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Supreme Court of Texas.
City of Dallas, Texas, Board of Adjustment of the City of Dallas,
Texas, and
Raj Sharma, in his capacity as the Building Official of the City of
Dallas,
Petitioners,
v.
Doug Vanesko and Grace Vanesko, Respondents.
No. 04-0263.

February 15, 2005.

Appearances:

Christopher D. Bowers, Assistant City Attorney, Dallas, TX, for petitioners.

Roger Albright, Law Offices of Roger Albright, Dallas, TX, for respondents.

Before:

Wallace B. Jefferson, Priscilla R. Owen, Harriet O'Neill, David M. Medina, Paul w. Green, Nathan L. Hecht, Dale Wainwright, Scott A. Brister, Justices.

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JUDGE: The Court is now ready to hear argument in 04-0263, City of Dallas, another version Doug Vanesko and Grace Vanesko.

ORAL ARGUMENT OF CHRISTOPHER D. BOWERS ON BEHALF OF THE PETITIONER

MR. BOWERS: May it please the Court, Chris Bowers to present argument to petitioners. Petitioners for [inaudible] for rebuttal. May it please the Court. [inaudible] makes three minor arguments today. First, the Court of Appeals aired in applying the standard of the local government code in correct section that the Court of Appeals aired that this is ignored the standards of granting variances in the city ordinance and third, the Court of Appeals aired because its ruling improperly snaps the city from enforcement in the said ordinance. Before I go into my three argument is helpful to take a look at the standard of review. This Court established the standard of review and the Boehme Bakery case in 1945. There, the Trial Court found overwhelming evidence in favor of granting the permit that concluded that the Board did not act arbitrarily in denying the permit. The Court

of Appeals concluded that the Board abused this discretion. This Court reversed holding that the standard was a very clear showing of abuse of discretion and then even though the evidence was overwhelming, in favor of granting the permit that nonetheless the Board of adjustments decision denying the permits should be upheld.

JUDGE: But what evidence can be consider as a legal question that is subject to review? Go ahead.

MR. BOWERS: Yes, your Honor.

JUDGE: So we can determine whether the city attorneys assistant to attorneys advice to disregard the erroneous building permit. We, we can look at that -

MR. BOWERS: Sure.

JUDGE: - whether that was correct legal decision.

MR. BOWERS: Yes, your Honor. Now, the Court may affirmed ...

JUDGE: Adjustment have power to grant a variance other than as permitted by the Court.

MR. BOWERS: No, your Honor. The ordinance and the local government code established the perimeter of the Board to powers.

JUDGE: And-- but you're saying that if a case falls squarely within the ordinance, the Board [inaudible].

MR. BOWERS: That the, the Board has a power to deny if the, if it correctly applies the standard in the city ordinance and of the government covered.

JUDGE: Is there any, is there any way the Board will say, "Well, this case fits under the statute and the ordinance [inaudible] records."

MR. BOWERS: The-- well, the granting of a variance in the local government code is permissive. So the statute says may grant if it applies unnecessary special conditions that there's unnecessary hardship and so it is possible under the statute of the government code for the Board to perhaps applying some hardship and nonetheless if I'm not [inaudible]. Now, in this particular case ...

JUDGE: So that's require applying the hardship?

MR. BOWERS: Well, certainly if the Board is going to grant a variance, it must apply unnecessary hardship and do the special conditions. Now, from this particular case, the standard in the local government code has been interpreted numerous times, the-- in fact the Dallas Court appeals in 1955 in the moody case said that the required proof for variance was subject to well settled rules and it says specifically, it cannot be self imposed hardship, it cannot be financially only, it must relate to the very property, unique oppressive and not comment to other property. Now, how that the Dallas Court appeals in 1955 and noted the rule was well settled. Well, you have to look at the history of the statute and the case that had been interpreted the statute. In this particular case, the legislature in act of the standard in 1927 and it was based on a model act proposed by the used Department of Commerce in mid 20's. And all states adopted this model act in some point and it still in effect in the [inaudible] states to death. Now, the thereafter of the model act recognize that uniform zoning might in advertedly prohibited reasonable use of certain properties.

JUDGE: What are citizens like Vaneskos to do when they relied upon an employee of the City to get their permit to, to go forward the discretion.

MR. BOWERS: Well, your Honor, in this particular case, Vaneskos had made several other pleadings of some other claims in case and those claims were seven. But they do have other arguments made such as a

stockhold perhaps, [inaudible] perhaps, they might have a cause of action against the official, the building official in his personal capacity because the ordinance states that the building official only may issue a permit in accordance with the city ordinance. Since he did not do that arguably, he might have been acting in his personal capacity. The Vaneskos also would have a legislative option of going to the Dallas City counsel.

JUDGE: But in-- I'm sorry. In this circular, I mean I think, I thought you said that, that there's no sub-- you can't [inaudible] and the one exception that was created in options that it was said that there is an exception for substantial feminine or more [inaudible] so I thought your argument was there was no [inaudible]. One of the problems I had here was if a city assistance, city attorney told the Board of Adjustments to disregard evidence of having permit position. Then, doesn't that create a problem that they can't consider the-- is Pacifica, Hodgen versus Pacifica exception. I mean in Pacifica was you have to consider consequences and, and, and substantial injustice -

MR. BOWERS: Sure.

JUDGE: - it have the same to be the Board of Adjustment was allowed to do that based upon those system city attorneys advice.

MR. BOWERS: Well, your Honor, the Board of Adjustment is not a Court of Law and so it could not consider the fault of remedies that a Court of Law which is ...

JUDGE: How was that work? Then, who gets to consider to proceed ...

MR. BOWERS: Of the Court Law, absolutely.

JUDGE: So we can look at that and we can determine as a matter of law.

MR. BOWERS: Yes, your Honor. But the only issue in front of this Court today is whether the Board of Adjustment, being a stop of claim asserted by Vaneskos which we disagree with is not before this Court, it was seven but in still lying and so the Vaneskos certainly have options, may also have a legislative options of going to the Dallas City counsel and seeking a, a raising the height of limitations in the city ordinance. So they have other options. Our argument is, is that going to the Board for this variance was not in those options because they don't have the hardship that the ordinance and the case law and the statute require ...

JUDGE: Had it determine ...

JUDGE: Let me try, I just want to try to understand your position and that is that a, a Pacifica exception says for justice requires this application, there's no inreference with the exercise of this government functions is applied in caution exceptional basis where the circumstances lowered to amend this application [inaudible] manifest the justice. Is it your argument that we make that determination as a matter of law.

MR. BOWERS: That, that all Courts of Law can make that determination as a matter of law, your Honor. One of the point I had made is that the city attorney advice some Board that he is just only counsel. In turn of the Board for all that evidence and there was nothing to stop the Board from considering that. In fact, you take a look at to the day, it is apparent to the Board took a look at the hardships of the Vaneskos talked about. Now the Board have ultimately apparently did the city attorneys advice but it was merely a loss. Now, the-- when you take a look at the standard the model act provided that the Board of Adjustment the grant of wherein a property has special conditions such that it enforcement with result to unnecessary

hardship. Now, the Texas Court of Appeals over the years have looked and define the phrase "unnecessary hardship" as under the local government code as existing only when an ordinance does not allowed any reasonable use of property. The [inaudible] case have the Court code in 1949 held that as this the Winning case in 1974, the Currey case, the ERISA case of [inaudible], out of Austen, the Harris case of the Court word on 2005. I did not cite that in my brief but is the case that was cited last month by the Court, Court of Appeals.

JUDGE: For are those pre-development, are those when the law, when law allow any use of the property, that really contemplate when the structures are already been build, do they?

MR. BOWERS: Well, your Honor I think they did. I think those contemplates situations of were perhaps a setback regulations might be 20 or 30 feet and nonetheless it took substandard of law that might have been invited before there's only use of chance and so the ordinance, the setback accordance for example might not allowed reasonable use of the law. And in that situation, the Board would be authorize to grant a variance that has give the ordinance would prohibit any reasonable abuse of the law.

JUDGE: Well, that the second, third, fourth and eighth Court of Appeals as you've mentioned used definition of unnecessary hardship that you just stated. There are couple of Courts of Appeal to go the other way. So there's a split in the Courts of Appeal and we've not addressed that issue in, in we will be able to in this case. Going back to Justice Medina's question, assume in this case that the Vaneskos had not gotten information from the building inspector that the roof was too high and they were acting entirely there at the course of building their house on the fact that the permit was issued and allow that the bill with the specifications indicated. Don't you think at some point in time, citizen should be able to rely the official acts of the city in saying, it's okay to proceed with this building, it makes our ordinances and requirements without having to be infer that there going to have to tear it down, it's done. At some point in time, they should be able to rely, shouldn't they?

MR. BOWERS: Your Honor, I was respectfully have to disagree because city ordinance says that building official may issue permits only in accordance with the city seven ordinance. He had absolutely no authority to issue that permit and this Court has held in the stop case that a delayed permit issues conversion, no rights whatsoever.

JUDGE: Yes, what third authority did make. The name of apparent authority to do that and there's capacity as an employee?

MR. BOWERS: Your Honor, I, I don't think there was an apparent authority. I think the ordinance for everybody of respective notice that building official had no authority or any permit outside the ...

JUDGE: Well, the height, the height restriction wasn't a secret, was it? or was it, yes.

MR. BOWERS: The height restriction is in the city on Board in this [inaudible] probable ...

JUDGE: So was not that they have constructive notice about this guys authority. Is the constructive notice of what the top limit, you could build was, right?

MR. BOWERS: Your Honor, it's in the city's ordinance that the building official has no authority or any permit outside of the city only on constructive notice of the building officials authority.

JUDGE: What if the head of department had issued that permit, would that change your position? Or you're making a distinction because it was a lower level employee that issued it?

MR. BOWERS: No, I'm not your Honor.

JUDGE: The City Mayor fit this is finding, you take the same position?

MR. BOWERS: Correct because ultimately what controls is the city's ordinance has passed by the city counsel and that is the law amend and no building official has the power to trump that if, if that were the law then it would lead all sorts by desirable is also the Court is recognize before it might encourage people to submit their plans, it might encourage bribery, pollution, no one official who's on elected should be allowed to trump the city's ordinance.

JUDGE: Obviously, they are concerns on both sides of this issue which is relatively close call but if everybody, is it your position that everybody involved in a development, the owners as well as all of the, of the public officials are incorrect about the requirements and they all agree to let say couple of years of development. That this particular building is in compliance and then at the very end, they realize there's mistake than the private property owner bears all of the consequence.

JUDGE: Well, is, is that a center of what you're telling this?

MR. BOWERS: Not necessarily, your Honor. I'm saying that, that private property might have other remedies, other legal claims and it might also be able to petition the city for the change in his own accordance. So in any case, the, the definition of unnecessary hardship has been determined by the Courts of Appeals have legally waived that authority is in our side and they comes from the fact that these Courts and this Court frequently when there's not a case that is precisely on point were look to have cases and had been decided in other states were the precise issue has been determined. And in this particular case, where you have a situation, where the building official is issued a permit in err and thereafter the owner saw the variance, the Courts and other States that looked at this issue are overwhelming on the city's side in this case. And we believed that cause other his only [inaudible] says are also based from this model act that this Court should looked by those cases to give them more persuasive authority than a case in other states might ordinarily have ...

JUDGE: That-- so in, in the hypothetical that I opposed sounds like you're saying private property owners in hypothetical do not have a remedy in your opinion under the code involving Board of Adjustment impediments that they may have other ...

MR. BOWERS: Yes, your Honor.

JUDGE: Thank you, counsel. The Court is ready to hear argument from the respondents.

ORAL ARGUMENT OF ROGER ALBRIGHT ON BEHALF OF THE RESPONDENT

MR. ALBRIGHT: May it please the Court. Mr. Roger Albright, then argue for the respondents. Thank you justices. With me had [inaudible] Doug Vanesko. Six years, this case is been going of for six years, Doug and Grace Vanesko awaiting to have one thing, that's a hearing before the Board of Adjustment at which all the evidence [inaudible]. They never had that, that opportunity, that is the remedy that the Trial Court put before them. They did not reverse [inaudible], he remanded it back to the Board to have a full hearing for the Board could consider all the evidence.

JUDGE: Do you think the Board is limited by the ordinance?

MR. ALBRIGHT: I, I believe so your Honor.

JUDGE: You seemed, you and amicus seemed argue that and second sentence says the variance it must to be a variance and so on. It attributed that the request must meet that second sentence or else the Board could [inaudible].

MR. ALBRIGHT: And he argued absolutely, it has to have showing of a, a hardship, unnecessary hardship and you're going to have [inaudible] that it is in the public interest for more correctly does not contrary to the public interest.

JUDGE: That's in a, that's in a first sentence.

MR. ALBRIGHT: Yes.

JUDGE: Then, look at the second sentence. The variance must be necessary to permit the eloquent of specific parcel of land which differs from other parcels of that are cannot be developed at mannered [inaudible] from all other parcels of land the districts with the same zoning classification that ...

MR. ALBRIGHT: Yes, your Honor. That is what the ordinance says. I believe we have to file the ordinance. I believe that Vaneskos request does ...

JUDGE: How, how does it meet that?

MR. ALBRIGHT: Because you have to deal with the property as you find it. Is the key distinction between this is in a vacant lot, we're not coming in and saying, "We have the vacant lot. Would you please allow us to build something eight feet too tall." That isn't the issue.

JUDGE: Wait, in your agreement, if that the case, you could do it 'cause there's nothing that to different about this law or the otherwise ...

MR. ALBRIGHT: I, I think you would certainly loose at the Board [inaudible]. Yes, sir. The-- whereas in this case obviously we have an existing building that completely characterize the character of this piece of property. Would that building own this piece of property because once again, we're not saying, we have a vacant piece of property. We have this piece of property. We are asking to build this. We're asking to keep this and that is a fruitful difference ...

JUDGE: So as this the area of the parcel of land, the shape of the parcel of land of the slope.

MR. ALBRIGHT: I believe you would characterize it as the area because obviously the area of the land, the lot that is remaining do the pack that there is building on it is obviously correct in restrict.

JUDGE: The house creates the special condition?

MR. ALBRIGHT: Yes, the, the fact of not just the house but how the house came to [inaudible]. And once again, that is do the permit process. The ...

JUDGE: It looks to me if that was the case, it will be a whole lot easier to get a variance to change in existing structure then to build the structure.

MR. ALBRIGHT: If the existing structure was illegally put then I believe the Board in its wisdom is the one to, to not grant that variance. The, the fear that the, that referred from the city that this is going to cause corruption and bribery and everybody is going to be trying to the permit process that, that's not, not happened. The, the Trial Courts opinion is a years old, everyone who does [inaudible] is promoting with the-- of the opinion. It has a [inaudible] of other, other cases to have a law because once again, this particular instance, when you have someone went to the department process, pay the city that to review these plans. Because he knew he wasn't a professional.

JUDGE: I have, I have a question after that. You say that, the thing that was paid covered a development code as well as the structure code and petitioners disagrees with that.

MR. ALBRIGHT: Yes, your Honor. The plan review process, you submit your plans, they review it for all the counts and I just merely construct the code but they go through the development code as well, plans that were submitted show the height, they will scaled show the height at after that apparent was issued, inspectors came out. And it is step of the one.

JUDGE: You say that the petitioners says the officers and you both cite the same page of the record. So ...

MR. ALBRIGHT: And so I guess the record will have to speak for himself.

JUDGE: Which was the stipulation of the parties so ...

MR. ALBRIGHT: If the Court recall we basically did and so the stipulation -

JUDGE: All right.

MR. ALBRIGHT: - instead of facts. So I think after the fact, I think the city got more creative with their arguments not the [inaudible].

JUDGE: What we're, what we're asking factual questions. What's the difference between maximum height and high as post.

MR. ALBRIGHT: The city measures height in two ways. There is, you measured to the midpoint of the roof from the edge of the eve to the ridgepole and you measure the middle. There's also a maximum height number over which you cannot go, in other words you could not have a steeple that is so tall even though the midpoint was lower after do it, there's also a maximum height.

JUDGE: So this 30(b), 36(b), 38(b), that's the midpoint.

MR. ALBRIGHT: Yes.

JUDGE: And then the high -

MR. ALBRIGHT: That's, that ...

JUDGE: - very high.

MR. ALBRIGHT: That's very high. Thank you.

JUDGE: Mr. Albright, what other legislative options does your client have?

MR. ALBRIGHT: In reality, no. The City of Dallas is not going to the, we are [inaudible] with covers a large portion of the Northern part of the City of Dallas. The city counsel is not going to change the R-10 zoning which would have a city wide effect to address one house that is too tall. That is why you have the option of a Board of Adjustment. The Board of Adjustment is to be the safety house, would, would you need variance. You doubt with the Board. You doubt at city counsel ask them to rewrite the 70 code. The city ...

JUDGE: I understand from the briefing, the facts in the briefing that during the construction with the inspector indicated there's a problem in the [inaudible] forms that to change that would have had \$4,200 of that point.

MR. ALBRIGHT: Your Honor, that was not in our case. Our case was he came out, that's all to be too tall. I think [inaudible] the [inaudible] case out of Court [inaudible]. Our case, the inspector came out, looked at it and said, there's problem [inaudible] it said, it was two feet too tall and guess it, we go to the Board. And the ...

JUDGE: That was the Court inspector was completed?

MR. ALBRIGHT: Yes, yes. We were on the framing was completed, the roof was up the [inaudible] with about 70 percent completed even at that point. City inspector did not say, stop work we've got a little

problem here. They allow work to continue and said, just over the Board given variance well, I was right of this problem about and I firmly agree but to work the fact of one of the Board members bringing up matters outside the record, namely [inaudible] at the Board member. We would have to consider it. We have stop replicating for proof. We were all at the [inaudible] that to be approved at the last minute, he calls at all because she lives in the neighborhood. And she held forth, a nonetheless going on this neighborhood. There was all exterior down. Everybody is trying to build a house more grant and the one that next to it. All the neighbors were opposed to this. That was just not true. He told the Board ...

JUDGE: But that is in a matter of within the Court's discretion. We enter a limited review power to look at what they want.

MR. ALBRIGHT: Correct.

JUDGE: If we will determine as a legal matter, that's city attorney was incorrect and [inaudible] not consider the matter of which the permit of issue, what, what now? Does it get remanded to the Board of Adjustment?

MR. ALBRIGHT: Yes, yes that, that is all the Trial Court would ask you or, or order ...

JUDGE: To then radius brief consider looking at that evidence.

MR. ALBRIGHT: Yes.

JUDGE: And then if the result was the same, what will be the power in behalf of that way.

MR. ALBRIGHT: At that point, once again your Honor, discretion stand so the Trial Court cannot substitute a judge for that of the Board.

JUDGE: But could we then find substantial hardships as a matter of law and ...

MR. ALBRIGHT: I think you can based on the decisions in, in Cantu, McBride and those Courts of Appeal rationale, I believe you can find the situation were as a matter of law, the variance should've been granted. It's an in constitutional variance. It is not against the public interest way of the equities are as-- I believe in this case are so far out of lack that it is indeed abuse of discretion as a matter of law not grant that variance.

JUDGE: The problem I'm having is if you have to comply with the second sentence as you say you do, then what, what different does it make that the building inspector Danny didn't issued a permit or that construction was on going or it wasn't or that the city employees said, "Well, go ahead. We got this taken care of they didn't." If you, if you have to make the second sentence, what difference is any of the other ...

MR. ALBRIGHT: I, I think it thanks an important different from two. One, to meet the test that you're referring to in the second sentence. You explain that I have an existing halves. And then you need to explain all the issue came behalf these existing halves. We did not get an opportunity to tell the Board to how the [inaudible]. How did this happen?

JUDGE: Well, the city approved. The city gave us a permit. Well, well why? Why are you here that?

JUDGE: [inaudible]. If you say the city did gave you a permit saying the city, didn't gave you a permit. But either way, what does it have to do with whether this specific parcel different from other parcels being accept to restrictive variance saying the slope, it cannot be.

MR. ALBRIGHT: Because you're going to be discussing with the Board

that you have a piece of property with the house want. And that, that is the, the different area of a piece of property.

JUDGE: That has nothing to do with whether a permit was issued.

MR. ALBRIGHT: That is correct, your Honor. But if you once again, I believe the Board is entitled to have all the evidence before them of how you adopt it.

JUDGE: And I understand that but what I, I guess what I'm having trouble is if you can't make the second sentence, then the other evidence doesn't seem to manner.

MR. ALBRIGHT: But your Honor, I believe we can make the second sentence and ...

JUDGE: Well, we're all having trouble with the second sentence is that you seems to me by this language to contemplate property was not built on yet. But it sounds to me like you're saying it does contemplate property that is built on as long as you take it into account construction.

MR. ALBRIGHT: That yes, your Honor. And I don't think this really something new of the, the greater case is in 1975 case deal with the City of Dallas of 30 year old very first similar situation there in the since that there was a, a permanent issue for a sign. A sign was constructed after the fact that determine the sign too tall. City went to District Court seeking an injunction to compel the sign of it taken down. The District Court denied that in [inaudible] and instead set everyone the Board of Adjustment to seek a variance because of the fact that already have this sign constructed so you had changed the nature of the property because now you have a piece of property with a sign. Because once again, if you end up with a Board, and said, I, I want to build a sign and I want to be ten feet too tall. The Board is not going to grant that. Let's say that have the property grant that.

JUDGE: But why in the world would they create if you let it with the sign of eight feet high said, I want to raise this ten feet too tall.

MR. ALBRIGHT: Well, your Honor, if, if you're talking about the new sign, they are not going to grant that.

JUDGE: Right. But why would they grant that all the-- it seems to me a [inaudible] scenic after build them complying a sign that has to build it too tall.

MR. ALBRIGHT: Well, your Honor, if you go out in illegally construct a sign, the Board in its wisdom is going to make a distinction between the witness is also wise important how we got here. If I went out in depth of the height and we built this house before anybody knew. And then we come in and say, we, the height variance of the house is already there. I believe the Board is wanted to look at that in a much different line then if we have a house that was as I say built with the knowledge of the city with the, the city's input were a long period of time. A d that's the information that we give to the Board I have I say the how [inaudible]. The why is to the city of [inaudible] to err and what is all we want to do is keep once there.

JUDGE: Let me ask ...

JUDGE: As suppose that out, I don't have much disagree with that but second sentence says the variance must be necessary so even if the Board is sympathetic to that circumstance, it looks to me like if it didn't meet the second sentence there's valid going to do about the [inaudible].

MR. ALBRIGHT: Well, your Honor, I know what the second sentence said. I also know because I appear before the Board in all the regular matter. I know how the Board treats that language and I know how over

the years they have interpreted that language and I could take from personal experience, they do not read it as nearly as strictly as it could be, be read. And they would just over it the course of time, the Board does indeed see itself as, as the safety house as the escape had when, when there is great disparities and that is once again, we could why it says it cannot be contrary to public interest. One thing I always look at is well, what say the name, what say our professional staff. In this case, I have professional staff saying, the variance should be granted. We have 80 percent, I think it's incredibly high and we had 80 percent of the property honored within the affected area. It favor of our variance request. No one was a [inaudible]. There was any neighbor down here saying, tat house is too tall. It's blacken by sunlight. It's ugly except in fact they're saying the opposite because all we're dealing here with is the [inaudible]. And you take this very large house that has a roof that is, is compatible with the rest of the structures, as far as mashing in shape for that sort of thing. Your next was talking about the [inaudible] or going down the not a block roof but much of different slope. It's not going to look right. And everybody in that neighborhood agrees it's not going to look right. That's not what they want down the street from it. So the public interest in this case was neighborhood.

JUDGE: But again, that's not our called to make. Isn't-- I mean we can review that decision.

MR. ALBRIGHT: No, no. But, but the issue is much they're looking for the two key things in granting a variance. It is not contrary to public interest. And that there was a do respectful circumstances unnecessary hardship. Those hard things that the, the Board would look at. And once again, that's why this to be back before the Board would the Board given the opportunity as opposed being told by counsel that they should not consider. Because this is in the brief, one of the Board members made a specific point that the difference between-- he could not consider the difference between building something new and keeping what was there. He recognize that, that was an important distinction. But one who's did not make based upon the fact that the city attorney said, "No, it's irrelevant how, how we got here." They don't consider they have affirmed it. They don't consider that's already built.

JUDGE: The respondents brief says that quote, the configuration of the treaties created the hardship unquote. How, how was that ...

MR. ALBRIGHT: That, that was your Honor that comes from the staff recommendation. That was one of the issues they saw that if you get this sign, I believe paraphrasing there, there reason in all this. To get this same amount of area that you would, would get to move a house therefore, take out towards. So that, that one of the staff issues that you could, could preserve treaty by granting this variance ...

JUDGE: You have to spread the house [inaudible].

MR. ALBRIGHT: Exactly.

JUDGE: You have to take up some treaty.

MR. ALBRIGHT: Right. And so that was another basis under which they could, could grant that variance.

JUDGE: What do I have as this existence of accordance anyway. Your client within this project presumably knowing what the ordinance said in terms of high restrictions in going to the [inaudible] example. [inaudible] builders when look at the ordinance and say, I want to build status higher than 15 hours and we go to the variance Board first. As was I'm talking to be on same side maybe I will have to approve this higher of the ordinance allows that you did that variance

first. My understanding in your argument is you rest in your position the fact that you got and have to meet the variance first that you did rely upon the city official to get to bring into the go.

MR. ALBRIGHT: Yes, your Honor. And it's a proof of a city's position. You could never do say, not just the house that make that 20-story commercial building. If there was an err, and I prove in several all the way down built foot too tall. The city's position as a 20 years down the road when somebody finally discovers that. That, that building, you need to take that floor of that building that you can measure sure the problem that it is a Board permanent, it's always been a void permit and ...

JUDGE: What would you go into that projects in understanding the ordinance limitations are, I mean the architect by understands all that. That this is a risk that the builder type ...

MR. ALBRIGHT: Absolutely. And that is why to, to counter that risk. You go to the city, you pay extra money, you say please review my plans. Because I'm not a fully expert, I'm not an architect, I'm not a builder. City, you're in this business, it's your ordinance, you're going to reviewing the ordinance here in our plan. Please tell me if these are okay and the city does.

JUDGE: So the city approves the building, the construction of the building that could it off and then after it's finished, far marshall comes in and says, this requires spring, it only have.

MR. ALBRIGHT: That would, that be contrary to the public interest. That's a public safety issue with something different than you have here which is as we torment an inconsequential variance or violation. No one is harmed, no one is particularly harmed by the fact that, that [inaudible] and I, I think that's the fruitful distinction absolutely if they come in and say, you know what, you don't have this spring, you need the steel was [inaudible] and that's a different issue.

JUDGE: The city come and takes position that you're asking for the tail to wag it all. They certain that the city establishes the ordinance and the codes but to allow the Board to grant variances at some point in time, have the tail wag it all when the city set codes that the Board could change it that might the Board starts to wag it all. What's your response to that? Sounds like you're saying in every instance that we have summary of facts the Board will be required to grant the variance.

MR. ALBRIGHT: I would necessarily go that far. I think the Board needs to consider all the facts in everyone of those cases.

JUDGE: And you think you should win.

MR. ALBRIGHT: Yes, sir. I, I think if all the facts were presented to the Board that this variance would have been grant. I think it was testified under the ordinance and I think the variance would have been granted as I say back for the instruction from the city attorney in err and not for the evidence coming in from outside the record by one of the Board members. We, we could have take good care of have we have all the put that all the evidence all.

JUDGE: Thank you, counsel. Any further question.

REBUTTAL ARGUMENT OF CHRISTOPHER D. BOWERS ON BEHALF OF PETITIONER

MR. BOWERS: I think it was the principle of law that defines with a reasonable ordinance that's not in challenge in this case. The height

of [inaudible] is not oppressive and that is why the Court of Appeals has said ...

JUDGE: When this say becomes oppressive. Let's say you have a home, it's been there for five years, you find out that the roof was too high, under your legal argument, you could force him under even though he's in period to take off the roof. And where would you say that comes to principle when, when does it come to manifestly adjust.

MR. BOWERS: Well, it comes an ordinance becomes oppressive when it doesn't allow reasonable development of the property. And that's the standard and the local government code has been interpreted by the Court.

JUDGE: So you would say it's okay, five years goes by [inaudible] knocks at your door and says, "Your roof is too high, the Board permit, you got a [inaudible] in every instance."

MR. BOWERS: Well, your remedy is not with the Board of Adjustment, your Honor. I would say that, that home owner may have some remedies after five years have passed perhaps in this lawful, perhaps life is on the city will agree with that, that there maybe Courts of law. The owner would have some remedies but the remedy is not with the Board of Adjustment, your Honor. That's the issue in this case, is whether the Board could consider that construction.

JUDGE: So they got a Court and file a lawsuit to prevent a-- permit a [inaudible].

MR. BOWERS: That would be an option. Another option would be able to seek a change in this only ordinance in contrary in what opposing counsel said, it would be possible to seek only in change on your property or your block, or on a neighborhood and not necessarily seek this only change with the entire are in district. So the property has its own options and our contention is that is this particular case, facts did not just justify a finding of unnecessary hardship.

JUDGE: So you think that the, the-- that as ordinance totally trumps the local government code provision. It seems to put certain put in all this that says, that's been a city hardship and said, the spare of the ordinance absurd the substantial justice is done, substantial justice is not within the Dallas development code.

MR. BOWERS: If your Honor, we believe that it is. In fact we believe that the Dallas ordinance clarify the standard that has been established by the Courts of Appeal in the first 20 or 30 years of the statute existence. And to the extent that the Courts of Appeal now have-- a few of them had changed the interpretation of unnecessary hardship. We believe that we have that power to maintain our standard and in fact four Courts of Appeal this [inaudible], the [inaudible], the [inaudible] those to reports and all said that Board's power is to claim by both statute and by ordinance and there are few other Courts of Appeal that have said, that have looked at the city's standard and have applied it and that will include the [inaudible] case, the [inaudible] case, the Boyer case, the [inaudible] case and the Currey case.

JUDGE: The Boyer under would amend it was never a permit to issue.

MR. BOWERS: That's true. In fact, this actually gets back to the point of whether a permit this issue is irrelevant. The city looked if you want it to simply not to affirm the system, just simply have the ordinances and some perhaps very small cities might even do this at one.

JUDGE: You don't have to have the Board of Adjustment.

MR. BOWERS: I'm sorry.

JUDGE: You don't have to have a Board of Adjustment.

MR. BOWERS: That, that is correct also, your Honor although of course we also used an A-size because it is a safety matter for the appropriate situation. But a permit is not insurance. It is not a guarantee. The city has the convenience to itself to into the enforcement nad divided by these situations like this I'm occurring. But the city could as result to an adverse position by this Court has the [inaudible] choose lower permits that this situation does even occur. The fact ...

JUDGE: Do you have a sense whether this ordinance is more restrictive than all cities that are not ...

MR. BOWERS: Your Honor, I don't know although it is apparent in somebody other cities, [inaudible] certainly have a standard that's substantial Board that flash down. Then the standard codes not allow the government code. We also believe that affirm the Court of Appeals in this particular case, in effect requires held support to grants the permit. The reason is the Trial Court last finding of fact or conclusive law is that the only decision at which the Board relied with they the enforcement would result to unnecessary hardship I mean that would compel the Board to grant a permit that-- [inaudible].

JUDGE: Yes.

MR. BOWERS: Thank you, your Honor. The Court of Appeals also has said that when the city without authority or-- excuse me when the city would require, the [inaudible] the authority that, that would result in the present condition and I admit that this situation were have been complete of oppressive and were that so it look compelled the issue [inaudible]. Thank you.

JUDGE: Thank you, counsel. That includes the argument and look forward to take the brief.

COURT MARSHALL: All rise.

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