & Inspection Review (the "Board") because both the Board and the Historical Commission failed to comply with applicable law, specifically the

mandatory requirement that “[t]he applicant has an affirmative obligation in good faith to attempt the sale of the property, . . .” Historical Commission Rules & Regulations, Section 9.4. (“Review Criteria”).

- a. The requirement contained in Section 9.4 is clear and unambiguous and further explained in the Siloam litigation, all of which plainly require an attempt to sell. Aside from Section 9.4 and the Siloam litigation, the record is devoid of any other interpretation of the ordinance by the Commission members or the Board.
 - b. Here, the applicant did not just fail to attempt a sale; there is uncontroverted evidence that the applicant *refused* to attempt a sale because the applicant did not want to lose control of the property.
 - c. To the extent that the Board and Commission have previously sometimes allowed demolitions for financial hardship without any attempt to sell (contrary to applicable law), and sometimes required an attempt to sell (as required by applicable law), such varying decisions represent arbitrary and capricious conduct.
2. Appellants believe that the Court erred in affirming the decision of the Board to the extent that the Board and the Historical Commission equated “impracticable” with a failure to satisfy the financial rates of return required by a particular private equity investor in the context of a complicated, multi-tiered development arrangement. According to the plain meaning of the word “impracticable,” it is not impracticable for this property to be preserved and reused successfully, which is what would occur if the applicant offers (or had offered) the property for sale.

3. Appellants believe that the Court erred in affirming the decision of the Board because both the Board and the Historical Commission failed to acknowledge that the Commission's own expert concluded that the subject property can indeed be preserved and reused in a way that would meet even the financial rates of return required by the particular private equity investor in the context of a complicated, multi-tiered development arrangement.
4. Appellants believe that the Court erred in affirming the decision of the Board because, while there may be substantial evidence that the University of Pennsylvania is not well suited to redevelop this property or that does not wish for it to be redeveloped in a manner not to its requirements, there is not substantial evidence to conclude that the property cannot be preserved and reused by the ordinary real estate professional.
5. Appellants believe that the Court erred in affirming the decision of the Board because if and to the extent both the Board (and the Historical Commission, although we do not know what the Commission based its decision on) concluded, as asserted by the applicant, that based on state tax law, an attempt to ground lease the property satisfies the requirement in Section 9.4 to attempt a sale, such conclusion was plainly erroneous and inconsistent with applicable law. Assuming *arguendo* that such a conclusion is correct, the record does not contain substantial evidence that the applicant sufficiently attempted to ground lease the property.
6. Given the language and the history of the financial hardship provisions of the Ordinance and the takings law presentation of the Commission's Executive Director that was adopted by the Commission, a hardship analysis must adhere to the

CERTIFICATE OF SERVICE

I hereby certify that, on the date indicated below, I served a copy of the foregoing *APPELLANTS' STATEMENT OF ERRORS COMPLAINED OF*, to the following parties and persons via first-class U.S. mail:

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The Honorable Judge Ellen Ceisler
Court of Common Pleas Civil Division
First Judicial District of PA
229 City Hall
Philadelphia, PA 19107
(also delivered today via hand delivery)

/s/

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Dated: May 28, 2014